Investigatory Powers Bill 2016

Briefing for House of Commons Second Reading

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Summary

A. Introduction

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 ensuing that these powers are used lawfully and responsibly.

We regret that the Bill fails to deliver the "world-leading", "comprehensive and comprehensible" surveillance law promised by the Government. Working to a timetable fixed to the sunset clause in the Data Retention and Investigatory Powers Act 2014 (December 2014), we regret very little time has been taken to reflect on significant and constructive criticism raised during pre-legislative scrutiny.

We consider that there are serious concerns about the compatibility of these powers with the provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. With challenges pending to many of the powers proposed in the Bill pending before the European Court of Human Rights and the Court of Justice of the European Union.

We agree with the UN Special Rapporteur on the right to privacy that the proposals in the latest version of the Bill appear to "*prima facie fail the benchmarks*" set by recent human rights cases in both the European Court of Justice and the European Court of Human Rights.

In this briefing, we highlight a number of specific problems in the Bill.

B. Authorising Surveillance

(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 judicial review 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 urgent procedure in the Bill should be amended to restrict the capacity for its arbitrary application.**

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

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

C. The Investigatory Powers Commissioner

***vi)* The Bill should be amended to provide a clear statutory basis for a new Investigatory Powers Commission. The independence of the Commission and its Judicial Commissioners will be paramount to its effectiveness.**

***vii)* The judicial functions of the Judicial Commissioners and the wider investigatory and audit functions of the Commission should remain operationally distinct. While it would, in our view, be beneficial for the Commissioners to be able to draw upon the wider expertise provided by the staff of the Commission, there should be no doubt about their capacity to take independent decisions on individual warrants.**

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

***(ix)* Any drain on the High Court when judges take up appointments as Judicial Commissioners should be offset by the Treasury.**

***(x)* The Appointment of Judicial Commissioners by the Prime Minister should not be allowed to undermine their independence.**

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

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

***(xiii)* JUSTICE is concerned that the Bill does not yet provide a clear safe-route to the IPC, as it fails to make clear that communications from officials or Communications Service Providers will not be treated as a criminal offence for any purpose, including when making voluntary disclosures.**

D. The Investigatory Powers Tribunal

***(xiv)* 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. The Bill should make clear beyond doubt that an appeal at any stage of proceedings against any determination on the law by the IPT remains possible.**

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

for example.

E. Additional Issues

(xvi) **JUSTICE is encouraged that Ministers accept that Legal Professional 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 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 insubstantial and may pose a significant risk to individual confidence in the ability to secure confidential legal advice and assistance if implemented.**

(xvii) The ban on the use of intercepted material in court proceedings should be removed.

(xvii) JUSTICE considers that the Bill should come with true sunset clause. Given the breadth of the intrusive powers in the Bill, and the uncertainty over their legality, Parliament should bear regular responsibility for the scrutiny of the operational need for such measures and their renewal or amendment if necessary.

Like the Armed Forces Bill, the Investigatory Powers Bill should be renewed on a regular basis, prompting an automatic Parliamentary consideration of effectiveness and necessity of the existing powers, any new capacities, and any concerns about the lawfulness of the underlying framework.

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. Building a legal framework for surveillance fit for the digital age is now a priority. In the past year, the Investigatory Powers Tribunal has found violations of the right to privacy under Article 8 ECHR by the intelligence services on two different occasions.[2] Section 1 of the Data Retention and Investigatory Powers Act is subject to challenge before the Court of Appeal and the Court of Justice of the European Union.[3] Three separate reviews have all raised serious concern about current practice related to UK surveillance and called for a substantial overhaul of its surrounding legal framework.[4]

3. The Joint Committee appointed to review the draft Investigatory Powers Bill took evidence from a broad section of witnesses including the Government, Parliamentarians, law enforcement, judicial commissioners, lawyers, journalists, academics, civil society groups, communications service providers and charities and victims groups. The Committee's report, including its many detailed and critical recommendations, was published on 11 February 2016.

4. The Joint Committee echoed the serious criticisms of the Intelligence and Security Committee:

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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] See *Liberty and others v Security Service, SIS, GCHQ* [2015] IPT/13/77/H, *Belhaj and others v the Security Service, SIS, GCHQ, Home Office and* FCO [2015] IPT/13/132-9/H.

[3] *Davis, Watson & Ors v Secretary of State for the Home Department and Ors* [2015] EWHC 2092 (Admin). This decision is subject to appeal and the Court of Appeal has referred a number of the questions to the Court of Justice of the European Union. See [2015] EWCA (Civ) 1185.

[4] *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review* (Cm 7948, October 2010), p44 (Herein the '*ISC Review*' and *A Question of Trust,* David Anderson QC, June 2015 (Herein *'the Anderson Review'*). In addition, in March 2014 the then deputy prime minister, Nick Clegg MP, asked the Royal United Services Institute to coordinate a panel made up of former members of the police and intelligence services, senior parliamentarians, academics, and business people to investigate the legality, effectiveness and privacy implications of the UK's surveillance programmes. That panel reported its conclusions in July 2015: see *A Democratic Licence to Operate: Report of the Independent Surveillance Review*. Herein '*the RUSI Review*'.

"The Investigatory Powers Bill is the first major piece of legislation governing the Agencies' powers in over 15 years. While the issues under consideration are undoubtedly complex, we are nevertheless concerned that thus far the Government has missed the opportunity to provide the clarity and assurance which is badly needed."[5]

5. 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 far short.

Timeframe

6. The Intelligence and Security Committee expressed real concern that the draft Bill suffered from a lack of "*sufficient time and preparation*".[6]

7. Unfortunately, Second Reading on the Bill is taking place less than a month after the publication of the Joint Committee's report. At 258 pages and accompanied by almost 500 pages of codes of practice and supporting material, we are concerned that the Government intends the Bill to pass by December. Between then and now there are many weeks of Parliamentary breaks for elections and the EU referendum, and limited time for focused scrutiny.

8. This timeline is determined by the sunset clause which sees the Data Retention and Investigatory Powers Bill lapse at the end of 2016. It would, of course, be open to Parliament to extend these powers, and to commit to further time to create a truly comprehensive and comprehensible surveillance law fit for a digital age.

Pre-legislative scrutiny

9. JUSTICE welcomed the overwhelming Parliamentary consensus that the draft version of the Bill required substantial redrafting to remove or revise overbroad, imprecise or vague powers and to strengthen crucial protections for individual privacy.

[5] Intelligence and Security Committee of Parliament, Report on the draft Investigatory Powers Bill HC 795 para 6.
[6] Intelligence and Security Committee of Parliament, Report on the draft Investigatory Powers Bill HC 795 para 7.

10. The Intelligence and Security Committee, the Joint Committee on the draft Bill and the Science and Technology Committee of the House of Commons, each made recommendations designed to strengthen the proposed framework and designed to support the Government's goal of creating a "world-leading" surveillance law for a digital age.

11. JUSTICE regrets that many important parts of the final version of the Bill appear largely unchanged. We share the views of David Anderson QC, the Independent Reviewer of Terrorism Legislation, that this remains a "*work in progress*",[7] and with the UN Special Rapporteur on Privacy who states that the latest version of the Bill "*leads to serious concern about the value of some of the revisions introduced"*.[8]

Protecting privacy, safeguarding security

12. The Intelligence and Security Committee was concerned that the Bill should be amended to ensure "*privacy considerations must form an integral part of the legislation, not merely an add-on."*[9]

13. The Government's primary response to this appears to have been to amend the Title of Clause 1 of the Bill to add the word "privacy". This kind of cosmetic alteration is clearly not what the Intelligence and Security Committee had in mind when they called for the Government to make privacy protections the "backbone" of the legislation.[10]

14. The UN Special Rapporteur on Privacy has invited the Government to revise the Bill *"to show greater commitment to protecting the fundamental right of privacy of its own citizens and those of others*".[11]

15. 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

[7] *The Daily Telegraph, "*The Investigatory Powers Bill is still a work in progress", 2 March 2016, *http://www.telegraph.co.uk/news/uknews/law-and-order/12180439/David-Anderson-The-Investigatory-Powers-Bill-is-still-a-work-in-progress.html*
[8] Joseph A. Cannataci, Report of the Special Rapporteur on the right to privacy HRC/31/64, Para 39
[9] Intelligence and Security Committee of Parliament, Report on the draft Investigatory Powers Bill HC 795 para 9.
[10] Ibid.
[11] Joseph A. Cannataci, Report of the Special Rapporteur on the right to privacy HRC/31/64, Para 39.

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.*"[12]

16. 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.*"[13]

17. 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.

Future-proofing

18. It would be regrettable if an ill-placed desire to 'future proof' these measures led to powers which were overbroad and unduly flexible. The UK has a long history of legal reform prompted by subsequent determinations that the law has failed to keep pace (from *Malone* to *Liberty v UK*).

19. 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). The Anderson Review made a number of recommendations to this effect.

20. Clause 222 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.

21. JUSTICE considers that both options 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

[12] (1978) 7 2 EHRR 214, paras 36, 41.
[13] 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'.*

area can be significantly impacted by changing precedent and shifting technological capacities.

The Bill

22. 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').

23. 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 CJEU and 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*".[14]

24. Recent case-law indicates that the European Court of Human Rights is moving towards an increasing scepticism about the use of bulk powers.[15] 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. Members may wish to ask Ministers whether the powers in this Bill may shortly be rendered incompatible with the UK's international obligations.

[14] Joint Committee, Report on the Draft Investigatory Powers Bill, para 331.
[15] 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.

25. 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*"[16] 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.

26. Given the short time available, we focus on the issues most closely allied to our current work and expertise. In this briefing, JUSTICE focuses 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 raise some wider concerns about the treatment of privileges, legal professional privilege, in particular, and the treatment of intercept material as evidence in legal proceedings.

27. Other organisations are in a better position to comment on the legality of the bulk powers in this Bill and the operational case for reform. Where we do not specifically address an issue, this should not be taken as support for the proposals in the Bill.

B. Authorising Surveillance

28. The Human Right Memorandum accompanying the Bill explains that an authorisation process which includes judicial approval is a "*fundamental safeguard*" of the Bill.[17] 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 other countries.

29. 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 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.

[16] Joint Committee, Report on the Draft Investigatory Powers Bill, 340.
[17] Home Office, Investigatory Powers Bill: European Convention on Human Rights Memorandum, para 25.

30. 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*". [18]

31. 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.[19]

32. The involvement of the Secretary of State in authorising surveillance requires that the Secretary of State signs thousands of warrant 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.[20]

Ministers or judges?

33. 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."[21] See, for example, Clause 19 (Targeted Interception, Examination and Mutual Assistance).

34. The Anderson Review recommended that all interception warrants (and bulk warrants) should be judicially authorised, concluding that "*the appropriate persons to perform this*

[18] *Szabó and Vissy v. Hungary* (Application no. 37138/14), 12 January 2016, para 77.
[19] *Digital Rights Ireland*, C-293/12 and C-594/12 8, April 2014.
[20] David Anderson QC, *A Question of Trust,* June 2015 para 14.49.
[21] Clause 17 - 21. However, these provisions are repeated in other clauses of the Bill.

function would be senior serving or retired judges in their capacity as Judicial Commissioners."[22]

35. 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*".[23] 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.

36. Unfortunately, the Bill adopts a two stage process, which provides for Executive or administrative authorisation, subject to judicial review. In evidence, the Government has explained its view that it is appropriate for the purposes of accountability to Parliament that the Secretary of State remain involved.

37. 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.[24] This reflects the original recommendation of the Independent Reviewer.[25]

38. 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*".[26] 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.

39. 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 democratically accountability. The Joint Committee was satisfied that a case has been made for having

[22] Anderson Review, para 14.47 at seq.
[23] Ibid, para 14.64.
[24] JUSTICE, written evidence, para 27.
[25] David Anderson QC, *A Question of Trust,* June 2015, Recommendation 38, 14.70.
[26] Joint Committee, Report on the Draft Investigatory Powers Bill, page 5.

a "double-lock" authorisation for targeted interception, targeted equipment interference and bulk warrants.[27] 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.[28] The Joint Committee emphasised that this "*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*".[29]

40. In 2011, we concluded that it was this "*very accountability that leads at least some of them to disregard the rights of unpopular minorities in favour of what they see as the broader public interest. The same mandate that gives elected officials their democratic legitimacy is what makes them so ill-placed to dispassionately assess the merits of intercepting someone's communications*".[30]

41. In practical terms, there is, in any event, little prospect of government ministers being held to account for the interception warrants they sign so long as the details of those warrants remain secret. If accountability is to be an effective safeguard, it must be more than nominal. Genuine accountability, however, would require a degree of transparency that would be impossible to square with the need for operational secrecy. If it is right, therefore, that details of interception decisions must be kept secret in order to remain effective, it would better for that authorisation to be made by someone who is already institutionally independent rather someone who is only nominally accountable.

42. The involvement of the Secretary of State has also been justified on the grounds that such a process will instils greater discipline on the part of public officials and agencies.[31] JUSTICE considers that any such perceived practical benefit is outweighed by considerable practical and principled disadvantages. The efficiencies in Ministerial time would not be insubstantial. The perception of Ministerial responsibility must be tempered by the increased public confidence engendered by a truly independent warranting process.

[27] See Joint Committee, Report on the Draft Investigatory Powers Bill, para 421.
[28] Ibid, para 420.
[29] Ibid.
[30] *Freedom from Suspicion*, para 85.
[31] Tom Hickman, written evidence, para 1.

Authorisation or Review?

43. The Bill requires the application by the Judicial Commissioners of judicial review principles in the process of approving any warrant issued by a minister.[32] The Joint Committee considered this approach would afford the Judicial Commissioners a "*degree of flexibility*".

44. 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. 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.

45. 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. 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. JUSTICE urges members to consider redrafting the Bill to include clear instructions that judges must conduct a full merits based assessment of the necessity and proportionality of any individual warrant:
    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.[33]
    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.[34]
    d. In a recent article, Lord Pannick QC has expressed his view that "The Home Secretary's proposals for judicial involvement *in national security cases* adopt, I

[32] Investigatory Powers Bill, Clause 21; Clause 97; Clause 123; Clause 139; Clause 157; Clause 179.
[33] *Miss Behavin' Ltd* [2007] 1 WLR 1420
[34] See, for example, *Rehman v Secretary of State for the Home Department* [2001] UKHL 47

think, the right balance in this difficult area" (emphasis added).[35] 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.[36]

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 *national security* cases, it is unlikely that this safeguard would be sufficiently robust in others, including in the significant proportion of applications relating to law enforcement and the prevention and detection of crime.

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[35] 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.

[36] 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).

46. JUSTICE also considers the Bill should be amended to guarantee – in so far as is possible – the Judicial Commissioner is well equipped to put the Minister (and the individual agencies seeking any warrant) to proof. This includes making sure Judicial Commissioners are provided with both expert technical support, and Special Advocates or Counsel with security clearance, who can effectively challenge the justification for intrusion**.**

Urgent warrants

47. Throughout the Bill judicial review is accompanied by an alternative 'urgent' procedure (see for example, Clause 22). 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.

48. The Bill provides that a urgent warrant by 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 5 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.

49. 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, 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.

50. 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. Members should question whether it is appropriate for material gathered unlawfully by using an urgent procedure inappropriately may yet be available

for use by the Minister, as envisaged by the Bill. This approach provides little disincentive against arbitrary use.

Triggers

51. 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.

52. 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.

53. 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).

54. 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.[37]

Modifications

55. 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

[37] *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

of State without fresh judicial consideration. The Joint Committee recommended that major modifications of warrants should properly be authorised by a Judicial Commissioner.[38]

56. JUSTICE regrets that throughout the Bill remain substantial modifications that may be carried out by Ministers or officials alone.[39] JUSTICE is concerned that unless most if not all modifications have to be subject to judicial approval, this system could easily be open to abuse.

Consistency and Communications Data

57. Only some surveillance decisions will benefit from any judicial involvement. The Interception of Communications Commissioner's Office has stressed that Judicial Commissioners will only be performing a "*very narrow*" part of the oversight envisaged by the Government.[40] The present Bill remains unchanged in this respect.

58. For example, all decisions on retention of communications data are taken by the Secretary of State, without provision for review.[41] Access to communications data, will generally be by someone within the same organisation as the person seeking permission or by the Secretary of State.[42]

59. JUSTICE considers that there is a strong case that by failing to subject retention and access to communications data to judicial oversight, the legal framework in the Bill may be out of step with international standards:
    a. The Court of Justice of the European Union ('CJEU') in the *Digital Rights Ireland* decision placed a particular premium on oversight by a judicial or other independent administrative body (see above).[43] This is likely to inform the consideration by national courts of necessary safeguards and by other international forums, including at the European Court of Human Rights.
    b. Although there is limited guidance on retention from Strasbourg, the less targeted a compulsory power exercised, the greater the likelihood the provision will be considered disproportionate. The Court has generally been hostile to the application of blanket rules applied to personal information,

[38] See, for example, Joint Committee, Report on the Draft Bill, at paras 439; 450.
[39] For example, in the case of interception warrants: Investigatory Powers Bill, Clause 30.
[40] Interception of Communications Commissioner's Office, written evidence, para 8.
[41] See Investigatory Powers Bill, Part 4.
[42] Investigatory Powers Bill, Clause 78.
[43] *Digital Rights Ireland*, C-293/12 and C-594/12 8, April 2014.

particularly in the criminal justice system. In *S & Marper,* for example, the Court robustly rejected domestic law on the retention of DNA and fingerprints taken from innocent adults and children. Although retention of the material served a legitimate aim – the prevention and detection of crime – its blanket application was disproportionate, particularly in light of the impact on innocent individuals and the stigma of association with a criminal database.[44]

c. Most recently, in *Zakharov,* the European Court of Human Rights again emphasised that surveillance powers must crucially be targeted at the prevention and detection of serious crime or the protection of national security: *"Turning now to the authorisation authority's scope of review, the Court reiterates that it must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security*.[45]

C. The Investigatory Powers Commissioner

60. In 2011, JUSTICE observed that the current oversight arrangements under RIPA were extremely fragmented, unnecessarily complex and ineffective.[46] 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.[47] 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.

61. JUSTICE supports the creation of a single statutory oversight body. According to the Interception of Communications Commissioner's Office, 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*

[44] *S & Marper v UK*, App No 30562/04, 4 December 2008.
[45] *Roman Zakharov v Russia (*Application no. 47143/06), 4 December 2015 para 260.
[46] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 346, 407.
[47] 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.

address the overlaps".[48] However we regret that Bill does not create an Investigatory Powers Commission.

62. Instead, the Bill in its present form still 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.[49]

63. JUSTICE agrees with the Interception of Communications Commissioner's Office that in order for the body to promote greater public confidence, it must "*be independent, have an appropriate legal mandate and be public facing*".[50] JUSTICE welcomes provisions in the Bill which now indicate that Judicial Commissioner may carry out own-initiative inquiries.[51]

64. However, 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.

Independence

65. We are concerned that the Bill replicates the language and model adopted by RIPA, focusing on the "Commissioner" rather than the Commission. This may appear a superficial distinction, but the structure of the Commission may be crucial to its success in practice.

66. Clause 196 sets out the main oversight functions of the "Commissioners". In Clause 196, the Draft Bill places a broad duty on Judicial Commissioners not to act in a manner which is contrary to the public interest or prejudicial to national security, the prevention and detection of crime or the economic well-being of the United Kingdom. We regret the inclusion of this duty in the Draft Bill. It appears, at best, superfluous, in light of the functions of the IPC, and at worst designed to encourage a degree of deference within

[48] Interception of Communications Commissioner's Office, written evidence, para 8.
[49] 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.
[50] Interception of Communications Commissioner's Office, written evidence, para 8.
[51] Investigatory Powers Bill, Clause 202(1).

the Commission towards the assessment of the Secretary of State and individual agencies and bodies of the risks associated with their work.

67. As an oversight body designed to audit and review compliance with the underlying law – which will include an assessment of proportionality and necessity – JUSTICE considers that the Bill should be amended to set a clear set of statutory duties, functions and responsibilities to guide the work of the IPC. These duties and considerations might include national security considerations, but should also include, for example, the public interest in the protection of individual privacy and the security of computer networks.

Conflation of responsibilities

68. The Bill conflates the spectrum of judicial, audit and inspection responsibilities of the Investigatory Powers Commissioner and the Judicial Commissioners in a manner that may inhibit their effectiveness and independence.

69. On the one hand Judicial Commissioners will be involved in the authorisation process but, on the other hand, will simultaneously bear responsibility for oversight of those decisions.[52] Plainly, the credibility of the Judicial Commissioners may be reduced if they appear to be "checking their own homework". Such duplication is not only constitutionally inappropriate but could act as a serious obstacle to the Investigatory Powers Commissioner's effectiveness as an oversight body.

70. JUSTICE considers that there must be a clear delineation of the judicial and audit functions in the Bill.[53] This would follow the model recommended by the Independent Reviewer (see Annexes 17 and 18). Without clarity, public confidence will be undermined.

Appointments

71. The Bill continues to provide for appointment of the Investigatory Powers Commissioner and Judicial Commissioners by the Prime Minister, although it now makes provision for consultation with the Lord Chief Justices in England and Wales and Northern Ireland, the

[52] Tom Hickman, written evidence, para 77.
[53] Joint Committee, Report on the Draft Investigatory Powers Bill, para 612.

Lord President in Scotland, and ministers in Northern Ireland and Scotland.[54] The Joint Committee recommended that these roles be appointed by the Lord Chief Justice.[55]

72. Having the Prime Minister involved in this process may undermine the independence and impartiality of the Commissioner, the Interception of Communications Commissioner's Office ("IOCCO") has suggested.[56] The Joint Committee stated that, in modern times, senior judges have had an "*unimpeachable record of independence*" from the executive and that they believed that "*any senior judge appointed to these roles would make his or her decisions unaffected by the manner of appointment*".[57]

73. As JUSTICE and others have highlighted, judges affiliated with the Investigatory Powers Commissioner would not only need to be independent, but *be seen* to be independent. In the interests of maintaining the independence of the Commission, the Investigatory Powers Commissioner and the Judicial Commissioners should be subject to an appointment mechanism which is beyond reproach.

Resources and budget

74. 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.[58] However, JUSTICE regrets that the key budget lines of the Investigatory Powers Commissioner remain to be determined by the Secretary of State.[59] The management of funding by the Secretary of State is likely to severely weaken the 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.[60]

[54] Investigatory Powers Bill, Clause 194.
[55] Joint Committee Report on the Draft Investigatory Powers Bill, para 588.
[56] Interception of Communications Commissioner's Office, written evidence, para 8
[57] Ibid.
[58] Investigatory Powers Bill, Clause 204.
[59] Ibid.
[60] Joint Committee, Report on the Draft Investigatory Powers Bill, para 604.

Powers and delegated legislation

75. JUSTICE regrets that no change has been made to the provisions in the Bill which allow the functions and powers of the Investigatory Powers Commissioner to be amended by Ministers through secondary legislation.[61]

76. The Joint Committee had "*every confidence such a power would only be exercised responsibly by the Secretary of State*."[62] However, 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.

Error Reporting

77. Clause 198 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 welcomes the changes to these provisions in the present Bill, which removes the condition for error-reporting that the Investigatory Powers Tribunal must agree that there is a serious error.[63] 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.[64]

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

    a. The Draft Bill includes an express bar on reporting of any other errors except by virtue of Clause 198 (Clause 198(7));
    b. The Draft 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 198(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.

[61] Investigatory Powers Bill, Clause 205.
[62] Joint Committee, Report on the Draft Investigatory Powers Bill, para 608.
[63] Investigatory Powers Bill, Clause 198.
[64] Joint Committee, Report on Draft Investigatory Powers Bill, para 622.

c. This "serious error" benchmark is set disproportionately – and inappropriately – high by the Draft Bill. Clause 198(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 198(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.

79. This provision falls far short of the mandatory notification requirements which operate in other countries. The Bill should be amended to give the IPC a duty to notify any relevant person of any error discovered in targeted surveillance, except in circumstances where disclosure would risk any on-going operation or investigation, or otherwise endanger national security or the prevention and detection of crime.

80. We consider that the Draft Bill should additionally be amended to provide for a *default* mandatory notification mechanism.[65] The requirement for individuals to be notified of 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".*[66] 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".*

81. 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. This model operates in other countries without difficulty, and although notification in very sensitive cases may be less likely, the potential for disclosure may create an additional impetus towards lawful decision making by agencies and other bodies exercising these

[65] *Freedom from Suspicion,* para 389.
[66] See *Association for European Integration and Human Rights and Ekimhzhiev* App No 62540/00, 28 June 2007, para [90]-[91

compulsory powers. 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.[67] 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".[68] We understand that similar models apply in both Germany and the Netherlands, with similar exemptions to protect the integrity of ongoing inquiries.[69]

Referrals

82. On 2 November 2015, following a roundtable conducted by JUSTICE and King's College London, IOCCO produced a "wish-list" for any new body. These included the power for the new oversight body to refer specific cases to the IPT for determination. The Bill makes no provision, beyond error notification for the Investigatory Powers Commissioner, to refer an issue directly to the IPT. JUSTICE would like to see the Bill amended to provide for a form of notification in those cases where the Investigatory Powers Commissioner thinks it has identified unlawful conduct could help the IPT to carry out its role more effectively**.**[70]

Safe reporting and whistle-blowers

83. 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

[67] 18 U.S.C §2518 (8) (d). See Annex 15, Anderson Review, for a brief analysis of comparative practice in the "five eyes" jurisdictions.
[68] Section 188, 195-196, Canadian Criminal Code.
[69] 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.
[70] Consistent with the recommendation of the Joint Committee, Report on the Draft Investigatory Powers Bill, para 642.

communicating with the Commission frankly.[71] Most worryingly, as has been highlighted by Public Concern at Work, channels through which intelligence services personnel could report misconduct were uncertain in the draft Bill.[72]

84. 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[73] and security and intelligence agencies.

85. Clauses 49 – 51 deal with authorised disclosures of information relating to interception warrants under Part 1 of the Bill or pursuant to some parts of RIPA. It provides for some "excepted disclosures" by officials or employees of CSPs to communicate with their legal advisers or the IPC. It appears that this provision is intended to provide protection from prosecution for unauthorised disclosures under the Act. It is unclear whether persons disclosing such information might be liable for other offences. It is far from clear whether similar safe-routes would apply to whistle-blowers disclosing other information pursuant to powers and duties exercised under other parts of this Act, or otherwise subject to the supervision of the IPC. JUSTICE welcomes that Clause 203 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.

86. JUSTICE considers that a safe-route to the IPC will be cruicially 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.

[71] 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.
[72] Joint Committee, Report on the Draft Investigatory Powers Bill, para 153.
[73] Joint Committee, Report on the Draft Investigatory Powers Bill, para 629.

D. Investigatory Powers Tribunal

87. In 2011, JUSTICE noted that the IPT bore *"only a remote resemblance to any kind of open and adversarial system of justice*[74]" and was lacking in effectiveness.[75] The 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.

88. 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.[76] In the recent case of *Liberty and others v GCHQ*,[77] the Tribunal mistakenly released a judgment stating that none of those complainants based in the UK had been subject to surveillance,[78] before it came to light that one of the parties, Amnesty International, had.

89. 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.[79]

90. 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.

[74] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 672.
[75] Ibid, para 357.
[76] Joint Committee, Report on the Draft Investigatory Powers Bill, para 657.
[77] *Liberty & Ors v GCHQ* [2014] UKIPTrib 13_77-H.
[78] Ibid.
[79] See *Big Brother Watch and others v UK* (Application no. 58170/13).

The Right of Appeal

91. JUSTICE welcomes the introduction of a right of appeal in Clause 208.[80] An appeal may only be pursued when it raises an "important issue of principle or practice" or "there is another compelling reason for granting leave".

92. Members may wish to consider whether the test for bringing an appeal is too restrictive. The test is modelled on the test for bringing second appeals in the Civil Procedure Rules 1998 and constitutes an unnecessarily high hurdle for potential appellants to challenge a determination made by the Tribunal, a first instance venue.[81]

93. Appeals against determinations on the law should be permitted at any point during proceedings before the IPT. Members may wish to ask the Minister to clarify that Clause 208 is intended to have this effect.

IPT and procedural reform

94. JUSTICE regrets that the Bill takes no further steps to increase the openness and effectiveness of the IPT and the ability of individuals to secure redress for unlawful acts of public surveillance. We consider this a missed opportunity:

    a. ***The Need for Openness*****:** There was overwhelming consensus across the recent three reviews into investigatory powers that the IPT should be striving towards greater openness.[82] The Joint Committee has also expressed serious concern about this issue and has recommended that the Home Office should conduct a consultation and review with the aim of tacking it.[83]

    JUSTICE considers that the Tribunal's default position of secrecy is especially concerning given that the Tribunal is increasingly making determinations of influence for the development of both human rights[84] and constitutional law.[85] An important step towards achieving openness would be to amend the Bill to provide that there is a presumption that all aspects of IPT proceedings will run in open

[80] Investigatory Powers Bill, Clause 208.
[81] Civil Procedure Rules, 1998, Rule 52.13 (2).
[82] The reviews were the Anderson review, the RUSI review and the review carried out by the Intelligence and Security Committee.
[83] Joint Committee, Report on the Draft Investigatory Powers Bill, para 660.
[84] For example, see *Liberty v GCHQ* [2014] IPT/13/77/H, which determined whether the legal regime under the Regulation of Investigatory Powers Act 2000, surrounding issuing of interception warrant, consisted with the UK's human rights obligations under Article 8 European Convention of Human Rights.
[85] For example, in the recent case of *Caroline Lucas and others v Security Service and others* [2015] IPT/14/79/CH, the Tribunal was responsible for determining the meaning and effect of the Wilson Doctrine (previously been thought to privilege the communications of parliamentarians).

and that any special procedures necessary to maintain secrecy should be justified in the public interest.

JUSTICE welcomes the recommendation made by the Joint Committee that all decisions on appropriateness of a position of "Neither Confirm Nor Deny" should be determined by the Tribunal and on the basis of a public interest.[86]

The Bill should take this opportunity to provide for a new regulatory framework for the IPT, which serves to set out in clear terms the procedures of the Tribunal (or provides for those rules to be determined in consultation with the Lord Chief Justices in England and Wales and Northern Ireland and the Lord President in Scotland.)

***b. Adversarial testing/Special advocates*:** JUSTICE considers that the Bill should be amended to make clear that in any closed session, a special advocate is appointed to allow any case to be subject to adversarial testing. However valuable the role played by counsel to the Tribunal in closed proceedings, it is not an effective substitute. This is because the counsel to the Tribunal is not charged with representing the interests of the excluded party. =

Parliament should take this opportunity to specify – whether in the model of a Special Advocate - or through an express obligation to appoint a Counsel to the Tribunal – that any claimant's interests should be represented in closed session by a security vetted counsel and the case of the public agency concerned subject to adversarial scrutiny.

While JUSTICE has principled concerns over the expansion of the use of secret evidence, such limited scrutiny and representation offered by a Special Advocate should not be limited to the discretion of any individual court, but available as of right in any case involving a closed material proceeding, including before the IPT.[87]

c. The Power to Make Declarations of Incompatibility: 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

[86] Joint Committee, Report on the Draft Investigatory Powers Bill, para 663.
[87] See *Freedom from Suspicion,* para 378 – 392; *Freedom from Suspicion: Second Report,* para 41.

pursuant to section 4 of the HRA.[88] It is unclear why this hasn't been included in the present version of the Bill.

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.

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.[89]

[88] See Liberty, written evidence, para 156.
[89] Joint Committee, Report on the Draft Investigatory Powers Bill, para 666.

E. Other Areas in Need of Reform

Privileges

95. 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.[90] In the interim, domestic court decisions have confirmed that the treatment of privileged material under the RIPA framework has been far from certain either for the agencies or the beneficiaries of the relevant privileges.[91] JUSTICE considers that it is crucial that the approach to privilege is absolutely clear on the face of the Bill.

Legal Professional Privilege

96. While JUSTICE welcomes new provisions in the Bill directed towards giving protections to Legal Professional Privilege ("LPP"), the substance of the provisions provide very limited protection and should be substantially amended.

97. In relation to provisions for the warrants for both interception[92] and equipment interference,[93] the Bill requires that a warrant may only be issued in "exceptional and compelling circumstances".[94] 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.

98. The provisions for protecting LPP in relation to bulk interception warrants[95] and bulk equipment interference warrants[96] 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".[97]

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[90] *Freedom from Suspicion,* paras 110 – 115, 339 – 342.
[91] 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.
[92] Investigatory Powers Bill, Clause 25
[93] ibid, Clause 100
[94] ibid, Clause 25 (3) (a); Clause 100 (3) (a).
[95] Ibid, Clause 135.
[96] Ibid, Clause 171.
[97] Ibid, Clause 135 (3), Clause 171 (3).

99. The protection of LPP is fundamental to the administration of justice. If the rights of individual clients are not adequately protected, then the extent to which they feel able to communicate with their lawyers will be undermined. JUSTICE considers that the provisions need to be substantially altered. We are 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 threats" alone, such as the killing of a child or an imminent terror attack, might justify interference with legal privilege.[98] 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.[99] It is clear that the Draft 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'),[100] the bar should not apply.

[98] See *Re McE* [2009] 1 AC 908, [108]
[99] See *Re McE* [2009] 1 AC 908, [41]
[100] 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,

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. 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 specify that the purpose of any guidance in the Code should be designed to protect against the unlawful disclosure of privileged material.

Politicians and Journalists

100. Clause 68 of the Bill establishes the authorisation procedure for officials to execute a warrant for collecting communications data for "identifying or confirming a source of journalistic information". However, it is unclear who may be deemed a "source of journalistic information". Clause 68 (7) states that a "source of journalistic information" means "an individual who provides material intending the recipient to use it for the purposes of journalism or knowing that it is likely to be so used". It is unclear whether the definition in the Bill could encompass information provided by non-traditional news sources, such as civil society organisations, academic researchers, human rights defenders, citizen journalists and bloggers.[101]

101. The Bill provides that where the correspondence of Members of Parliament (or Members of the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly) is subject to targeted interception or a request for access to communications data, the Secretary of State must consult the Prime Minister before granting the relevant warrant (Clauses 24 and 94).

102. We are concerned about the inconsistency of approach in the Bill. Thus, additional protection is afforded to Members of Parliament subject to a targeted interception warrant, but not to journalists seeking to protect their sources. Similarly, while access to

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then there should be no objection to amendment of the Draft 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.

[101] See UN Special Rapporteurs, written evidence, para 11.

communications data which targets journalistic sources provides for authorisations to be subject to judicial review, access to other communications data, which might engage the privilege afforded to Members of Parliament or to legally privileged material is not.

103. There are some wider concerns about these provisions, which Members might wish to consider. For example, will consultation with the Prime Minister provide significant reassurance for members of parties in opposition? Similarly, will such consultation garner much reassurance outside Westminster, if at all? In considering the sanctity of communications with members of the Scottish Parliament and the Welsh and Northern Ireland Assemblies, members might with to consider whether consultation with the Prime Minister would give any comfort.

Intercept evidence

104. Clause 48 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. Schedule 3 makes a number of exceptions to allow intercept evidence to be considered in civil proceedings where a closed material procedure – where a party and his or her legal team are excluded – is in place. These proceedings, for example, include proceedings under Section 6 of the Justice and Security Act 2015, in the Special Immigration Appeals Commission or under the Terrorism Prevention and Investigation Measures Act 2011. There is no exemption for criminal proceedings, except in so far as material may be disclosed to the prosecution and to the judge, in order that a judge might determine whether admissions by the Crown are necessary in order for the trial to proceed in a manner which is fair; (if it would not be fair, a prosecution may have to be dropped).[102]

105. 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'.[103] 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

[102] See Schedule 3(21).
[103] See JUSTICE, *Intercept Evidence: Lifting the ban*, October 2006, p13 – 17. See also *Freedom from Suspicion,* paras 129 – 139.

safeguard; against arbitrary and unlawful surveillance, as material obtained unlawfully will not be available to found the basis of any prosecution.[104] 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".[105]

106. 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 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.[106]

107. 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.

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[104] *Uzun v Germany,* App No 35623/05, [72].
[105] *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.
[106] Joint Committee, Report on the Draft Investigatory Powers Bill, paras 675.