Investigatory Powers Bill 2016

Surveillance Oversight

Further Briefing for House of Lords Committee Stage

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JUSTICE is concerned that the Investigatory Powers Bill, like the draft Bill and draft Communications Data Bill before it, includes very broad provisions for untargeted and bulk powers of surveillance, with insufficiently robust oversight mechanisms for ensuing that these powers are used lawfully and responsibly.

In this briefing, we highlight a number of specific problems in the remainder of provisions to be considered in Committee and suggest a number of amendments to improve the mechanisms for oversight of the use of surveillance powers.

Error Reporting and Notification

***(i)* The Bill's provision for the reporting of errors should be substantially amended. At a minimum, it should be accompanied by a mandatory notification requirement for individuals targeted for surveillance to be provided with information after-the-event.**

Funding and oversight

***(ii)* The Secretary of State should not have any involvement in the management of resources for the new Investigatory Powers Commissioner.**

Delegated powers and independence

***(iii)* The Secretary of State should not be able to modify the functions of the Commissioners by secondary legislation.**

Whistleblowing and disclosure

***(vi)* JUSTICE is concerned that the Bill does not yet provide a clear safe-route to the IPC.**

JUSTICE remains concerned that the structure of the office of the Investigatory Powers Commission proposed by the Bill is flawed. We share the concerns recently expressed by the Interception of Communications Commissioner's Office that reform is necessary to ensure the effectiveness and credibility of the new oversight model. These issues have already been considered in Committee and dismissed by the Government. JUSTICE encourages members to return to these matters at Report.

The Investigatory Powers Tribunal

***(vii)* The new right of appeal from decisions of the Investigatory Powers Tribunal is welcome. Members may wish to consider whether the test for appeal is unduly restrictive.**

***(viii)* JUSTICE considers that the Bill should be amended to modernise the procedures of the IPT. This should include that the Rules of the Tribunal be determined by the Rules Committee and an amendment to provide for the IPT to be able to make declarations of incompatibility pursuant to Section 4, Human Rights Act 1998.**

Review and sunset clauses

(ix) **Clause 232 currently provides for a single review, five years into the Bill's operation. The House may wish instead to consider whether surveillance, by its nature, is an area suited to regular default consideration by Parliament (like the Armed Forces Act, which must be renewed periodically).**

A. Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. Since 2011, JUSTICE has recommended that the Regulation of Investigatory Powers Act 2000 ('RIPA') is repealed and replaced by a modern, comprehensive legal framework for surveillance.[1] This new legislation provides a unique opportunity to restore public faith in UK surveillance practices; and to create a framework which is truly "world-leading". However, JUSTICE regrets that this Bill falls short.

2. There is a significant obligation on the State to ensure that surveillance powers are closely drawn, safeguards appropriate and provision made for effective oversight: "*[it is] unacceptable that the assurance of the enjoyment of a right … could be…removed by the simple fact that the person concerned is kept unaware of its violation.*"[2]

3. The European Court of Human Rights has stressed that the justification of any surveillance measures places a significant burden on States to adopt the least intrusive measures possible: "*[P]owers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.*"[3]

The Bill

4. JUSTICE is concerned that this Bill is being considered at a time when the legality of bulk surveillance models is still currently being tested at both the Court of Justice of the European Union and at the European Court of Human Rights in Strasbourg. The existing case law suggests that untargeted powers of surveillance are likely to be incompatible with the European Convention of Human Rights. Indeed, the Joint Committee pointed out that "*it is possible that the bulk interception and equipment interference powers*

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[1] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011. In anticipation of the publication of the Draft Investigatory Powers Bill for consultation, we published an update to that report, *Freedom from Suspicion: Building a Surveillance Framework for a Digital Age.*http://www.justice.org.uk/resources.php/305/freedom-from-suspicion Hererin, '*Freedom from Suspicion*'. JUSTICE, *Freedom from Suspicion: Building a Surveillance Framework for a Digital Age,* Nov 2015. http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/11/JUSTICE-Building-a-Surveillance-Framework-for-a-Digital-Age.pdf Hererin, '*Freedom from Suspicion: Second Report'.* JUSTICE is grateful to Daniella Lock, JUSTICE Policy Intern, for her assistance in the drafting of this briefing.

[2] (1978) 7 2 EHRR 214, paras 36, 41.

[3] Ibid, para 42. See also para 49: *'The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism adopt whatever means they deem appropriate'.*

contained in the draft Bill could be exercised in a way that does not comply with the requirements of Article 8 as defined by the Strasbourg Court".[4]

5. Recent case-law indicates that the European Court of Human Rights is moving towards an increasing scepticism about the use of bulk powers.[5] The European Court of Justice has expedited its consideration of the case originally brought by David Davis MP and Tom Watson MP against the current regime for data retention in the Data Retention and Investigatory Powers Act 2014. Initial analysis suggest that many of the powers in the Bill may be insufficiently defined and accompanied by too few safeguards to comply with the requirements of the ECHR and the UK's obligations in EU law.[6]

6. In June 2016, he Government appointed the Reviewer of Terrorism Legislation, David Anderson QC, to review the 'operational case' for bulk surveillance powers contained in the Bill. 6. The terms of reference for the review were published on 7th June 2016. Mr Anderson submitted his final report to the Prime Minister two months later, on 7th August 2016.[7] Broadly, the short review confirmed the 'utility' of the powers in the Bill following an assessment of utility set with the Security and Intelligence Agencies. It is important to note however, that the review team accept that their analysis did not consider whether the powers are 'necessary' or 'proportionate'. These tests are important legal standards for the purposes of interference with the individual right to privacy protected by the European Convention on Human Rights and the Human Rights Act. The Government argues that the ability of the powers in the Bill to be applied only in a manner which is necessary and proportionate is a crucial safeguard.

7. JUSTICE considers that, the justification for each of these intrusive powers – and the Government's assessment of their legality - must be tested rigorously by Parliament. Parliament must consider whether the powers are themselves 'necessary' and 'proportionate', not merely useful.

8. Other organisations, including Liberty and Privacy International, have provided full briefing on the bulk powers in the Bill, the conclusions of the bulk powers review and

[4] Joint Committee, Report on the Draft Investigatory Powers Bill, para 331.
[5] See *Roman Zakharov v Russia (*Application no. 47143/06), 4 December 2015, para 250; *Szabó and Vissy v. Hungary* (Application no. 37138/14), 12 January 2016, para 73.
[6] Joined Cases C-203/15 and C-698/15. See Advocate General's Decision on 19 July 2016, http://curia.europa.eu/juris/document/document.jsf?text=&docid=181841&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=96721
[7] Report of the Bulk Powers Review – David Anderson Q.C., 19 August 2016

further developments in international law and practice.[8] While safeguards are crucial to the legality of surveillance powers, they are not conclusive, nor determinative. It is for Parliament first to be satisfied that the powers *themselves* are both necessary and proportionate.

9. In this briefing, JUSTICE has focused on a small number of specific issues concerning the effectiveness of independent oversight by the Judicial Commissioners, the Investigatory Powers Tribunal and Parliament.[9] Where we do not specifically address an issue, this should not be taken as support for the proposals in the Bill.

[8] See for example, Liberty Briefing, August 2016 https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Response%20to%20the%20Report%20of%20the%20Bulk%20Powers%20Review.pdf

[9] Fuller briefing on JUSTICE's position on the Bill can be found here: http://justice.org.uk/investigatory-powers-bill/

PROPOSED AMENDMENTS

The Investigatory Powers Commissioner

10. In 2011, JUSTICE observed that the current oversight arrangements under RIPA were extremely fragmented, unnecessarily complex and ineffective.[10] In 2014, reports produced by both the Independent Review of Terrorism Legislation ("Independent Reviewer") as well as RUSI recommended the establishment of a single body responsible for the oversight of investigatory powers.[11] It was argued that this single body would give have a number of advantages over its predecessor Commissioners: including the ability to compare practice across the whole range of different public authorities and to inspect the whole range of surveillance techniques.

11. JUSTICE supports the creation of a single statutory oversight body. According to the Interception of Communications Commissioner's Office ("IOCCO"), a single unified oversight body "*will present an opportunity to streamline the oversight landscape, to put all of the oversight responsibilities on a statutory footing, to bridge some of the identified gaps and address the overlaps*".[12] Instead, the Bill provides for the creation of a group of Judicial Commissioners led by a lead Commissioner, with powers inconsistent with the conduct of judicial or quasi-judicial decision making. If this body is to provide the backbone of this new legal framework, its statutory powers and duties must be clearly identifiable, accessible and robust. Refusing to address the flawed Commissioner model ignores the case for reform clearly articulated by both the Anderson and RUSI reviews.[13]

12. JUSTICE agrees with IOCCO that in order for the body to promote greater public confidence, it must "*be independent, have an appropriate legal mandate and be public facing*".[14] In its latest briefing, IOCCO stresses:

> "*At present clause 203 of the IP Bill only creates a Chief Judicial Commissioner and a small number of Judicial Commissioners. The commissioners will only be responsible for approving approximately 2% of the applications falling within the remit of the oversight. The remaining 98% will only be subject to post-facto oversight. The post-facto oversight will be carried out predominantly by specialist inspectors, investigators, analysts and technical staff within the Commission and it is important*

[10] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 346, 407.
[11] David Anderson QC *A Question of Trust,* June 2015 para 28; RUSI, *A Democratic Licence to Operate: Report of the Independent Surveillance Review*, July 2015, Recommendation 17.
[12] Interception of Communications Commissioner's Office, written evidence, para 8.
[13] David Anderson QC *A Question of Trust,* June 2015 para 28; RUSI, *A Democratic Licence to Operate: Report of the Independent Surveillance Review*, July 2015, Recommendation 17.
[14] Interception of Communications Commissioner's Office, written evidence, para 8.

for those individuals to have a delegated power to require information or access to technical systems. The creation of a Commission is crucial to achieve a modern, inquisitive oversight body that has the expertise to carry out investigations and inquiries to the breadth and depth required and the intellectual curiosity to probe and challenge the conduct of the public authorities. Putting the oversight Commission on a statutory footing will be a huge step towards guaranteeing independence, capability and diversity within the organisation which will inspire public trust and confidence."[15]

13. JUSTICE remains concerned that the Bill fails to ensure that the new oversight body will be both independent and provided with the resources and powers necessary for its effective operation. JUSTICE encourages members to return to this issue on Report.

Clause 207: Error reporting

PROPOSED AMENDMENTS

Clause 207, Page 159, Line 38, leave out from "aware" to "error" on Line 41.

Clause 207, Page 159, Line 40, leave out subclauses (2)-(5) and insert the following new subclauses –

(-) The Investigatory Powers Commissioner may decide not to inform a person of an error in exceptional circumstances.

(-) Exceptional circumstances under subsection (-) will arise if the public interest in disclosure is outweighed by a significant prejudice to –

(a) national security, or

(b) the prevention and detection of serious crime.

Clause 207, Page 160, Line 26, insert the following new subclause –

(-) provide the person with such details of the submissions made by the public authority on the error and the matters concerned pursuant the subsection 198(5) as are necessary to inform a complaint to the Investigatory Powers Tribunal.

Clause 207, Page 160, Line 32, leave out subclause (b)

Clause 207, Page 160, Line 38, leave out 'and'

Clause 207, Page 160, Line 39, leave out subclause (b)

[15] IOCCO Briefing, 8 August 2016 http://www.iocco-uk.info/docs/IOCCO%20Update%20on%20the%20IP%20Bill%208Aug.pdf

PURPOSE

14. Clause 207 prohibits the Investigatory Powers Commissioner from disclosing any errors made in connection with the performance of activities under this Act, except in so far as it provides. It limits notification to only those errors determined to be "serious" errors which cause "significant prejudice or harm" to an individual.

15. These amendments would amend the Bill to provide for the Commissioner to notify any relevant person of any error made pursuant to the activities in the Bill, in order to allow those individuals to consider whether a claim may lie to the Investigatory Powers Tribunal for redress. It makes provision for non-disclosure in circumstances where the public interest in disclosure would be outweighed by a significant risk of prejudice to national security or the prevention and detection of crime.

BRIEFING

16. Clause 207 provides a mechanism for the IPC to report errors to individuals affected by them. The IPC must report to the subject of any surveillance, any "relevant error" which it considers is a "serious error". JUSTICE regrets that the Government has not followed the recommendation made by the Joint Committee that the Government should review the error-reporting threshold in light of such concerns presented in the written evidence presented to the Joint Committee.[16]

17. While we recommended in *Freedom from Suspicion* that where possible, errors should be notified to the IPT and the individual concerned, there are a number of significant problems with this measure:

    a. The Bill includes an express bar on reporting of any other errors except by virtue of Clause 207 (Clause 207(7));

    b. The Bill defines the seriousness of any error by reference to the impact on the individual concerned, without reference to the illegality of the conduct by the relevant public body. Any reportable error must, in the view of the Commissioner, have caused "significant prejudice or harm to the person concerned" (Clause 207(2)). This would significantly limit the circumstances when the duty to report is triggered, despite unlawful conduct by a public body inspected by the IPC;

[16] Joint Committee, Report on Draft Investigatory Powers Bill, para 622.

c. This “serious error” benchmark is set disproportionately – and inappropriately – high by the Bill. Clause 207(3) indicates that something *more* than a breach of Convention rights protected by the HRA 1998 is required for an error to be considered “serious”.

d. If the purpose of reporting is to allow an individual to consider whether to pursue a case before the IPT, it is unclear why reports should be limited only to cases of serious error. The Bill provides a detailed mechanism for reporting on serious errors and the maintenance of relevant data about reported errors (Clause 207(8)). We are concerned that the distinction between serious and other errors could, in practice, lead to underreporting of surveillance inconsistent with the requirements of the law or the relevant Codes of Practice. This could significantly diminish the effectiveness and value of the new IPC.

18. **In the alternative, JUSTICE supports the amendments tabled by Lord Paddick and Baroness Hamwee (Amendments 191A – J), which are designed to amend the high threshold for error reporting currently reflected in the Bill.**

New Clause: General Duty of Notification

PROPOSED AMENDMENTS

Page 160, line 43, insert new clause –

(-) ***Notification***

(1) The Intelligence and Surveillance Commissioner is to notify the subject or subjects of investigative or surveillance conduct relating to the statutory functions identified in section 196, subsections (1), (2) and (3), including -

a) the interception or examination of communications,
b) the retention, accessing or examination of communications data or secondary data,
c) equipment interference,
d) access or examination of data retrieved from a bulk personal dataset,
e) covert human intelligence sources,
f) entry or interference with property.

(2) The Intelligence and Surveillance Commissioner must only notify subjects of surveillance under subsection (1) upon completion of the relevant conduct or the cancellation of the authorisation or warrant.

(3) The notification under subsection (1) must be sent by writing within thirty days of the completion of the relevant conduct or cancellation of the authorisation or warrant.

(4) The Intelligence and Surveillance Commissioner must issue the notification under subsection (1) in writing, including details of –

a) the conduct that has taken place, and
b) the provisions under which the conduct has taken place, and
c) any known errors that took place within the course of the conduct.

(5) The Intelligence and Surveillance Commissioner may postpone the notification under subsection (1) beyond the time limit under subsection (3) if the Commissioner assesses that notification may defeat the purposes of an on-going serious crime or national security investigation relating to the subject of surveillance or where there is reasonable suspicion that the subject or subjects have committed or are likely to commit a serious criminal offence.

(6) The Intelligence and Surveillance Commissioner must consult with the person to whom the warrant is addressed in order to fulfil an assessment under subsection (5).

PURPOSE

19. JUSTICE supports the amendments prepared by Liberty which would introduce a new duty of general notification. These amendments would create the presumption that subjects of surveillance would be notified after the end of a period of surveillance, subject to a public interest in preserving the integrity of police investigations and national security inquiries.

BRIEFING

20. JUSTICE considers that the Bill should additionally be amended to provide for a *default* mandatory notification mechanism.[17] The requirement for individuals to be notified of

[17] *Freedom from Suspicion,* para 389.

surveillance as soon as possible, is a key safeguard identified by the European Court of Human Rights, which as stressed that *"as soon as notification can be made without jeopardising the purpose of the surveillance after its termination, information should be provided to the persons concerned".*[18] The House of Lords Constitution Committee has previously recommended that *"individuals who have been made the subject of surveillance be informed of that surveillance, when completed, where no investigation might be prejudiced as a result".*

21. Provision for mandatory notice would allow individuals to pursue a claim before the IPT in their own right even in circumstances where the IPC has not identified an error. Although notification in very sensitive cases may be unlikely, the potential for disclosure may create an additional impetus towards lawful decision making by agencies and other bodies exercising these compulsory powers.

22. For example, for instances of interception in law enforcement matters in the United States, notification is by default within 90 days of the termination of the relevant surveillance, unless the authorities can show there is "good cause" to withhold that information.[19] A similar model operates in Canada, where the subjects of interception warrants for the purposes of law enforcement must be given notice within 90 days of a warrant expiring. This may be extended up to three years in terrorism claims, subject to judicial oversight, if in the "interests of justice".[20] We understand that similar notification provisions apply in both Germany and the Netherlands, with similar exemptions to protect the integrity of ongoing inquiries.[21]

[18] See *Association for European Integration and Human Rights and Ekimhzhiev* App No 62540/00, 28 June 2007, para [90]-[91

[19] 18 U.S.C §2518 (8) (d). See Annex 15, Anderson Review, for a brief analysis of comparative practice in the "five eyes" jurisdictions.

[20] Section 188, 195-196, Canadian Criminal Code.

[21] Under the German Code of Criminal Procedure, section 101(4)(3), individuals under telecommunication surveillance shall be notified of surveillance measures. The notification should mention the individual's option of court relief and the applicable time limits and should be given as soon as possible without "endangering the purpose of the investigation, the life, physical integrity and personal liberty of another or significant assets including the possibility of continued use of the undercover investigator." But notification will be "dispensed with where overriding interests of an affected person that merit protection constitute an obstacle." In the Netherlands, under the Code of Criminal Procedure, Part VD, Chapter One, Section 126bb, the public prosecutor must notify in writing the user of telecommunications or the technical devices of the surveillance "as soon as the interest of the investigation permits", but not if it is not reasonably possible to do so. If the individual is a suspect and learns of the exercise of surveillance power through means described in 126aa(1) or (4) of the Code, notice is not required. If the inquiry relates to an investigation of terrorist offences or another serious offence, information pertaining to an individual's name, address, postal code, town, number, and type of service of a user of a communication service may be requested, and the notice provisions of 126bb will not apply.

Clause 210: Reporting to Parliament

PROPOSED AMENDMENTS

Clause 210, Page 163, Line 34, leave out subclause (3)

Clause 210, Page 164, Line 8, leave out "contrary to the public interest or" and insert "seriously"

Clause 210, Page 164, Line 11, leave out subclauses (c) and (d)

Clause 210, Page 164, Line 16, insert the following new subclause –

> (-) In subsection (7) any publication will be considered "seriously prejudicial" where it would involve a significant risk to the life or of serious physical injury of any person.

Clause 210, Page 164, Line 25, leave out "if requested to do so by the Prime Minister"

PURPOSE

23. These amendments would constrain the circumstances when the Investigatory Powers Commissioner may be compelled to report by the Prime Minister. They would also restrict the circumstances in which the Prime Minister might redact any report before laying it before Parliament.

24. The Bill would provide that redactions would be possible in a wide range of circumstances including, for example, where "prejudicial" to the function of any public authority subject to the oversight of the Investigatory Powers Commissioner (including for example, the Food Standards Agency). Arguably, any critical report could be prejudicial to the discharge of the functions of a public body. These provisions are exceptionally broad and could undermine both the independence and effectiveness of the Commissioner.

25. These amendments would restrict the power to redact to circumstances which would seriously prejudice national security or the prevention and detection of crime. Serious prejudice must involve a significant threat to life or serious physical injury.

26. The Bill provides that, even after redaction of a report tabled before Parliament, the Commissioner is only permitted to publish that report or part thereof at the request of the Prime Minister. These amendments would remove this limitation and would give the Commissioner the discretion to publish any part of any report laid before Parliament.

BRIEFING

27. As outlined above, the independence of the new oversight model will be paramount to its effectiveness, these amendments are designed to highlight the degree of control which the Prime Minister will exercise over the publication of the reports of the Investigatory Powers Commissioner. Members may wish to ask Ministers to explain why the Commissioner should not report to Parliament, subject to consultation with the Prime Minister on the process of redaction.

Clause 210: Reporting to Parliament

PROPOSED AMENDMENTS

Clause 210, Page 163, Line 21, leave out "the Prime Minister" and insert "Parliament"

Clause 201, Page 163, Line 34, leave out subclause (3) and insert –

(-) The Investigatory Powers Commissioner must lay a copy of the report before Parliament together with a statement as to whether any part of the report has been excluded from publication.

Clause 210, Page 163, Line 37, leave out "the Prime Minister" and insert "Parliament"

Clause 210, Page 163, Line 44, leave out subclause (7)

Clause 210, Page 164, Line 4, leave out "Prime Minister" and insert "Investigatory Powers Commissioner"

Clause 210, Page 164, Line 4, leave out "Investigatory Powers Commissioner" and insert "The Prime Minister"

PURPOSE

28. These amendments are prepared supplementary to the proposed amendments above. The Bill provides that the Commissioner will report to the Prime Minister who will take ultimate responsibility for any redactions before the Commissioner's reports are published or presented to Parliament. The Prime Minister is required to consult with the Commissioner.

29. These amendments would provide for the Commissioner to report directly to Parliament. He or she would take responsibility for redactions, subject to consultation with the Prime Minister and the relevant duties in Clause 210 and in other parts of the Bill, which would

require the Commissioner to conduct himself in a way which is not contrary to the public interest or prejudicial to national security.

BRIEFING

30. By providing that the Commissioner should report directly to Parliament, this would significantly enhance the functional and apparent independence of the Commission. As a High Court judge, or former High Court judge, they are well placed to consider reporting restrictions, and by providing for consultation with the Prime Minister before any report is tabled, this allows the Prime Minister's assessment of any risk of prejudice to the public interest to be taken into account in that decision making process.

Clause 212: Whistleblowing and the Public Interest

PROPOSED AMENDMENTS

Clause 212, Page 165, Line 21, insert the following new subclauses –

> (-) A disclosure pursuant to subsection (1) will not constitute a criminal offence for any purposes in this Act or in any other enactment.
>
> (-) In subsection (1), a disclosure for the purposes of any function of the Commissioner may be made at the initiative of the person making the disclosure and without need for request by the Investigatory Powers Commissioner.

PURPOSE

31. Clause 212 provides that a disclosure to the Commissioner will not violate any duties of confidence or any other restriction on the disclosure of information. These amendments would put beyond doubt that voluntary, unsolicited disclosures are protected, and that any whistleblower is also protected from criminal prosecution.

BRIEFING

32. JUSITCE is concerned that provisions in the Bill may risk inadvertently discouraging or preventing individuals within public authorities or agencies or in Communication Service Providers from approaching the Investigatory Powers Commissioner with concerns or communicating with the Commission frankly.[22]

[22] Although Clause 43 in the draft Bill makes provision for an authorised disclosure to a Judicial Commissioner, this exception is not consistently applied to all non-disclosure duties and offences in the Bill. In light of the history of significant misunderstandings and disagreements about the scope of surveillance law, JUSTICE feels it would be regrettable if individuals and organisations were prevented from consulting with the Investigatory Powers Commissioner about good practice and areas of conflict in the application of the law by overly rigid non-disclosure requirements.

33. JUSTICE strongly supports recommendations made by the Joint Committee that the Bill should be amended both so that it specifies that any disclosure to the Investigatory Powers Commissioner for the purposes of soliciting advice about any matter within the scope of its responsibilities, or for the purposes of supporting its duty to review, will be an authorised disclosure, and not subject to any criminal penalty. The Joint Committee has made recommendations that provisions should be inserted into the draft Bill to allow for direct contact to be made between Judicial Commissioners and both Communication Service Providers[23] and security and intelligence agencies.

34. JUSTICE considers that a clear safe-route to the IPC will be crucially important in determining its credibility and effectiveness. Members may wish to ask the Minister to provide a further explanation for the intended effects of the Bill and the protection offered to ensure that individual officials and employees of CSPs might seek effective guidance, or may be protected as a whistle-blower if choosing to report unlawful or irresponsible conduct.

Clause 213: Budgetary control

PROPOSED AMENDMENTS

Clause 213, Page 165, Line 24, after "such", insert "funds"

Clause 213, Page 165, Line 24, after "determine" insert "necessary for the purposes of fulfilling the functions of the Judicial Commissioners under this Part"

Clause 213, Page 165, Line 40, leave out subclause (2) and insert –

> (-) In determining the sums to be paid pursuant to subsection (1), the Treasury shall consult the Investigatory Powers Commissioner.

PURPOSE

35. The Bill currently provides that the Treasury will set the remuneration and allowances for the Judicial Commissioners. However, it also provides that the provision of staff, accommodation and facilities to the Commissioners is to be determined and provided by the Secretary of State. The Secretary of State is given sole discretion to determine what staff, accommodation, facilities and equipment are necessary for the work of the Investigatory Powers Commissioner under this Act. The Bill gives the Secretary of State a significant and inappropriate degree of control over the budget of the Investigatory Powers Commissioner.

[23] Joint Committee, Report on the Draft Investigatory Powers Bill, para 629.

36. These amendments would require the Treasury to set the budget for the Investigatory Powers Commissioner, after consultation with the Commissioner. It would remove the Secretary of State from that process entirely.

BRIEFING

37. JUSTICE welcomes provisions in the Bill which specify that the Treasury, rather than the Secretary of State, is to determine the remuneration and allowances that the Judicial Commissioners receive.[24] However, JUSTICE regrets that the Secretary of State will continue to be involved in the allocation of resources to the Commissioner's office.[25] The management of funding by the Secretary of State is likely to severely weaken the perceived and actual independence of the Investigatory Powers Commissioner. JUSTICE supports the Joint Committee in view that the management of resources by the Secretary of State is "*inappropriate*" and that the Bill should be amended to give a role for Parliament in determining the budget.[26]

Schedule 7 and Codes of Practice

PROPOSED AMENDMENTS

Schedule 7, Page 225, Line 21, insert the following new paragraph –

> (-) A statutory instrument for the purposes of paragraph (4) must be accompanied by a report by the Investigatory Powers Commissioner on the content of the draft code and his consultation response.

Schedule 7, Page 225, Line 38, insert the following new paragraph –

> (-) A statutory instrument for the purposes of paragraph (4) must be accompanied by a report by the Investigatory Powers Commissioner on the content of the draft code and his consultation response.

PURPOSE

38. These amendments would require any code of practice, or any proposed revision to an existing code, to be accompanied by a report by the Investigatory Powers Commissioner on its merits before it is laid before Parliament. This would allow the Commissioner to draw to the attention of Parliament any relevant information about the scope of the Code or its potential impact.

[24] Investigatory Powers Bill, Clause 213.
[25] Ibid.
[26] Joint Committee, Report on the Draft Investigatory Powers Bill, para 604.

Clause 214: Functions and delegated powers

PROPOSED AMENDMENTS

Clause 214 should not stand part of the Bill.

PURPOSE

39. The Bill currently provides for the Secretary of State to modify the functions of the Investigatory Powers Commissioner and the Judicial Commissioners by secondary legislation, subject to affirmative resolution.

40. These amendments would remove the power to change the scope of the powers of the Investigatory Powers Commissioner and the Judicial Commissioners by delegated legislation.

BRIEFING

41. The Joint Committee had "*every confidence such a power would only be exercised responsibly by the Secretary of State*."[27] In their report on the Bill, the House of Lords Constitution Committee has explained its concern about the Henry VIII power in this Clause:

> *"For two reasons, we are not satisfied that the Henry VIII power as presently framed in the Bill is constitutionally acceptable. First, notwithstanding the possibility of distinguishing between the Judicial Commissioners' various functions, it remains the case that the office of Judicial Commissioner is a judicial office. An executive power to diminish the legal role and responsibility of holders of such an office would be inappropriate on separation of powers grounds. Second, when exercising oversight functions, Judicial Commissioners would be carrying out oversight of an interception of communications regime operated by the Government (albeit with judicial involvement via the double lock process) and Government agencies. The availability of a Henry VIII power to adjust, and particularly to reduce, the Commissioners' oversight functions might give cause for concern, since such a power would enable the Government to weaken an oversight regime of which it was the subject."*[28]

[27] Joint Committee, Report on the Draft Investigatory Powers Bill, para 608.
[28] 3rd Report of Session 2016-17, Investigatory Powers Bill, HL 24, para 20.

42. In light of the important function of the ISC in holding ministers and public agencies to account, JUSTICE considers that granting ministers a delegated power to alter its powers would be inappropriate.

Oversight and the Investigatory Powers Tribunal

Clause 217: Scope of Appeal from the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Clause 217, Page 167, Line 24, leave out subsection (6)

PURPOSE

43. The Bill provides that an appeal on an error of law will only lie when an appeal raises an important point of principle or practice or there is another compelling reason to grant leave.

44. This amendment would remove this restriction and create a right of appeal against any error in law.

BRIEFING

45. The additional hurdle provided in the Bill creates a barrier to appeal more commonly seen in second appeals to higher courts, not generally used in connection with a first appeal in connection with an error in law.

46. Matthew Ryder QC told the Joint Committee on the Draft Bill that leaving this test in place would be "unconscionable".[29] Clearly, providing for this extra hurdle would leave some errors of law without remedy or appeal. David Anderson QC recommended in *A Question of Trust* that an appeal should lie from the Investigatory Powers Tribunal to the Court of Appeal on *any* error of law.[30] The Joint Committee on the Draft Bill recommended that the Bill be so amended.[31]

[29] Joint Committee Report, para 652
[30] Ibid
[31] Joint Committee Report, para 654

New Clause: Openness and the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Page 169, Line 8, insert the following new clause –

(-) After section 68(1) of the Regulation of Investigatory Powers Act 2000, insert –

> (-) Any hearing conducted by the Tribunal must be conducted in public, except where a special proceeding is justified in the public interest.
>
> (-) Any determination by the Tribunal must be made public, except where a special proceeding may be justified in the public interest.
>
> (-) A special proceeding will be in the public interest only where there is no alternative means to protect sensitive material from disclosure.
>
> (-) Material will be sensitive material for the purposes of this Section if its disclosure would seriously prejudice (a) national security or (b) the prevention and detection of crime.
>
> (-) Publication for the purposes of this Section will be seriously prejudicial if it would lead to a significant threat to life or of a serious physical injury to a person.
>
> (-)The Tribunal shall appoint a person to represent the interests of a party in any special proceedings from which the party (and any legal representative of the party) is excluded.
>
> (-) Such a person will be known as a Special Advocate.

PURPOSE

47. The Bill engages little with the procedures of the Investigatory Powers Tribunal. These amendments would alter the provisions of the Regulation of Investigatory Powers Act 2000 to create a default presumption in favour of open hearings before the Tribunal. They provide for a special proceeding to be initiated in cases where sensitive material prejudicial to the life or physical integrity of a person is produced, contrary to the public interest in national security and the prevention and detection of crime. It provides that, in any special proceedings where a person or his legal team is excluded, a Special Advocate should be appointed to represent their interests in any closed hearing.

BRIEFING

48. In 2011, JUSTICE noted that the IPT bore *"only a remote resemblance to any kind of open and adversarial system of justice*[32]*"* and was lacking in effectiveness.[33] The

[32] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 672.

excessive secrecy and the unfair nature of the Tribunal's procedures meant even those complainants who reasonably suspected they were victims of unnecessary surveillance were unlikely to have a reasonable prospect of success.

49. In recent years, the IPT has been increasingly holding cases in public, as well as providing more detailed judgments to accompany their decisions. While this is to be welcomed, these cases have primarily served to emphasise the urgent need for procedural reform. The IPT's procedures and judgment remain opaque and lacking in clarity: an issue which was highlighted in detail in the recent report by the Joint Committee.[34] In the recent case of *Liberty and others v GCHQ*,[35] the Tribunal mistakenly released a judgment stating that none of those complainants based in the UK had been subject to surveillance,[36] before it came to light that one of the parties, Amnesty International, had.

50. All three recent reviews of investigatory powers emphasised the need for significant reform of the IPT. The need for reform is also reflected in the recommendations for made by the Joint Committee in its recent report. The procedures of the IPT will soon be revisited by the European Court of Human Rights, determining claims brought by Big Brother Watch and others regarding the inadequacy of the Tribunal as an avenue for effective judicial remedy.[37]

51. JUSTICE considers it crucial that the Bill is amended to ensure that the IPT plays an effective role in the new surveillance framework. Any other alternative would be a missed opportunity. The Joint Committee on the Draft Bill recommended that when making a decision on whether a hearing or part of a hearing should be open or not the Tribunal should apply a public interest test (Recommendation 74). Both the Anderson and RUSI Reviews considered that the Tribunal should conduct its proceedings in open as default, with limitations only as the public interest requires.[38] JUSTICE has long standing concerns about the use of Special Advocates and open justice,[39] but the right of the excluded applicant to have their interests represented within closed sessions of the IPT should be a minimum safeguard.

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[33] Ibid, para 357.
[34] Joint Committee, Report on the Draft Investigatory Powers Bill, para 657.
[35] *Liberty & Ors v GCHQ* [2014] UKIPTrib 13_77-H.
[36] Ibid.
[37] See *Big Brother Watch and others v UK* (Application no. 58170/13).
[38] RUSI Recommendation 11, Anderson Review, para 6.106.
[39] See for example, JUSTICE, *Secret Evidence* (2009).

52. Parliamentarians may wish to ask Ministers to explain why the Bill should not provide a clear framework for the conduct of Tribunal hearings in a manner consistent with the principle of open justice, in so far as the public interest will allow.

New Clause: Openness and the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Page 169, Line 8, insert the following new clause –

(-) Within 12 months of the coming into force of this Act, the Secretary of State must make arrangements for an independent review of the procedures of the Investigatory Powers Tribunal to be placed before Parliament.

(-) The Treasury will provide such funds, remuneration or allowances as necessary for the Independent Reviewer appointed to produce his report pursuant to section (1).

(-) The Independent Review in section (1) must consider –

(a) the capacity of the Tribunal to afford redress to individuals when compulsory powers are exercised unlawfully, including in a manner incompatible with Convention Rights protected by the Human Rights Act 1998; and

(b) the conduct of Tribunal hearings and the production of Tribunal decisions which are open, transparent and accessible, except in so far as can be justified in light of a serious risk to life or of physical injury of any person, seriously prejudicial to:

(i) national security; or

(ii) the prevention and detection of serious crime.

PURPOSE

53. This amendment would compel the Secretary of State to appoint an Independent Reviewer to conduct a review of the operation of the Investigatory Powers Tribunal, and to produce a report within 12 months of the coming into force of this Act. Such report would be required to consider the adequacy of the Tribunal as a route to redress and secrecy in Tribunal hearings and decisions.

New Clause: IPT and Declarations of Incompatibility

PROPOSED AMENDMENTS

Page 169, Line 8, insert the following new clause –

(-) After Section 4(5)(f) of the Human Rights Act 1998 insert -

"(g) the Investigatory Powers Tribunal."

PURPOSE

54. This amendment would extend to the Investigatory Powers Tribunal the power to make a declaration of incompatibility pursuant to Section 4 of the Human Rights Act 1998.

BRIEFING

55. JUSTICE, along with the Joint Committee, supports the proposal made by the Independent Reviewer that the IPT should be given the power to make a declaration of incompatibility pursuant to section 4 of the HRA.[40]

56. While the right to appeal will ensure that a declaration might be sought before the Court of Appeal, the Tribunal should have the opportunity to consider whether a declaration would be appropriate. For it would be an inefficient use of judicial resources if the only reason an appeal might be pursued would be to secure a remedy unavailable in the first instance.

57. JUSTICE regrets that the Bill does not follow the Joint Committee's recommendation that the IPT should be able to make declarations of incompatibility under section 4 of the Human Rights Act.[41]

New Clause: The Rules of the IPT (Amendment 194D)

58. **JUSTICE supports Amendment 194D proposed by Lord Pannick, Baroness Hamwee and Lord Rosser, which would require that the Rules of the IPT are made by the Tribunal Procedure Committee.**

59. In keeping with JUSTICE's longstanding concerns about the transparency and accountability of the Tribunal, and the new provision for a right of appeal from the Tribunal to the Court of Appeal, JUSTICE considers that the role of the Secretary of State under RIPA in settling the Rules of the IPT is inappropriate.

Review and Sunset Clause

Clause 232

Page 179, line 18, leave out Clause 232 and insert–

[40] See Liberty, Written Evidence, para 156.
[41] Joint Committee Report, para 666.

(-) Review of the Operation of this Act

(1) The Secretary of State shall appoint an Independent Reviewer to prepare the first report on the operation of this Act within a period of 6 months beginning with the end of the initial period.

(2) In subsection (1) "the initial period" is the period of 4 years and 6 months beginning with the passage of this Act.

(3) Subsequent reports will be prepared every 5 years after the first report in subsection (1).

(4) Any report prepared by the Independent Reviewer must be laid before Parliament by the Secretary of State as soon as the Secretary of State is satisfied it will not prejudice any criminal proceedings.

(5) The Secretary of State may, out of money provided by Parliament, pay a person appointed under subsection (1), both his expenses and also such allowances as the Secretary of State determines.

(-) Duration of this Act

(1) This Act expires at the end of one year beginning with the day on which it is passed (but this is subject to subsection (2)).

(2) Her Majesty may by Order in Council provide that, instead of expiring at the time it would otherwise expire, this Act shall expire at the end of a period of not more than one year from that time.

(3) Such an Order may not provide for the continuation of this Act beyond the end of the year 2022.

(4) No recommendation may be made to Her Majesty in Council to make an Order under subsection (2) unless a draft of the Order has been laid before, and approved by a resolution of, each House of Parliament.

PURPOSE

60. These amendments would replace the current provision in the Bill for review with a sunset clause which would require rolling renewal of the measures in the Act by Order in Council on an annual basis and wholesale renewal within 5 years of the Act coming into force (by 2022). The amendments are based on the existing mechanism for rolling renewal of the Armed Forces Act.

BRIEFING

61. It would be regrettable if an ill-placed desire to 'future proof' these measures led to powers which were either overbroad or unduly flexible. The UK has a long history of repeat legal reform prompted by successive determinations that changing powers and expanding technology have rendered surveillance powers disproportionate and unlawful in their operation (from *Malone* to *Liberty v UK*).[42]

62. Members may wish instead to consider whether surveillance, by its nature, is an area suited to regular default consideration by Parliament (like the Armed Forces Act, which must be renewed periodically).

63. Clause 232 currently provides for a single review, five years into the Bill's operation, by the Home Office. The Joint Committee recommended early review by a Joint Committee of both Houses[43] (An amendment has been tabled by Lord Paddick and Baroness Hamwee to reduce the time for review to two years (Amendment 234)).

64. JUSTICE considers that a single review would fail to take seriously concerns about the scope and impact of the measures proposed in the Bill, and the historical experience that law in this area can be significantly impacted by changing precedent and shifting technological capacities.

JUSTICE
September 2016

[42] See *Malone v UK*, App No 8691/79, *Liberty v UK*, App No 58243/00.
[43] Joint Committee Report, para 660.