Investigatory Powers Bill 2016: Parts 1 and 2

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 broad provisions for untargeted and bulk powers of surveillance, with insufficiently robust oversight mechanisms for ensuring that these powers are used lawfully and responsibly.

In this briefing, we highlight a number of specific problems in Parts 1 and 2 of the Bill and propose amendments for further consideration in Committee.

(i) **The Bill should be amended to provide for judicial authorisation of warrants throughout as a default, subject to a limited exception for certification by the Secretary of State in some cases involving defence and foreign policy matters. Certification should be subject to approval by Judicial Commissioners.**

(ii) **If a review is conducted, it should be clear on the face of the Bill that Judicial Commissioners are required to conduct a full merits review of the necessity and proportionality of a Secretary of State's decision on surveillance.**

(iii) **The scope of a targeted warrant should be narrowed to better specify the individuals who are subject to surveillance and to better reflect the requirements of the European Convention on Human Rights, as laid out in its case law.**

(iv) **The grounds for warrants should be amended to better reflect that case-law. We propose amendments to remove a trigger based on economic circumstances or threats. We also propose that members should consider expressly linking the significant powers in the Bill to circumstances where there is a reasonable suspicion that a serious offence has occurred.**

(v) **Judicial Commissioners considering applications should have access to security vetted advocates to help represent the interests of the subject and the wider public interest in protecting privacy.**

(vi) **The urgent procedure in the Bill should be removed or amended to restrict the capacity for its arbitrary application.**

(vii) **All substantive modifications of warrants should be made by a Judicial Commissioner.**

(viii) **JUSTICE is encouraged that Ministers accept that Legal Privilege must be addressed on the face of the Bill and subject to debate in Parliament. However, we regret that the provision in the Bill, including in Clause 27, provides for the authorisation of the interference with legally privileged materials in circumstances which are considered 'exceptional and compelling'. The safeguards proposed in the Bill are limited and may yet pose a significant risk to individual confidence in the ability to secure confidential legal advice and assistance if implemented.**

***(ix)* The absolute ban on the use of intercepted material in court proceedings should be removed (Clause 53).**

***(x)* The provisions in the Bill should be amended to provide a clear and safe route for whistleblowers acting in the public interest. We are concerned that the criminal offences in the Bill relating to non-disclosure should not act as a deterrent against responsible disclosure by officials and agents in public bodies and intelligence agencies or employees in Communications Service Providers.**

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]

2. 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". We welcome the decision by the Government to avow and specify the powers proposed in the Bill. This is an improvement on the existing approach in RIPA and on the proposal for broad delegated legislation in the Draft Communications Data Bill. However, we regret that the powers proposed in the Bill may be overly broad and the safeguards unduly limited.

3. In many instances, an individual subject to surveillance may never know whether his information has been reviewed or what has been retained. Only in the limited circumstances when the information obtained is used in a trial or when an authority acknowledges the surveillance may an individual be able to challenge its propriety. Accordingly, in these circumstances, there is a significant obligation on the State to ensure that surveillance powers are closely drawn, their safeguards appropriate and that provision is 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]

4. 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*

[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'.*

[2] *Klass v Germany* (1978) 2 EHRR 214, paras 36, 41.

the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."[3]

5. 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 necessary and proportionate.

The Bill

6. Part 1 of the Bill provides for a number of offences which relate to the misuse of powers relating to surveillance. Part 2 deals with the interception of communications by security agencies, law enforcement bodies and others. Parts 3 and 4 deal with the retention of communications data and access to that material. These parts replace the Data Retention and Investigatory Powers Act 2014 ('DRIPA'). They expressly empower the Secretary of State to request the retention of 'Internet Connection Records'. Part 5 governs "Equipment Interference" (also known as hacking or Computer Network Exploitation). Part 6 creates a framework for 'bulk interception' warrants and for bulk warrants for the acquisition of communications data and equipment interference. Part 7 provides for access to bulk personal datasets. Part 8 provides for the creation of new oversight roles, in the form of an Investigatory Powers Commissioner ('IPC') whose work is to be supported by a group of Judicial Commissioners. This Part also proposes a new right of appeal from decisions of the Investigatory Powers Tribunal ('IPT').

7. 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 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]

[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'.*
[4] Joint Committee, Report on the Draft Investigatory Powers Bill, para 331.

8. 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 brought by David Davis MP and Tom Watson MP against the current regime for data retention (being heard in April 2016). Members may wish to ask Ministers whether some of the powers in this Bill may shortly be rendered incompatible with the UK's international obligations, particularly without the introduction of significant further safeguards.

9. The Joint Committee expressed a 'belief' that *"the security and intelligence agencies would not seek these powers if they did not believe they would be effective and that the fact that they have been operating for some time would give them the confidence to assess their merits."*[6] 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.

10. In its briefing on the Bill, JUSTICE has focused principally on issues of authorisation and the judiciary; oversight and the role of the new Investigatory Powers Commissioner ('IPC') and the Investigatory Powers Tribunal ('IPT'). We have raised some wider concerns about the treatment of privileges, legal professional privilege, in particular, and the treatment of intercept material as evidence in legal proceedings.[7]

11. **In this briefing we propose some detailed amendments to Parts 1 and 2 for consideration for members. Where we do not specifically address an issue, this should not be taken as support.**

[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] Joint Committee, Report on the Draft Investigatory Powers Bill, 340.
[7] Fuller briefing on JUSTICE's position on the Bill can be found here: http://justice.org.uk/investigatory-powers-bill/

B. PROPOSED AMENDMENTS AND BRIEFING

Clause 2: Privacy clause and binding legal obligations

Clause 2

Page 3, line 8, leave out "the need to have regard to"

Page 3, line 10, leave out "may" and insert "shall"

PURPOSE

1. Clause 2 inserts into the Bill a number of duties to have regard to particular considerations when exercising the powers and duties it creates. However, these considerations include a number of factors which are already binding on public authorities and others in the conduct of all of their public functions, principally, the provisions of the Human Rights Act 1998 and the ordinary provisions of public law (see Clause 2(4)(d)-(e). These amendments are designed to remove any ambiguity that those binding provisions are anything other than binding legal requirements.

BRIEFING

2. While JUSTICE welcomes the decision to introduce a statutory statement of the privacy considerations which public bodies will have to consider in the operation of this Bill, many of the factors listed are likely to already bind individual decision makers by virtue of either the Human Rights Act 1998 or the ordinary public law. Greater safeguards for privacy should be considered in the design of the substantive powers themselves and the specific safeguards applied by the Bill.

3. However, JUSTICE is concerned by the ambiguity in the drafting of Clause 2 which suggests that duties which are binding in law are merely subject to an optional obligation to "have regard" which "may" apply in some contexts. Although the substantive impact of those duties may vary according to the context, the substantive obligations of the Human Rights Act 1998 and the ordinary public law will always apply to the public authorities exercising powers under the Bill (with express exceptions in the provisions of those requirements for Acts of Parliament already recognised). To avoid an unfortunate

precedent, or sending an ambiguous message to public decision makers, the Bill should be amended.

4. In the alternative, JUSTICE supports the amendments tabled in the name of Baroness Hamwee and Lord Pannick to Clause 2, for the same purpose.

Clauses 19 - 23: Ministers or judges?

PROPOSED AMENDMENTS

Clause 19 – Power of Secretary of State to issue warrants

Page 14, line 29, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 14, line 30, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 14, line 33, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 14, line 35, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 14, line 38, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 14, line 41, leave out paragraph (d)

Page 15, line 1, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 3, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 5, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 8, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 12, leave out paragraph (d)

Page 15, line 16, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 18, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 20, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 23, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 15, line 26, leave out paragraph (d)

Page 15, line 30, leave out subsection (4)

Page 15, line 41, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 16, line 9, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 16, line 10, leave out "Secretary of State" and insert "Judicial Commissioners"

Page 16, line 21, leave out Clause 21

Page 17, line 32, leave out Clause 22

Clause 23 – Certification of warrants

Page 18, line 25, leave out Clause 21 and insert –

"Power of Secretary of State to certify warrants"

(1) The Secretary of State may certify an application for a warrant in those cases where the Secretary of State has reasonable grounds to believe that an application is necessary pursuant to section 18(2)(a) (national security) and involves:

> **(a) the defence of the United Kingdom by Armed Forces; or**
>
> **(b) the foreign policy of the United Kingdom.**

(2) A warrant may be certified by the Secretary of State if -

> **(a) the Secretary of State considers that the warrant is necessary on grounds falling within section 18; and**
>
> **(b) the Secretary of State considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.**

(3) Any warrant certified by the Secretary of State subject to subsection (1) is subject to approval by a Judicial Commissioner.

(4) In deciding to approve a warrant pursuant to this section, the Judicial Commissioner must determine whether:

(a) the warrant is capable of certification by the Secretary of State subject to subsection (1);

(b) the warrant is necessary on relevant grounds subject to Section 18(2)(a) and subsection (1)(a) or (b); and

(b) the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(4) Where a Judicial Commissioner approves or refuses to approve a warrant under this Section, the Judicial Commissioner must produce written reasons for the refusal.

(5) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, approves or refuses to approve a warrant under this Section, the Secretary of State or any Public Interest Advocate appointed, may ask the Investigatory Powers Commissioner to decide whether to approve the decision to issue the warrant.

PURPOSE

5. The Bill provides that the primary decision maker for some surveillance decisions will be the Secretary of State or a senior official, whose decision will then be subject to review by a Judicial Commissioner. The Judicial Commissioner will review whether a warrant is (a) "necessary on relevant grounds" and (b) "whether the conduct that would be authorised by the warrant is proportionate to what is sought to be achieved". In conducting a review, the Commissioner must "apply the same principles as would be applied by the court on an application for judicial review."[8] See, for example, Clause 19 – 23) (Targeted Interception, Examination and Mutual Assistance).

6. These amendments would amend Clauses 19 - 23 so that Judicial Commissioners are the default decision-makers regarding most warrants for interception of communications. It removes Clauses 21 - 22 which make particular provision for approval by Scottish Ministers in Scottish applications, as all applications will be processed by the Judicial Commissioners. The Secretary of State would be allowed to certify a warrant in those

[8] Clause 19 - 23. However, similar provisions are repeated in other clauses of the Bill.

cases involving defence of the UK and in foreign policy (both reserved matters).[9] This broadly reflects the original recommendation of the Independent Reviewer in his report, *A Question of Trust*.[10]

7. The Bill provides that where a Judicial Commissioner refuses to approve a warrant, the person making the warrant may ask the Investigatory Powers Commissioner to reconsider. This draft would allow a Public Interest Advocate appointed to ask for a similar reconsideration of any warrant approved (see further briefing, below).

8. The Bill provides that reasons should be provided if a warrant is refused. This amendment would provide for reasons to be produced when a warrant is approved or refused. The Bill provides that reasons should be given to the Secretary of State or such other person as has issued the warrant. This provides limited opportunity for transparency and precedent on the application of the law. While, of course, there may be sensitive material which may need to be protected, JUSTICE considers that the Bill should expressly provide for open reasons to be provided on the law, where possible. Judicial Commissioners should be encouraged to publicise precedent on their interpretation and application of the Act, to improve the quality of applications and public understanding of the scope of the law on surveillance. This would go some way to promoting public confidence in the oversight role which the Judicial Commissioners will play.

BRIEFING

9. The Human Rights Memorandum accompanying the Bill explains that an authorisation process which includes judicial approval is a "*fundamental safeguard*" of the Bill.[11] Termed a "double-lock", JUSTICE is concerned that the Government's description of this safeguard is misleading. The provisions in the Bill fall far short of the mechanisms for prior judicial authorisation or judicial warrantry applied in most other countries.

10. JUSTICE is particularly concerned that the Bill: (i) conflates authorisation and review; (ii) is inconsistent in its approach to judicial involvement, (iii) provides insufficiently specific triggers for warranting powers throughout the Bill, and in particular, in connection with new thematic or bulk, untargeted powers; (iv) provides for an inappropriately broad

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[9] JUSTICE, written evidence, para 27.
[10] David Anderson QC, *A Question of Trust,* June 2015, Recommendation 38, 14.70.
[11] Home Office, Investigatory Powers Bill: European Convention on Human Rights Memorandum, para 25.

mechanism for urgent authorisation of warrants; (v) permits the modification of warrants without sufficient oversight; and (vi) makes limited provision for to ensure that the procedure for authorisation is fair and takes into account the interests of the individual subject to surveillance and the wider community in the protection of privacy.

11. The Anderson Review recommended that all interception warrants (and bulk warrants) should be judicially authorised, concluding that "*the appropriate persons to perform this function would be senior serving or retired judges in their capacity as Judicial Commissioners.*"[12]

12. A two stage "certification" model was recommended in cases involving "defence of the UK and foreign policy". In these cases alone the Secretary of State should have the power to certify that the warrant is required in the interests of the defence and/or the foreign policy of the UK. The judge should have the power to depart from that certificate, the Independent Reviewer suggests, "*only on the basis of the principles applicable in judicial review*" which he notes would be "*an extremely high test in practice, given the proper reticence of the judiciary where matters of foreign policy are concerned*".[13] The judge would remain responsible for verifying whether the warrant satisfied the requirements of proportionality and other matters falling outside the scope of the certificate.

13. JUSTICE considers a strong case for clear judicial control of surveillance decisions has been made. In the recent case of *Szabó and Vissy v. Hungary*, the Court held that judicial authorisation offers "*the best guarantees of independence, impartiality and a proper procedure*" and that in the case of surveillance, "*a field where abuse is potentially so easy in individual cases*" and "*could have such harmful consequences for democratic society… it is in principle desirable to entrust supervisory control to a judge*". [14]

14. In the recent case of *Digital Rights Ireland*, the European Court of Justice held that "*prior review carried out by a court or by an independent administrative authority*" was a requirement even in respect of access to retained communications data – which is considered less intrusive material that that obtained through intercept.[15]

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[12] Anderson Review, para 14.47 at seq.
[13] Ibid, para 14.64.
[14] *Szabó and Vissy v. Hungary* (Application no. 37138/14), 12 January 2016, para 77.
[15] *Digital Rights Ireland*, C-293/12 and C-594/12 8, April 2014.

15. The involvement of the Secretary of State in authorising surveillance requires that the Secretary of State signs thousands of warrants every year. The Independent Reviewer has highlighted that it is open to question whether this function is the best use of the Secretary of State's valuable time.[16] It is worth noting that these provisions in Part 1 not only relate to targeted and thematic interception, but include warrants for examination of material pursuant to targeted examination warrants (it is unclear how many of this type of warrant might be expected pursuant to the powers set out in this Bill).

16. JUSTICE considers that the Bill should be amended so that judges are the default decision-makers regarding warrants and that the Secretary of State should be allowed to certify a warrant in those cases involving defence of the UK and in foreign policy.[17] This reflects the original recommendation of the Independent Reviewer.[18]

17. The Joint Committee has highlighted that "*making this change will reduce the risk that the UK's surveillance regime is found not to comply with EU law or the European Convention on Human Rights*".[19] Given the importance of the role of judicial authorisation, in terms of constituting the primary protection against the abuse of investigatory powers, it is important that the Bill ensures that this role will be effective.

18. Ministerial control, as provided for in the Bill, has been justified on the grounds that it allows the process of authorisation of surveillance to be subject to greater democratically accountability. The Joint Committee was satisfied that a case has been made for having a "double-lock" authorisation for targeted interception, targeted equipment interference and bulk warrants.[20] However, in presenting this view, the Joint Committee conceded that at least in relation to police warrants, it is questionable whether there needs to be a ministerial element in the authorisation process – given how many police warrants are required to be signed every year.[21] The Joint Committee emphasised that removing Ministerial involvement in police warranting "*would help to allay the concerns of those who believe that ministerial involvement in authorising all warrants may become unsustainable as the number of warrants continue to rise*".[22]

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[16] David Anderson QC, *A Question of Trust,* June 2015 para 14.49.
[17] JUSTICE, written evidence, para 27.
[18] David Anderson QC, *A Question of Trust,* June 2015, Recommendation 38, 14.70.
[19] Joint Committee, Report on the Draft Investigatory Powers Bill, page 5.
[20] See Joint Committee, Report on the Draft Investigatory Powers Bill, para 421.
[21] Ibid, para 420.
[22] Ibid.

Clause 23: Authorisation or Review?

PROPOSED AMENDMENT

Clause 23

Page 18, line 28, after “must” leave out to “matters”, and insert “determine”

Page 18, line 34, leave out subsection (2)

PURPOSE

19. The Bill requires the application by the Judicial Commissioners of judicial review principles in the process of approving any warrant issued by a minister. The Joint Committee considered this approach would afford the Judicial Commissioners a “*degree of flexibility*”.

20. JUSTICE considers that given the significant reliance placed on judicial involvement in the warranting process, the test to be applied on any review should be clearly specified by Parliament without any ambiguity. We are concerned that evidence on the model in the Bill suggests that the degree of scrutiny conducted by Judicial Commissioners is designed by the Government to be precisely as assessed by the Joint Committee; flexible.

21. These amendments would remove the reference to judicial review principles, making plain on the face of the Bill the responsibility of the Judicial Commissioners to consider the merits of any application afresh before determining whether it is necessary or proportionate.

BRIEFING

22. The application of judicial review principles imports a spectrum of review into the warranting process. It is as yet unclear where on that spectrum any particular type or class of application might fall. The Government have accepted an amendment to this section, designed to directly link the intensity of review to the privacy clause (Clause 23(2)(b). While this is a welcome indication to Judicial Commissioners that they have a significant responsibility to treat the standard of review with the appropriate ‘degree of

care', JUSTICE is concerned that this does not add significantly greater certainty to the type of review likely to be conducted.

23. It may be that, in some cases, even where there is serious detriment to individual rights, national security considerations may, following existing judicial review practice, encourage a very light touch form of scrutiny.

24. As Lord Judge explained during the Public Bill Committee evidence sessions:

> *"I think "judicial review" is a very easy phrase to use. It sounds convincing, but it means different things to different people. People say, "Wednesbury unreasonableness"—that was a case decided by the Court of Appeal in 1948 or 1947, and it has evolved.*
>
> *Personally, I think that when Parliament is creating structures such as these, it should define what it means by "judicial review". What test will be applied by the judicial—I call him that—commissioner, so that he knows what his function is, the Secretary of State knows what the areas of responsibility are and the public know exactly who decides what and in what circumstances? I myself do not think that judicial review is a sufficient indication of those matters'."*[23]

25. JUSTICE urges members to consider redrafting the Bill to indicate that judges must conduct a full merits based assessment of the necessity and proportionality of any individual warrant. Necessity and proportionality are assessments with which judges are familiar in the context of both the application of EU law and the application of the Human Rights Act 1998. They are assessments conducted by judges the world over in the context of judicial decision making.

26. By way of contrast, the inclusion of a standard of review based on ordinary judicial review principles introduces a degree of both flexibility and uncertainty which would be inappropriate for a Bill of this kind, authorising wide-ranging and intrusive powers which may impinge widely on individual rights in practice:

[23] HC Deb (PBC), 24 March 2016, Col 68 (QQ Keir Starmer)

a. The principles of judicial review, while long-standing, are not fixed in stone, they can be altered by later judicial practice or statutory intervention (see, for example the Criminal Justice and Courts Act 2015).
b. Since the introduction of the Human Rights Act 1998, it has been trite law that the reviewing role of any judge assessing necessity and proportionality in human rights cases *must* involve a substantive assessment.[24]
c. However, the standard of review, even in ordinary judicial review claims, is a flexible one. In some circumstances, a reviewing court will be required to conduct 'anxious scrutiny' (for example, in cases involving breaches of fundamental rights in the common law). In other cases, the court will be expected to afford the relevant decision maker a very wide margin of discretion.[25]
d. Lord Pannick QC has expressed his view that "The Home Secretary's proposals for judicial involvement *in national security cases* adopt, I think, the right balance in this difficult area" (emphasis added).[26] We agree with Lord Pannick QC and the Anderson Review, as we explain above, that in *some key national security* cases the "review model" might strike an appropriate balance.
e. There is no guarantee that the close scrutiny applied in the cases cited by Lord Pannick QC will necessarily be applied to applications pursuant to the process in the Bill. While this kind of anxious review has been consistently applied by the courts in cases involving threats to life or limitations on liberty, it is far from certain that this approach would apply consistently to applications following the procedure in the Bill.[27]

[24] *Miss Behavin' Ltd* [2007] 1 WLR 1420
[25] See, for example, *Rehman v Secretary of State for the Home Department* [2001] UKHL 47. See also *Baker v Secretary of State for the Home Department* [2001] UKIT NSA 2, [75] – [76].
[26] The Times, "Safeguards provide a fair balance on surveillance powers*",* 12 November 2015. Lord Pannick references the involvement of courts in other decisions engaging national security. JUSTICE notes that the treatment of cases under the Terrorism Preventions and Investigation Measures Act 2012 and by the Special Immigration Appeals Commission, are not directly comparable to the ex parte application for a warrant envisaged in the Bill. In those cases, albeit subject to an exceptional closed material procedure, the subject of the relevant order is aware of the proposed interference with his or her rights and can make submissions to rebut the Secretary of State's position.
[27] Consider, for example, *Home Office v Tariq* [2011] UKSC 35, [27]. The applicant sought the same guarantees applicable in TPIMs procedures – the provision of a gist of material considered in closed material proceedings. The Court distinguished this case from TPIMs determinations, which involve liberty of the individual, and similarly noted that a high standard was not expected in other significantly serious cases outside the scope of liberty claims: "Mr Tariq also has an important interest in not being discriminated against which is entitled to appropriate protection; and this is so although success in establishing discrimination would be measured in damages, rather than by way of restoration of his security clearance (now definitively withdrawn) or of his position as an immigration officer. But the balancing exercise called for in para 217 of the European Court's judgment in *A v United Kingdom* depends on the nature and weight of the circumstances on each side, and cases where the state is seeking to impose on the individual actual or virtual imprisonment are in a different category to the present, where an individual is seeking to pursue a civil claim for discrimination against the state which is seeking to defend itself." (JUSTICE is intervening in the case of *Tariq v UK,* currently being considered by the European Court of Human Rights).

f. Importantly, in an ordinary judicial review claim or a statutory appeal, a claimant will be able to challenge the standard of review applied in practice by a judge. Surveillance applications will necessarily be *ex-parte*. Following the procedure in the Bill, there will be no opportunity for external scrutiny of the standard applied other than in the post-hoc review by the IPC or if the Secretary of State chooses to challenge the approach of the Judicial Commissioner and request a fresh decision by the Investigatory Powers Commissioner. (In the latter case, of course, it will be open to the Secretary of State to argue that the standard of review has been *too* robust.)
g. In any event, even if close scrutiny is applied in some cases, it is unlikely that this safeguard would be applied in others, including in the significant proportion of applications relating to law enforcement and the prevention and detection of crime.

Clause 23: Effective oversight and adversarial challenge

PROPOSED AMENDMENTS

Clause 23

Page 19, Line 8, insert the following new subclauses –

(-) In consideration of any warrant pursuant to this Part, a Judicial Commissioner may instruct a Public Interest Advocate to represent the interests of any person or persons subject to the warrant or the wider public interest.

(-) A Judicial Commissioner must instruct a Public Interest Advocate when considering applications for a warrant –

> **(a) in the interests of national security;**
>
> **(b) in the interest of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security; or**
>
> **(c) involving the consideration of items subject to legal professional privilege.**

(-) For the purposes of these proceedings Public Interest Advocates are persons appointed by the relevant law officer.

(-) The "appropriate law officer" is—

> **(a) in relation to warrants in England and Wales, the Attorney General,**
>
> **(b) in relation to warrants in Scotland, the Advocate General for Scotland, and**
>
> **(c)in relation to warrants in Northern Ireland, the Advocate General for Northern Ireland.**

(-) A person may be appointed as a Public Interest Advocate only if—

> **(a) in the case of an appointment by the Attorney General, the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,**
>
> **(b) in the case of an appointment by the Advocate General for Scotland, the person is an advocate or a solicitor who has rights of audience in the Court of**

Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

(c) in the case of an appointment by the Advocate General for Northern Ireland, the person is a member of the Bar of Northern Ireland.

PURPOSE

27. This amendment would introduce a power for Judicial Commissioners to instruct Public Interest Advocates with security clearance to assist in the consideration of any application for a warrant. The purpose of the Advocate would be to represent the interests of the person or persons subject to a warrant and the wider public interest in the protection of privacy.

28. The amendment would place Judicial Commissioners under a duty to appoint an Advocate in any case involving a claim of national security, the economic well-being of the United Kingdom or in any case involving material which may be subject to legal professional privilege.

29. The appointment of an Advocate would ensure that material produced to support an application is subject to adversarial testing in so far as is possible.

30. JUSTICE considers that in so far as a decision of a Judicial Commissioner is currently subject to reconsideration on the application of an applicant to the Interception of Communications Commissioner, Advocates should also have the power to request reconsideration in the public interest.

BRIEFING

31. JUSTICE considers that Bill should be amended to make clear that a security-vetted Public Interest Advocate should be appointed to represent the interests of the subject and the wider public interest. While JUSTICE has strong principled concerns over the expansion of the use of secret evidence, such scrutiny and representation as is offered by such an Advocate would improve the ability of Judicial Commissioners to test in so far as possible, the grounds and supporting material in any application for a warrant under the Act.

32. In *Freedom from Suspicion* (2011), JUSTICE recommended that judges should have the power, in sufficiently complex cases, to direct the appointment of a special advocate to represent the interests of any affected person and the public interest in general. We repeat this recommendation in our latest report.[28]

33. For the past 15 years, it has been a statutory requirement in Queensland to appoint a Public Interest Monitor to supervise all applications for the use of surveillance devices.[29] In October 2011, Victoria also introduced a Public Interest Monitor in respect of applications for interception and surveillance.[30] In March 2015, the Australian federal government announced that it would introduce a Public Interest Monitor in relation to applications for access to journalists' communications data.[31]

34. Without such independent means of challenge, there will be limited argument put before the Judicial Commissioner to independently test the case made for the grant of an application for a warrant.

[28] *Freedom from Suspicion,* para 141.
[29] See Police Powers and Responsibility Act 2000 (Qld) s 740(1) and Crime and Misconduct Act 2001 (Qld) s324(1).
[30] Public Interest Monitor Act 2011 (Vic).
[31] See e.g. "*Abbott government and Labor reach deal on metadata retention laws*", Sydney Morning Herald, 19 March 2015.

Clause 24: Urgent warrants

PROPOSED AMENDMENTS

Clause 24 - 25

Page 19, line 14, after “must” insert “immediately”

Page 19, line 19, leave out from “the third” to end line 36 and insert -

> **“24 hours after the warrant was issued.”**

Page 19, line 20, insert new subclause –

(-) A warrant under this Section can only be issued in an emergency situation posing immediate danger of death or serious physical injury.

Clause 25

Page 19, line 33, leave out “may” and insert “must”

Page 19, line 35, leave out subclauses (b) and (c) and insert (3A) –

> **3A If the Judicial Commissioner determines that there are exceptional circumstances, the Judicial Commissioner must instead impose conditions as to the use or retention of any of that material.**

Page 20, line 5, after “addressed” insert –

> **(-) any Public Interest Advocate appointed.**

Page 20, line 7, after “warrant” insert –

> **(-) or any Public Interest Advocate appointed.**

PURPOSE

35. Throughout the Bill judicial review is accompanied by an alternative ‘urgent’ procedure (see for example, Clause 25). The scope of the urgent mechanism is extremely broad and ill-defined, and in our view could fatally undermine any safeguard provided by any mechanism for judicial authorisation or review.

36. The Bill provides that an urgent warrant may be issued by the Secretary of State in any case which she “considers” there is “an urgent need”. Urgent need is not defined. An urgent warrant must be subject to judicial review within 3 days. If a judge is satisfied that the surveillance should never have been authorised, they may (but are not required to) order that the material gathered is destroyed. The Joint Committee considered that this period should be “*shortened significantly*” to provide for approval within 24 hours of signature by the minister.[32]

37. These amendments would limit urgent warrants to circumstances where there is immediate danger to life. It would limit the urgent authorisation to a 24 hour period as recommended by the Joint Committee on the Draft Bill and would require conditions to be imposed on material gathered under a warrant not subsequently approved by the Judicial Committee. The Bill provides for any warrant refused by a Judicial Commissioner to be reconsidered by the Investigatory Powers Commissioner, on application by the applicant. These amendments would allow such reconsideration to be triggered by a Public Interest Advocate and for a Public Interest Advocate to be heard on such applications for reconsideration.

BRIEFING

38. JUSTICE considers that this provision is unnecessary and would permit the already limited judicial scrutiny proposed in the Bill to be side-stepped in ill-defined circumstances and for unspecified purposes. JUSTICE recognises that surveillance decisions may be required urgently. However, an urgent decision would be familiar to any judge or former judge appointed as a Judicial Commissioner. From search warrants pursuant to the Police and Criminal Evidence Act 1984 to High Court duty judges dealing with injunctions and deportation, urgent orders in family cases for child protection, considering evidence and taking decisions on short notice at anti-social hours forms a familiar part of the judicial experience.

39. At a minimum, Members may wish to amend the Bill to clarify when a situation is considered sufficiently serious to trigger the “urgent” process, and to adopt the recommendation of the Joint Committee that judicial authorisation should be sought and granted within 24 hours.

[32] Report of the Joint Committee, para 457.

Clause 17-19: Targeting and warrants

PROPOSED AMENDMENTS

Clause 17

Page 13, line 31, after ‘person’ leave out ‘or organisation’

Page 13, line 36, insert after activity ‘where each person is named or specifically identified using a unique identifier’

Page 13, line 37, after ‘person’ leave out ‘or organisation’

Page 13, line 39, insert after ‘operation’ ‘where each person is named or specifically identified using a unique identifier’

Page 13, line 40, leave out paragraph (c)

Page 13, line 41, leave out subsection (3)

Clause 19

Page 22, line 36, after ‘person’ leave out ‘or organisation’

Page 22, line 37, leave out ‘or describe that person or organisation’ and insert ‘or specifically identify that person using a unique identifier’

Page 22, line 43, leave out ‘or describe as many of those persons as it is reasonably practicable to name or describe’ and insert ‘or specifically identify all of those persons using unique identifiers’

Page 23, line 1, after ‘person’ leave out ‘or organisation’

Page 23, line 5, leave out ‘or describe as many of those persons or organisations, or as many of those sets of premises, as it is reasonably practicable to name or describe’ and insert ‘or specifically identify all of those persons using unique identifiers’

Page 23, line 8, leave out subsection (6)

PURPOSE

40. These amendments, prepared by Liberty, would restrict the ability for targeted warrants to apply to organisations or to persons or to groups of people who are not named or identified. They would also remove the ability for warrants to be issued for the purposes of training or testing. JUSTICE would support similar amendments to introduce a similar degree of specificity to later parts of the Bill, including in respect of Equipment Interference (Clause 95 – 107).

BRIEFING

41. The breadth of the triggers which may justify the use of the powers in the Bill and the scope of the application of individual warrants or powers require close scrutiny. In particular, the gateway to a number of thematic or bulk powers may be insufficiently precise to be compatible with Article 8 ECHR.

42. In any event, the breadth of application of some of the powers concerned may make it particularly difficult to assess necessity and proportionality in any meaningful way, undermining the ability of any authorising body, including a Judicial Commissioner to act as a significant safeguard against abuse.

43. Importantly, the Joint Committee also recommended "*that the language of the Bill be amended so that targeted interception and targeted equipment interference warrants cannot be used as a way to issue thematic warrants".*[33]

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[33] *Report of the Joint Committee on the Draft Investigatory Powers Bill,* 11 February 2016, recommendation 38, para. 468

Clause 20: Grounds and warrants

PROPOSED AMENDMENTS

Clause 20

Page 15, line 45, after security insert “or”

Page 15, line 46, delete “or”

Page 15, line 46, after “crime” insert “where there is a reasonable suspicion that a serious criminal offence has been or is likely to be committed”.

Page 16, line 1, delete subclause (2)(c)

Page 16, line 12, delete subclause (4)

PURPOSE

44. The main grounds in the Bill for issuing surveillance warrants are (a) “in the interests of national security”, (b) “for the purposes of preventing or detecting serious crime” and (c) “in the interests of the economic well-being of the UK, in so far as those interests are also relevant to the interests of national security”. Communications data can be accessed by a larger number of authorities and for a greater variety of purposes (including public health, public safety and for the collection of taxes, duties or levies, for example). These amendments address warrants for interception and examination, but JUSTICE would support similar amendments for all warrantry under the Bill.

45. This amendment would further circumscribe the grounds proposed for the making of warrants for the interception of communications. It would introduce a threshold which would limit the use of these intrusive powers for the investigation of crime to circumstances where there is reasonable suspicion that a serious offence has occurred or is likely to be committed.

BRIEFING

46. The European Court of Human Rights in *Zakharov* expressed particular concern about a Russian surveillance law which permitted bulk collection of mobile telephone data for reasons connected with “*national, military, economic or ecological security*”, noting that “*which events or activities may be considered as endangering such types of security*

interests is nowhere defined in Russian law". The only safeguard against abuse of this absolute discretion was effective judicial authorisation, capable of conducting a more focused assessment of the proportionality of an individual measure. However, the authorisation process in that case proved inadequate.[34]

47. While the Strasbourg court has been keen to stress that the grounds for surveillance need not be defined in absolute terms, a sufficient degree of certainty is necessary in order to allow an individual to understand when they might be likely to be subject to surveillance. JUSTICE considers that the breadth of the proposed triggers for surveillance should be subject to particularly robust scrutiny by Members of both Houses.

[34] *Roman Zakharov v Russia (*Application no. 47143/06), 4 December 2015*,* paras 246, 260. The Court in *Zakharov* expressed particular concern about a Russian surveillance law which permitted bulk collection of mobile telephone data for reasons connected with "national, military, economic or ecological security", noting that "*which events or activities may be considered as endangering such types of security interests is nowhere defined in Russian law*". The only safeguard against abuse of this absolute discretion was effective judicial authorisation, capable of conducting a more focused assessment of the proportionality of an individual measure. However, the authorisation process in that case proved inadequate.

Clauses 32 - 34: Modification and warrants

PROPOSED AMENDMENTS

Page 26, line 43, at end insert “and” followed by new subsection

(c) that the modification has been approved by a Judicial Commissioner.

Page 27, leave out subections (4) – (11)

Page 28, line 22, leave out clauses 35 and 36.

PURPOSE

48. The Bill provides in Clauses 30 and 31 for warrants to be modified without a fresh approval by a Judicial Commissioner. The Bill provides for modification of warrants by the Secretary of State or by officials without further scrutiny. These amendments would remove the power to make such unsupervised alterations and would require all proposed modifications to be subject to approval by a Judicial Commissioner.

49. In both cases JUSTICE would remove Clause 31 which provides for modification to urgent warrants issues by the Secretary of State by “senior officials”.

BRIEFING

50. JUSTICE considers that it undermines the purpose of judicial involvement for a warrant that has been approved by a Judicial Commissioner to then be modified by the Secretary of State without fresh judicial consideration.

51. JUSTICE regrets that throughout the Bill remain substantial modifications that may be carried out by Ministers or officials alone.[35] JUSTICE is concerned that unless most - if not all – substantive modifications are subject to judicial approval, this system could easily be open to abuse. Clause 32(6) appears to make clear that the provisions in the Bill are designed to deal with substantive changes, not minor spelling or errors in calculation, for example, such as might be made without changing the scope of the conduct authorised or required by the warrant.

[35] For example, in the case of interception warrants: Investigatory Powers Bill, Clause 30.

52. The Joint Committee recommended that major modifications of warrants should properly be authorised by a Judicial Commissioner.[36] Unfortunately, even this change would leave substantial scope for significant amendment. Notably, the factors relevant to the identification of a group subject to a thematic targeted warrant are considered a "minor" modification (see Clause 32 (2)).

53. In light of the limited proposed scrutiny for urgent warrants during their short duration, JUSTICE considers that further substantive modification by officials would be entirely inappropriate, including in urgent cases (Clause 36).

54. If the intended purpose of the modification provisions is to allow greater specificity to be added in the case of thematic warrants, this is far from clear in the drafting of the Bill. As currently drafted, the modification process could be used to widen rather than narrow the scope of a warrant. Similarly, it could be used to apply the scope of a warrant to a group of individuals or individuals not necessarily covered by the factors identified in the original application. If the Government's intention is to allow this measure to operate in a way which requires investigatory authorities to improve the detail specified in a warrant as information becomes available, the Bill will require significant amendment to achieve that purpose.

[36] See, for example, Joint Committee, Report on the Draft Bill, at paras 439; 450.

Clause 27: Legal Professional Privilege

PROPOSED AMENDMENTS

Clause 27

JUSTICE supports amendments prepared by the Bar Council and the Law Society of England and Wales, tabled in the names of Lord Pannick QC and Lord Lester of Herne Hill QC.

PURPOSE

55. In relation to provisions for the warrants for both interception and equipment interference, the Bill requires that a warrant which targets legally privileged material may only be issued in "exceptional and compelling circumstances". However the Bill does not provide any definition as to how this test might be interpreted by the Secretary of State, subject only to the limited judicial approval mechanism outlined above.

56. The provisions for protecting privilege in relation to bulk interception warrants and bulk equipment interference warrants are even weaker. The protections provided in this context mean that it is a senior official who may give approval for the examination of communications between lawyers and their communications, obtained through either bulk interception or bulk equipment interference, again using the vague test of whether the examination would be being carried out in "exceptional and compelling circumstances".

57. The amendments prepared by the Bar Council and the Law Society of England and Wales are designed to restrict the circumstances when legally privileged material can be accessed to those circumstances when the privilege is ousted by criminal conduct. Where such material is not targeted, but is obtained in the course of another warrant, it can only be used or examined further if a Judicial Commissioner is satisfied the same iniquity principle applies.

BRIEFING

58. In *Freedom from Suspicion,* JUSTICE regretted that the treatment of legal professional privilege under RIPA had been inadequate and that the Codes of Practice produced under its various parts had provided little reassurance to the public that communications

which benefitted from privilege were being handled lawfully.[37] In the interim, domestic court decisions have confirmed that the treatment of privileged material under the RIPA framework has been far from certain.[38] JUSTICE considers that it is crucial that the approach to privilege is absolutely clear on the face of the Bill. (JUSTICE would also support amendments to the Bill to deal with amendments constitutionally important for other purposes, including to protect the correspondence of individuals with their MPs and to allow journalists to protect their sources. Others have prepared detailed amendments for these purposes, including Liberty and the National Union of Journalists.)

59. The provisions for the protection of legal privilege in the Bill provide very limited protection and should be substantially amended. JUSTICE, jointly with the Bar Council and the Law Society of England and Wales, the Faculty of Advocates and the Law Society in Scotland, and others, have produced a joint position paper on the minimum safeguards necessary to protect legal privilege. These amendments are based on that joint briefing.[39]

60. The protection of privilege is fundamental to the administration of justice. If the right to speak privately is not adequately protected, then the extent to which individuals will feel able to communicate with their lawyers will be undermined. JUSTICE is concerned that the language in the Bill is overbroad and inconsistent with the spirit of the existing case law:

    a. Although the House of Lords accepted that RIPA might permit the interception of legally privileged materials in *Re McE,* the conclusions in that case are limited and controversial. In light of the long standing protection for legal professional privilege offered in centuries of common law, and in statute (for example, in the Police and Criminal Evidence Act 1984), the decision was a surprise to practitioners and commentators alike. The case considered an analysis of a part of RIPA which did not expressly mention legal professional privilege, nor which Parliament had considered. In any event, the decision should be narrowly confined to truly exceptional circumstances and subject to the highest possible safeguards. For example, Lord Carswell considered "grave and imminent

[37] *Freedom from Suspicion,* paras 110 – 115, 339 – 342.
[38] See, for example, *Belhadj,* [2015] UKIP Trib 13_132-H, *Lucas, Jones and Galloway v SSHD & Ors,* [2015] UKIPTrib 14_79-CH. See also, *R v Barkshre* [2011] EWCA Crim 1885.
[39] See Joint Briefing Paper dated June 2016, here: http://www.barcouncil.org.uk/media/481861/160621_ip_bill_joint_lpp_briefing_paper.pdf

threats" alone, such as the killing of a child or an imminent terror attack, might justify interference with legal privilege.[40] Equally, Lord Phillips indicated the importance of prior judicial authorisation, indicating that the European Court of Human Rights would require at a minimum that interference with privileged material should be governed by a clear statutory framework, providing the limited circumstances where privilege might be overridden and access to person with "judicial status" to determine any such question.[41] It is clear that the Bill contains no such limitations.

b. The Bill must acknowledge that the protection of legal professional privilege is important for *all* forms of surveillance, including bulk forms of activity.

c. There should be a clear statutory presumption that legally privileged material should not be deliberately targeted for surveillance. This should only apply to material which attracts privilege. Where privilege is lost or set aside, including in circumstances where a lawyer is complicit in unlawful behaviour ('the iniquity exemption'),[42] the bar should not apply.

d. If there are any circumstances where material which might be legally privileged may be sought (e.g. in reliance on the 'iniquity principle'), this should be subject to clear prior judicial authorisation, not Ministerial or official authorisation subject to subsequent judicial review (see above).

e. The Bill should clearly provide a duty to avoid the capture of legally privileged material. Codes of Practice for each of the powers granted in the Bill should be required to provide guidance to prevent, in so far as possible, the inadvertent capture of legally privileged material, and to ensure that if captured, such data is afforded such additional protection as necessary to ensure respect for access to justice and the rule of law. The Bill should be redrafted to protect against the unlawful disclosure of privileged material.

[40] See *Re McE* [2009] 1 AC 908, [108]
[41] See *Re McE* [2009] 1 AC 908, [41]
[42] See for example, Police and Criminal Evidence Act 1984, Section 10(2). Importantly, it appears that the Government does not seek to target LPP, but only the circumstances when it may be abused. If this is the case, then there should be no objection to amendment of the Bill to exclude deliberate targeting of legally privileged material in applications, as abuse of the kind envisaged would abrogate the privilege concerned. See 30 November 2015, Evidence of Paul Lincoln, Q 15, HC 651, 30 November 2015.

Clause 53: Intercept evidence

PROPOSED AMENDMENT

Clause 53

Page 37, Line 33, leave out Clause 53

PURPOSE

61. Clause 53 of the Bill, together with Schedule 3, broadly replicates the existing procedure in Section 17(1) of RIPA, whereby material obtained by way of an intercept warrant cannot be used as evidence in ordinary criminal proceedings. This amendment would remove this exclusion and would permit intercepted material to be treated as admissible in both ordinary civil and criminal proceedings, subject to the ordinary exclusions applicable to other proceedings, including public interest immunity and the provision of the Justice and Security Act 2013 in civil proceedings.

BRIEFING

62. JUSTICE has long recommended the lifting of the bar on the admission of intercept material as evidence in civil and criminal proceedings. In 2006, we published *Intercept Evidence: Lifting the ban,* in which we argued that the statutory bar on the use of intercept as evidence was 'archaic, unnecessary and counterproductive'.[43] The UK's ban reflects a long-standing Government practice but it is out of step with the position in many other commonwealth and European countries and it has proved increasingly controversial over time. Importantly, the ECtHR has recognised the value placed on admissible intercept material, in countries where it is available, constitutes 'an important safeguard; against arbitrary and unlawful surveillance, as material obtained unlawfully will not be available to found the basis of any prosecution.[44] In 2014, a Privy Council review confirmed that fully funded model for the removal of the ban could result in a "significant increase in the number of successful prosecutions".[45]

63. The failure of this Bill to reconsider the role of intercept material as evidence would represent a missed opportunity for Parliament to bring UK practice into line with the approach in other countries; a step which consensus agrees could lead to more

[43] See JUSTICE, *Intercept Evidence: Lifting the ban*, October 2006, p13 – 17. See also *Freedom from Suspicion,* paras 129 – 139.
[44] *Uzun v Germany,* App No 35623/05, [72].
[45] *Intercept as Evidence*, Cm 8989, December 2014, para 84. The review also reflected the concerns of the agencies and law enforcement bodies that removing the ban without full funding could reduce their effectiveness.

successful prosecutions against those guilty of terrorist offences and other forms of serious crime. The Joint Committee recommended that the issue remain under review but invited Government to take note of the "significant perceived benefits" of using such material.[46]

64. Members may wish to consider how the bar on the use of targeted intercept material relates to a new focus on expanded and untargeted access to communications data; and whether lifting the ban (a) would increase the likelihood of successful criminal prosecutions, (b) would reduce reliance on administrative alternatives to prosecution, such as Terrorism Prevention and Investigation Measures Orders ('TPIMs') or on the use of untargeted forms of surveillance, and (c) whether the costs based analysis conducted by the Government is accurate and sustainable.

[46] Joint Committee, Report on the Draft Investigatory Powers Bill, paras 675.

Clause 56: Whistleblowing and the Public Interest

PROPOSED AMENDMENT

Clause 56

Page 44, line 33, insert new subsection –

> **(-) In proceedings against any person for an offence under this Section in respect of any disclosure, it is a defence for the person to show that the disclosure was in the public interest.**

PURPOSE

65. This proposed amendment would introduce a broad public interest defence to the offence of unlawful disclosure in Clause 56.

BRIEFING

66. JUSTICE is concerned that provisions in the Bill should not 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.[47]

67. JUSTICE welcomes that Clause 212 makes provision for any disclosure to the IPC "for the purposes of any function of the Commissioner" will be protected in respect of any duty of confidence or any other bar on disclosure. It is unclear whether these measures will cover unsolicited disclosures or only those sought proactively by Commissioners.

68. JUSTICE considers that a 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 conduct.

JUSTICE

7 July 2016

[47] Although Clause 43 in the 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.