Investigatory Powers Bill 2016: Part 8

Surveillance Oversight

Briefing for House of Commons 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 ensuing that these powers are used lawfully and responsibly.

In this briefing, we highlight a number of specific problems in Part 8 of the Bill and suggest a number of amendments to improve the mechanisms for oversight of the use of surveillance powers, including through the creation of a new Investigatory Powers Commission and enhancement of the powers of the Investigatory Powers Tribunal.

The Investigatory Powers Commissioner

i) **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.**

ii) **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.**

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

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

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

(vi) **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. Members should urge Ministers to explain why a default disclosure duty should not apply, in keeping with practice in other countries.**

(vii) **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.**

The Investigatory Powers Tribunal

***(viii)* 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.**

***(ix)* 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.**

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". However, JUSTICE regrets that this Bill falls short. 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, safeguards appropriate and provision made for effective oversight: "*[it is] unacceptable that the assurance of the enjoyment of a right … could be…removed by the simple fact that the person concerned is kept unaware of its violation.*"[2]

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'.* JUSTICE is grateful to Daniella Lock, JUSTICE Policy Intern, for her assistance in the drafting of this briefing.

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

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.[4] 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*".[5]

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[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]

[5] 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.[6] 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.

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*"[7] JUSTICE considers that, the justification for each of these intrusive powers – and the Government's assessment of their legality - must be tested rigorously by Parliament.

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 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.[8]

11. In this briefing we propose detailed amendments to Parts 8 and the effectiveness of the new proposed model for oversight of the use of surveillance powers.

12. Where we do not specifically address an issue, this should not be taken as support for the proposals in the Bill.

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[6] 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.
[7] Joint Committee, Report on the Draft Investigatory Powers Bill, 340.
[8] Fuller briefing on JUSTICE's position on the Bill can be found here: http://justice.org.uk/investigatory-powers-bill/

PROPOSED AMENDMENTS

Part 8: The Investigatory Powers Commissioner

Clause 194 et seq: "The Investigatory Powers Commission"

PROPOSED AMENDMENTS

Clause 194, Page 148, Line 35, leave out '"Commissioner and other Judicial Commissioners" and insert "Commission"

Clause 194, Page 148, Line 36, insert the following new subclause:

(-) There shall be a body corporate known as the Investigatory Powers Commission.

(-) The Investigatory Powers Commission shall have such powers and duties as shall be specified in this Act.

Clause 194, Page 148, Line 41, insert the following new subclause:

(-) The Investigatory Powers Commissioner must appoint –

(a) the Chief Inspector, and

(b) such number of Inspectors as the Investigatory Powers Commissioner considers necessary for the carrying out of the functions of the Investigatory Powers Commission.

(-) In appointing Investigators the Investigatory Powers Commissioner shall—

(a) appoint an individual only if the Investigatory Powers Commissioner thinks that the individual—

(i) has experience or knowledge relating to a relevant matter, and

(ii) is suitable for appointment,

(b) have regard to the desirability of the Investigators together having experience and knowledge relating to the relevant matters.

(-) For the purposes of sub-paragraph (1) the relevant matters are those matters in respect of which the Investigatory Powers Commission has functions including, in particular—

(a) national security;

(b) the prevention and detection of serious crime;

(c) the protection of privacy and the integrity of personal data;

(d) the security and integrity of computer systems and networks;

(e) the law, in particular, as it relates to the matters in subsections (-)(a) – (b);

(f) human rights as defined in Section 9(2) of the Equality Act 2006.

Clause 194, Page 149, Line 23, insert the following new subclauses –

(-) The Chief Inspector is an Inspector and the Chief Inspector and the other Inspector are to be known, collectively, as the Inspectors.

Clause 194, Page 149, Line 23, insert new subclause -

> (c) to the Investigatory Powers Commission are to be read as appropriate to refer to the body corporate, the Investigatory Powers Commission, and in so far as it will refer to the conduct of powers, duties and functions, those shall be conducted by either the Judicial Commissioners or the Inspectors as determined by this Act or by the Investigatory Powers Commissioner, consistent with the provisions of this Act.

Clause 196, Page 150, Line 21, leave out "Commissioner" and insert "Commission"

Clause 196, Page 150, Line 38, leave out "Commissioner" and insert "Commission"

Clause 196, Page 151, Line 18, leave out "Commissioner" and insert "Commission"

Clause 196, Page 151, Line 41, insert the following new subclause –

(-) The powers and functions specified in this Part will be exercised by the Inspectors under the supervision of the Investigatory Powers Commissioner, except in so far as those powers are powers of the Judicial Commissioners specified in Parts 1 – 8 of this Act.

Clause 197, Page 152, Line 28, leave out "Commissioner" and insert "Commission"

Clause 197, Page 152, Line 35, leave out "Commissioner" and insert "Commission"

Clause 200, Page 154, Line 34, leave out "Commissioner" and insert "Commission"

Clause 200, Page 154, Line 34, leave out "and the other" and insert ",the"

Clause 200, Page 154, Line 35, after "Commissioners" insert "and Inspectors"

Clause 200, Page 154, Line 41, leave out "Commissioner" and insert "Commission"

Clause 201, Page 156, Line 38, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 156, Line 41, leave out "Commissioner" and insert "Commission"

Clause 201, Page 156, Line 47, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 157, Line 7, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 157, Line 11, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 202, Page 157, Line 43, leave out "Judicial Commissioner" and insert "the Investigatory Powers Commission"

Clause 202, Page 157, Line 44, leave out “Commissioner” and insert “Commission”

Clause 202, Page 157, Line 45, leave out “Commissioner’s” and insert “Commission’s”

Clause 202, Page 158, Line 1, after “Commissioner” insert “or Inspector”

Clause 202, Page 158, Line 4, after “Commissioner” insert “or Inspector”

Clause 202, Page 158, Line 8, after “Commissioner” insert “or Inspector”

Clause 202, Page 158, Line 10, leave out “Commissioner” and insert “Commission”

Clause 202, Page 158, Line 15, leave out “Commissioner” and insert “Commission”

Clause 204, Page 158, Line 1, leave out “Judicial Commissioners” and insert “Investigatory Powers Commission”

Clause 204, Page 158, Line 42, leave out “Commissioner” and insert “Commission”

Clause 204, Page 158, Line 44, leave out “Judicial Commissioners” and insert “Investigatory Powers Commission”

Clause 204, Page 159, Line 3, leave out “Commissioner’s” and insert “Commission’s”

PURPOSE

13. The purpose of this series of amendments is the replace the proposal to create an Investigatory Powers Commissioner with provisions to create a new Investigatory Powers Commission.

14. The Bill proposes at present that the judicial and audit functions which provide for oversight of the intrusive powers in the Bill will be performed by the same Judicial Commissioners under the supervision of a single Investigatory Powers Commissioner.

15. These amendments would separate the judicial and audit functions, providing for the audit functions to be conducted by Inspectors working subject to the oversight of a Chief Investigator appointed by the Investigatory Powers Commissioner.

16. The amendments make clear the distinction between the judicial functions of the Judicial Commissioners and the audit functions of the Inspectors. Consequential amendments provide for the appointment of any Inspector to be driven by their expertise in a number of areas and matters likely to be crucial for the conduct of effective oversight by the new Independent Investigatory Powers Commission.

17. JUSTICE believes, for the reasons set out below, that this model would provide for greater independence and public confidence in the work of the Investigatory Powers Commission. This model better reflects the recommendations of the Independent Reviewer, David Anderson QC, in *A Question of Trust,* and is broadly based on one of the framework models provided in Annex A of his report, providing for greater functional independence of the judicial and audit functions of the new independent Commission.

18. JUSTICE would, in the alternative, support an amendment prepared by Liberty, designed to entirely separate the functions of the Judicial Commissioners from the audit role of the Commission.

BRIEFING

19. In 2011, JUSTICE observed that the current oversight arrangements under RIPA were extremely fragmented, unnecessarily complex and ineffective. [9] 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.[10] 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.

20. 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 address the overlaps*".[11] However we regret that Bill does not create an Investigatory Powers Commission.

21. 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,

[9] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 346, 407.
[10] 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.
[11] Interception of Communications Commissioner's Office, written evidence, para 8.

accessible and robust. Refusing to address the flawed Commissioner model ignores the case for reform clearly articulated by both the Anderson and RUSI reviews.[12]

22. JUSTICE agrees with the Interception of Communications Commissioner's Office (IOCCO) that in order for the body to promote greater public confidence, it must "*be independent, have an appropriate legal mandate and be public facing*".[13] JUSTICE welcomes provisions in the Bill which now indicate that Judicial Commissioner may carry out own-initiative inquiries.[14]

23. 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

24. 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.

25. 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

26. 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.

[12] 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.
[13] Interception of Communications Commissioner's Office, written evidence, para 8.
[14] Investigatory Powers Bill, Clause 202(1).

27. 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.[15] 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.

28. JUSTICE considers that there must be a clear delineation of the judicial and audit functions in the Bill.[16] This would follow the model recommended by the Independent Reviewer (see Annexes 17 and 18). Without clarity, public confidence will be undermined.

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

Clause 194: Appointments

PROPOSED AMENDMENTS

Clause 194, Page 149, Line 4, insert the following new subclause –

(-) The Prime Minister may make an appointment under subsection (1) only following a recommendation by –

(a) The Judicial Appointments Commission;

(b) The Judicial Appointments Board of Scotland; or

(c) The Northern Ireland Judicial Appointments Commission

PURPOSE

29. The Bill provides for the appointment of Judicial Commissioners by the Prime Minister after consultation with the senior judiciary in England and Wales, Scotland and Northern Ireland. This amendment would provide that no appointment can be made except pursuant to a recommendation by the independent bodies in England and Wales, Scotland and Northern Ireland tasked with making judicial appointments in those jurisdictions.

BRIEFING

30. While the Bill provides for every Judicial Commissioner to have held high judicial office, the appointment to the Investigatory Powers Commission will require a high degree of independence and skill specific to that role.

31. JUSTICE welcomes the amendment of the draft Bill to provide for consultation with the senior judiciary, but believes that the independence of the new oversight body and the Judicial Commissioners will be significantly improved by further removing the Prime Minister (or other Ministers) from their selection and appointment.

32. 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.[17] 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*".[18]

[17] Interception of Communications Commissioner's Office, written evidence, para 8
[18] Ibid.

33. 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.

Clause 195: Terms of appointment

PROPOSED AMENDMENTS

Clause 195, Page 149, Line 36, leave out “three” and insert “six”

Clause 195, Page 149, Line 36, after “may” insert “not”

PURPOSE

34. At present, the Bill provides for Judicial Commissioners to be appointed for short terms of three years, subject to potentially rolling renewal. These amendments would extend the length of the term to be served, but would remove the prospect of renewal.

BRIEFING

35. Secure judicial tenure is one of the key components designed and recognised as a key safeguard for judicial independence. The provision for the Judicial Commissioners to be appointed by the Prime Minister and for their terms to be short, subject only to renewal at his discretion could pose a significant barrier to the Commissioners functional or apparent independence.

36. While longer terms would allow the Commissioners to develop their expertise, these could also lead to concerns about stagnation or co-option. JUSTICE would encourage Parliamentarians to act to ensure that Judicial Commissioners’ tenure will not undermine their crucial independence from Government and the officers, agencies and public bodies using the powers they are appointed to oversee.

Clause 196 and Clause 205: Functions and delegated powers

PROPOSED AMENDMENTS

Clause 196, Page 151, Line 19, leave out subclause (a)

Clause 205 should not stand part of the Bill.

PURPOSE

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

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

BRIEFING

39. The Joint Committee had "*every confidence such a power would only be exercised responsibly by the Secretary of State*."[19] 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.

[19] Joint Committee, Report on the Draft Investigatory Powers Bill, para 608.

Clause 196: Functions of the Investigatory Powers Commission

PROPOSED AMENDMENTS

Clause 196, Page 151, Line 42, leave out from “must not act” to “prejudicial to” and insert “must have due regard to the public interest in avoiding acts prejudicial to”

Clause 196, Page 151, Line 43, after “Commissioner” insert “or Inspector” *(Consequential to amendments outlined above)*

Clause 196, Page 151, Line 47, leave out subclause (c) and insert –

(c) privacy and the integrity of personal data; and

(d) the security and integrity of communications systems and networks.

Clause 196, Page 151, Line 48, leave out subclauses (6) – (7)

PURPOSE

40. The Bill currently provides for the Investigatory Powers Commissioner to be bound to prioritise national security, the prevention and detection of serious crime and the economic well-being of the United Kingdom above all other considerations in the exercise of his or her functions. It also provides a particular duty not to “jeopardise the success” of intelligence or security or law enforcement operations or to “unduly impede” the “operational effectiveness” of the intelligence agencies, the police or the Armed Forces.

41. These amendments would instead create a “due regard” duty for the Commissioner to exercise his functions in a manner which considers the range of important public interests which his oversight function is designed to preserve, including the protection of individual privacy and the integrity of personal data and the security and integrity of communications systems and networks. It would, consistent with other amendments, remove the reference to economic well-being of the United Kingdom. It would remove the exceptionally broad particular duty to refrain from impeding the work of the agencies, the police or the Armed Forces.

42. Consequential to earlier proposed amendments, an amendment would make clear that these principles would also apply to the functions of the Chief Investigators and the Investigators in conducting their audit functions.

BRIEFING

43. 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.

44. It is regrettable that the Bill proposes to tie the hands of the oversight body to give overriding priority to national security, the prevention and detection of crime and other less well defined objectives underpinning the powers proposed in the Bill. This would, in JUSTICE's view, not only undermine the apparent independence of the oversight body, but would clearly diminish its effectiveness.

Clause 196: Provide for consistent oversight functions

PROPOSED AMENDMENT

Clause 196, page 150, line 43, after 'under section 216 (national security notices)' insert 'and under section 217 (technical capability notices)'

PURPOSE

45. This provision would make clear that the Commission (or Commissioners) would have responsibility for oversight of both national security notices and technical capability notices.

BRIEFING

46. Obligations to remove electronic protection – or encryption - in the Bill can be issued in either a 'national security notice' or more likely, a 'technical capability notice' from the Secretary of State.[20] As the Bill is currently drafted, there is no judicial authorisation or test of necessity and proportionality required for either notice.

47. At a minimum, these potentially intrusive powers must all be subject to oversight by the new proposed oversight body.

[20] Investigatory Powers Bill 2016, clause 218, subsection (1)

Clause 197: Directions to the Investigatory Powers Commissioner

PROPOSED AMENDMENTS

Clause 197, Page 152, Line 26, leave out Clause 197

Alternatively:

Clause 197, Page 152, Line 27, leave out "directed" and insert "requested"

Clause 197 Page 152, Line 27, leave out "must" and insert "may"

Clause 197, Page 152, Line 39, leave out "in a manner which the Prime Minister consider appropriate"

Clause 197, Page 152, Line 42, leave out "contrary to the public interest or" and insert "seriously"

Clause 197, Page 152, Line 46, leave out subclauses (c) and (d)

Clause 197, Page 193, Line 3, insert the following new clause –

(-) The Treasury shall make available such remuneration or allowances as (1).

PURPOSE

48. The Bill currently binds the Investigatory Powers Commissioner to conduct any such review of the work of the intelligence services or the Armed Forces, subject to the direction of the Prime Minister. While the Commissioner may request that the Prime Minister give such a direction, the Prime Minister will only issue a direction at his discretion.

49. These amendments would remove the power to direct such reviews take place. The would either remove the power entirely or replace it with a power to request that the Investigatory Powers Commissioner undertake such a review, being ordinarily outwith its ordinary powers under the Act.

50. The Bill provides that any direction may be published only in such form as deemed appropriate by the Prime Minister and may be redacted for a number of very broad reasons, including the discharge of the functions of any public authority exercising activities subject to review by the Investigatory Powers Commissioner. This could include, for example, the Food Standards Agency (a body which may have access to communications data).

51. These amendments would limit the power to keep any direction (or request) secret and they would provide for additional funds to be made available by the Treasury to cover

work additional to the ordinary functions of the Commissioner at the request of the Prime Minister.

BRIEFING

52. JUSTICE has long worked to increase the effectiveness of the mechanisms for transparency and accountability in public decision making, including in respect of the conduct of the intelligence agencies and the Armed Forces. However, the provision in the Bill for the Prime Minister to direct the Commissioner to undertake work outside the ordinary scope of its statutory functions yet again undermines the perception that the Commissioner is independent.

53. Not least, there is no provision on the face of the Bill for these additional functions to be funded, or for provision to be made to ensure that they do not impinge on the ability of the Commissioner to undertake the statutory functions in the Bill.

Clause 198: Error reporting

PROPOSED AMENDMENTS

Clause 198, Page 153, Line 6, leave out from "aware" to "error" on Line 9.

Clause 198, Page 153, Line 10, leave out subclauses (2)-(5) and insert the following new subclauses –

> (-) The Investigatory Powers Commissioner may decide not to inform a person of an error in exceptional circumstances.
>
> (-) Exceptional circumstances under subsection (-) will arise if the public interest in disclosure is outweighed by a significant prejudice to –
>
> > (a) national security, or
> >
> > (b) the prevention and detection of serious crime.

Clause 198, Page 153, Line 38, insert the following new subclause –

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

Clause 198, Page 153, Line 45, leave out subclause (b)

Clause 198, Page 154, Line 6, leave out 'and'

Clause 198, Page 154, Line 7, leave out subclause (b)

PURPOSE

54. Clause 198 prohibits the Investigatory Powers Commissioner from disclosing any errors made in connection with the performance of activities under this Act, except in so far as it provides. It limits notification to only those errors determined to be "serious" errors which cause "significant prejudice or harm" to an individual.

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

BRIEFING

56. 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.[21] 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.[22]

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

    b. The Bill defines the seriousness of any error by reference to the impact on the individual concerned, without reference to the illegality of the conduct by the relevant public body. Any reportable error must, in the view of the Commissioner, have caused "significant prejudice or harm to the person concerned" (Clause 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;

    c. This "serious error" benchmark is set disproportionately – and inappropriately – high by the 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.

[21] Investigatory Powers Bill, Clause 198.
[22] Joint Committee, Report on Draft Investigatory Powers Bill, para 622.

Clause 198: Error reporting

ALTERNATIVE PROPOSED AMENDMENTS

Clause 198, Page 153, Line 11, leave out “may not” and insert “must”

Clause 198, Page 153, Line 12, after “has” insert “no”

Clause 198, Page 153, Line 12, leave out “significant”

Clause 198, Page 153, Line 14, leave out “has” and insert “may have”

Clause 198, Page 153, Line 15, leave out “not”

Clause 198, Page 153, Line 19, leave out “and its effect on the person concerned”

Clause 198, Page 153, Line 20, leave out “contrary to the public interest or” and insert “seriously”

Clause 198, Page 153, Line 26, insert the following new subclause –

> (-) In subsection (4) any publication will be considered “seriously prejudicial” where it would involve a significant risk to the life or of serious physical injury of any person.

Clause 198, Page 153, Line 24, leave out subclauses (c) and (d)

Clause 198, Page 153, Line 38, insert the following new subclause –

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

PURPOSE

58. These amendments are alternative amendments to Clause 198. They would retain the distinction between serious and other errors for the purpose of the Bill and would only require the disclosure of serious errors.

59. While the Bill purports that a clear violation of the HRA 1998 would not be sufficient to render an error serious, these amendments would make clear that a possible violation of Convention rights should be sufficient to render an error serious.

60. These amendments would retain a public interest test for disclosure but would significantly narrow the public interests reasons whereby disclosure could be refused. It retains a de minimis test, but makes clear that the only circumstances for non-disclosure will automatic is be where there is no prejudice or harm to the person concerned.

61. Following the alternative amendments, above, these would also provide for disclosure of any submissions made by the relevant public body to the relevant person.

New Clause: General Duty of Notification

PROPOSED AMENDMENTS

Page 153, line 4, insert new clause 197A –

197A: Notification

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

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

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

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

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

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

(5) The Intelligence and Surveillance Commissioner may postpone the notification under subsection (1) beyond the time limit under subsection (3) if the Commissioner assesses that notification may defeat the purposes of an on-going serious crime or national security investigation relating to the subject of surveillance.

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

Clause 198, page 153, line 39, delete subsection (7)

PURPOSE

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

BRIEFING

63. JUSTICE considers that the Bill should additionally be amended to provide for a *default* mandatory notification mechanism.[23] 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".*[24] 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".*

64. 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 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.[25]

[23] *Freedom from Suspicion,* para 389.
[24] See *Association for European Integration and Human Rights and Ekimhzhiev* App No 62540/00, 28 June 2007, para [90]-[91
[25] 18 U.S.C §2518 (8) (d). See Annex 15, Anderson Review, for a brief analysis of comparative practice in the "five eyes" jurisdictions.

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".[26] We understand that similar notification provisions apply in both Germany and the Netherlands, with similar exemptions to protect the integrity of ongoing inquiries.[27]

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

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

Clause 199: Cooperation with the Investigatory Powers Tribunal and other Public Authorities

PROPOSED AMENDMENTS

Clause 199, Page 154, Line 11, leave out "Judicial Commissioner" and insert "Investigatory Powers Commission"

Clause 199, Page 154, Line 18, leave out "Judicial Commissioner" and insert "Investigatory Powers Commission"

Clause 199, Page 154, Line 21, leave out subclauses (3) and (4) and insert the following new clause –

> (-) in any circumstances where the Commission has identified a relevant error pursuant to section 198, the Commission must give such documents, information or other material as may be relevant to the investigation of the error to the Tribunal.
>
> (-) the duty in subclause (-) shall be exercised without request from the Tribunal.

Clause 199, Page 154, Line 9, insert the following new clause:

> "(1A) A Judicial Commissioner may refer to the Investigatory Powers Tribunal any matter the Commissioner considers may have involved the unlawful use of investigatory powers."

PURPOSE

65. The Bill currently provides for Judicial Commissioners to provide information to the Investigatory Powers Tribunal such as the Tribunal may require in connection with an investigation or the consideration or determination of any matter. It also provides for the Commission to be able to other public authorities in connection with the powers under the Act. This latter provision for assistance and cooperation is significantly limited by requirements in Clause 198(3) which requires the Secretary of State to be consulted at any time when information is to be provided by the Commissioners to the Tribunal.

66. These amendments would remove the requirement to consult the Secretary of State and would make clear that in circumstances where a relevant error has been identified, material should be provided to the Tribunal by the Commission. It would make clear beyond a doubt that any potentially unlawful use of the powers in this Act may be referred to the Tribunal by the Commissioners (this final amendment has been proposed by the Equality and Human Rights Commission).

67. These amendments would remove the requirement to consult the Secretary of State before giving assistance direct to other public authorities.

68. The language in these amendments reflect the proposed amendments above, which would provide for the creation of an Investigatory Powers Commission.

BRIEFING

69. These amendments are designed to encourage Parliamentarians to again probe the propriety of the links provided in the Bill between the Commissioner's office, the Secretary of State and the Prime Minister. JUSTICE considers that, while the Commissioner's decisions may be subject to criticism by the IPT, it may yet be valuable for the IPT to be able to draw on the information available to the IPC in some circumstances. However, where a claim involves a challenge to the judicial decision of a Commissioner, consultation and cooperation between the two bodies may undermine the perceived independence and effectiveness of either the Commissioner or the Tribunal.

70. Similarly, it may be valuable for the IPC to be able to provide guidance to other authorities pursuant to its statutory functions in the Bill. It is unclear why the latter of these functions should only occur after filtering by Ministers.

Clause 201: Reporting to Parliament

PROPOSED AMENDMENTS

Clause 201, Page 156, Line 38, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 156, Line 41, leave out "Commissioner" and insert "Commission"

Clause 201, Page 156, Line 47, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 157, Line 3, leave out subclause (3)

Clause 201, Page 157, Line 7, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 157, Line 11, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission"

Clause 201, Page 157, Line 23, leave out "contrary to the public interest or" and insert "seriously"

Clause 201, Page 157, Line 27, leave out subclauses (c) and (d)

Clause 201, Page 157, Line 30, insert the following new subclause –

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

Clause 201, Page 157, Line 40, leave out "if requested to do so by the Prime Minister"

PURPOSE

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

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

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

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

75. These amendments include some amendments consequential to earlier proposed amendments to create an Investigatory Powers Commission.

BRIEFING

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

Clause 201: Reporting to Parliament

SUPPLEMENTARY PROPOSED AMENDMENTS

Clause 201, Page 156, Line 37, leave out “the Prime Minister” and insert “Parliament”

Clause 201, Page 157, Line 6, leave out “the Prime Minister” and insert “Parliament”

Clause 201, Page 157, Line 13, leave out subclause (3) and insert –

(-) The Investigatory Powers Commissioner must lay a copy of the report before Parliament together with a statement as to whether any part of the report has been excluded from publication under subsection (7).

Clause 201, Page 157, Line 19, leave out “the Prime Minister” and insert “The Investigatory Powers Commissioner”

Clause 201, Page 157, Line 19, leave out “Investigatory Powers Commissioner” and insert “The Prime Minister”

Clause 201, Page 157, Line 22, leave out “Prime Minister” and insert “Investigatory Powers Commissioner”

PURPOSE

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

78. These amendments would provide for the Commissioner to report directly to Parliament. He would take responsibility for redactions, subject to consultation with the Prime Minister and the relevant duties in Clause 196, which would require the Commissioner to conduct himself in a way which is not contrary to the public interest or prejudicial to national security etc (subject to proposed amendments, above).

BRIEFING

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

Clause 203: Whistleblowing and the Public Interest

PROPOSED AMENDMENTS

Clause 203, Page 158, Line 33, insert the following new subclauses –

(-) A disclosure pursuant to subsection (1) will not constitute a criminal offence for any purposes in this Act or in any other enactment.

(-) In subsection (1), a disclosure for the purposes of any function of the Commissioner may be made at the initiative of the person making the disclosure and without need for request by the Investigatory Powers Commissioner.

PURPOSE

80. Clause 203 provides that a disclosure to the Commissioner will not violate any duties of confidence or any other restriction on the disclosure of information. These amendments would put beyond doubt that voluntary, unsolicited disclosures are protected, and that any whistleblower is also protected from criminal prosecution.

81. JUSTICE would also support amendments proposed by Public Concern at Work to provide for a more detailed system of "protected disclosures" to provide broader protection for public interest disclosures by officials, agents and employees of public bodies and communications providers subject to the duties in the Bill (addressed in their Committee Stage Briefing).

BRIEFING

82. JUSITCE is concerned that provisions in the Bill may risk inadvertently discouraging or preventing individuals within public authorities or agencies or in Communication Service Providers from approaching the Investigatory Powers Commissioner with concerns or communicating with the Commission frankly.[28] 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.[29]

83. 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

[28] 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.

[29] Joint Committee, Report on the Draft Investigatory Powers Bill, para 153.

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[30] and security and intelligence agencies.

84. 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.

85. 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.

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

Clause 204: Budgetary control

PROPOSED AMENDMENTS

Clause 204, Page 158, Line 39, leave out “Judicial Commissioners” and insert “Investigatory Powers Commission”

Clause 204, Page 158, Line 40, after “such”, insert “funds”

Clause 204, Page 158, Line 40, after “determine” insert “necessary for the purposes of fulfilling the functions of the Investigatory Powers Commission under this Part”

Clause 204, Page 158, Line 41, leave out subclause (2) and insert –

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

PURPOSE

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

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

BRIEFING

88. 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.[31] However, JUSTICE regrets that the key budget lines of the Investigatory Powers Commissioner remain to be determined by the Secretary of State.[32] 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

[31] Investigatory Powers Bill, Clause 204.
[32] Ibid.

"*inappropriate*" and that the Bill should be amended to give a role for Parliament in determining the budget.[33]

[33] Joint Committee, Report on the Draft Investigatory Powers Bill, para 604.

Part 8: Schedule 7 and Codes of Practice

PROPOSED AMENDMENTS

Schedule 7, Page 216, Line 17, insert the following new paragraph –

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

Schedule 7, Page 2016, Line 34, insert the following new paragraph –

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

PURPOSE

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

Part 8: Oversight and the Investigatory Powers Tribunal

Clause 208: Scope of Appeal from the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Clause 208, Page 160, Line 31, leave out subsection (6)

PURPOSE

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

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

BRIEFING

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

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

New Clause: Openness and the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Clause 208, Page 162, Line 22, insert the following new clause –

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

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

PURPOSE

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

BRIEFING

95. In 2011, JUSTICE noted that the IPT bore *"only a remote resemblance to any kind of open and adversarial system of justice*[34]*"* and was lacking in effectiveness.[35] The excessive secrecy and the unfair nature of the Tribunal's procedures meant even those

[34] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* Nov 2011, para 672.
[35] Ibid, para 357.

complainants who reasonably suspected they were victims of unnecessary surveillance were unlikely to have a reasonable prospect of success.

96. 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.[36] In the recent case of *Liberty and others v GCHQ*,[37] the Tribunal mistakenly released a judgment stating that none of those complainants based in the UK had been subject to surveillance,[38] before it came to light that one of the parties, Amnesty International, had.

97. 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.[39]

98. 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.

99. The Joint Committee on the Draft Bill recommended that when making a decision on whether a hearing or part of a hearing should be open or not the Tribunal should apply a public interest test (Recommendation 74). Both the Anderson and RUSI Reviews considered that the Tribunal should conduct its proceedings in open as default, with limitations only as the public interest requires. Parliamentarians may wish to ask Ministers to explain why the Bill should not provide a clear framework for the conduct of Tribunal hearings in a manner consistent with the principle of open justice, in so far as the public interest will allow.

[36] Joint Committee, Report on the Draft Investigatory Powers Bill, para 657.
[37] *Liberty & Ors v GCHQ* [2014] UKIPTrib 13_77-H.
[38] Ibid.
[39] See *Big Brother Watch and others v UK* (Application no. 58170/13).

New Clause: Openness and the Investigatory Powers Tribunal

PROPOSED AMENDMENTS

Clause 208, Page 162, Line 22, insert the following new clause –

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

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

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

> (a) the capacity of the Tribunal to afford redress to individuals when compulsory powers are exercised unlawfully, including in a manner incompatible with Convention Rights protected by the Human Rights Act 1998; and
>
> (b) the conduct of Tribunal hearings and the production of Tribunal decisions which are open, transparent and accessible, except in so far as can be justified in light of a serious risk to life or of physical injury of any person, seriously prejudicial to:
>
> > (i) national security; or
> >
> > (ii) the prevention and detection of serious crime.

PURPOSE

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

New Clause: IPT and Declarations of Incompatibility

PROPOSED AMENDMENTS

Page 162, Line 22, insert the following new clause –

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

"(g) the Investigatory Powers Tribunal."

PURPOSE

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

BRIEFING

102. JUSTICE, along with the Joint Committee, supports the proposal made by the Independent Reviewer that the IPT should be given the power to make a declaration of incompatibility pursuant to section 4 of the HRA.[40] It is unclear why this hasn't been included in the present version of the Bill.

103. 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.

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

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27 April 2016

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