



BRIEFING PAPER

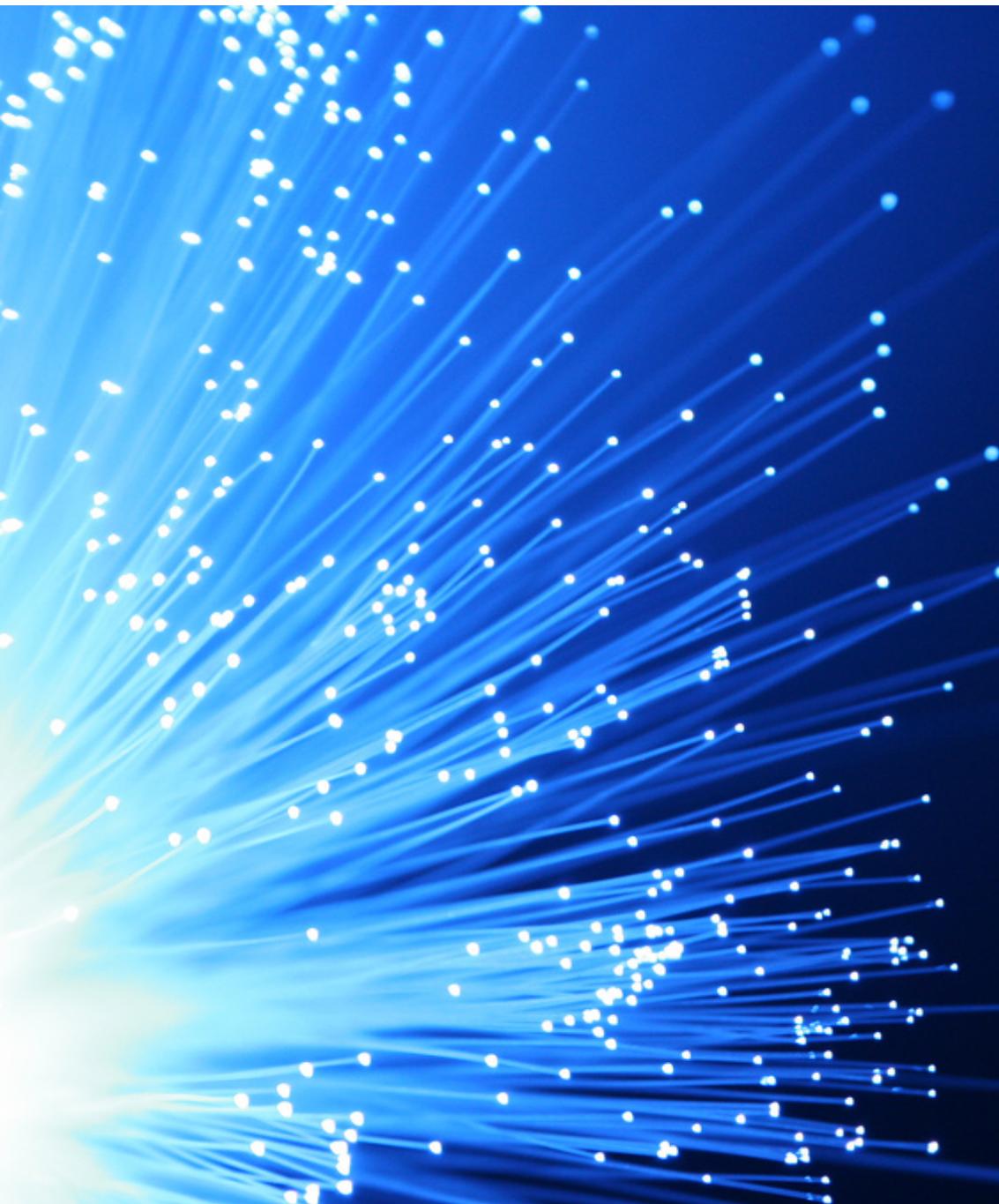
Number 7578, 2 June 2016

Investigatory Powers Bill: Committee Stage Report

By Joanna Dawson

Inside:

1. Introduction
2. Part 1: General Privacy Protections
3. Part 2: Lawful interception of communications
4. Part 3: Authorisations for obtaining communications data
5. Part 4: Retention of Communications Data
6. Part 5: Equipment interference
7. Part 6: Bulk warrants
8. Part 7: Bulk personal datasets
9. Part 8: Oversight arrangements
10. Part 9: Miscellaneous and general provisions
11. Committee members



Contents

Summary	3
1. Introduction	4
1.1 Second Reading	4
1.2 Joint Committee on Human Rights	5
1.3 This paper	6
2. Part 1: General Privacy Protections	7
3. Part 2: Lawful interception of communications	9
4. Part 3: Authorisations for obtaining communications data	16
5. Part 4: Retention of Communications Data	20
6. Part 5: Equipment interference	21
7. Part 6: Bulk warrants	23
Amendments made	23
Other debate	23
8. Part 7: Bulk personal datasets	26
Amendments made	26
Other debate	26
9. Part 8: Oversight arrangements	28
10. Part 9: Miscellaneous and general provisions	31
11. Committee members	34

Summary

The Investigatory Powers Bill was introduced on 1 March 2016 and received its second reading on 15 March. Library Briefing Paper 7518 [Investigatory Powers Bill](#) provides an analysis of the Bill as originally introduced in the Commons.

There were sixteen sittings of the Public Bill Committee, including two evidence sessions. The Bill is due to have its report stage on 6 June 2016.

Amendments made in Committee were largely technical or minor drafting amendments.

Particularly controversial areas included:

- The process for judicial authorisation of warrants
- The retention of internet connection records
- The need for an independent review of bulk powers
- The extent to which the Bill makes adequate provision for the protection of privacy
- Protection for sensitive and confidential communications, including those of journalists and MPs, and material subject to legal professional privilege

1. Introduction

1.1 Second Reading

The Bill had its Second Reading on 15 March 2016.¹ Labour and the SNP chose to abstain from the vote; the Liberal Democrats and Plaid Cymru voted against the Bill.

Introducing the Bill, Theresa May stated that following pre-legislative scrutiny, it was clearer, with tighter technical definitions and stronger privacy safeguards. She summarised the Bill as follows:

The Bill provides unparalleled transparency on our most intrusive investigatory powers, robust safeguards and an unprecedented oversight regime, but it will also provide our law enforcement and intelligence agencies with the powers they need to keep us safe. Because of its importance, our proposals have been subject to unprecedented levels of scrutiny, which has resulted in a Bill that really does protect both privacy and security – it is truly world-leading.²

The Shadow Home Secretary, Andy Burnham, suggested that there was broad agreement on the need for the law to be updated and consolidated, and for stronger safeguards. He accepted the Government's objectives, and suggested that characterising the Bill as a "snoopers' charter" was lazy, and insulting to law enforcement and security and intelligence agencies. However, he suggested that there were some well-founded concerns about the Bill, including the abuse of powers. He raised six specific concerns:³

- There should be a general presumption of privacy, in the form of an overarching privacy requirement, as recommended by the Intelligence and Security Committee (ISC). There should also be additional protections for the sensitive professions, such as MPs, journalists and lawyers, applied consistently in the context of the different investigatory powers provided for by the Bill;
- There should be a higher threshold for accessing internet connection records (ICRs) – serious crime, rather than any crime, to reflect the level of intrusion. Thresholds for other powers – national security and economic well-being – should be defined;
- The definition of ICRs should be revised to make clear that they can include domains but not URLs, and the range of bodies able to access ICRs should be reduced;
- There should be an independent review of all the bulk powers, to be concluded in time for Report and Third Reading;
- Judicial commissioners should not be limited to applying judicial review principles when deciding whether to approve a decision to issue a warrant;
- There should be a clear criminal offence of the deliberate misuse of the powers contained in the Bill.

Dominic Grieve, speaking as chair of the Intelligence and Security Committee (ISC), confirmed that the ISC was satisfied that the

¹ [HC Deb 15 March 2016, c812](#)

² [HC Deb 15 March 2016, c824](#)

³ [HC Deb 15 March 2016, cc824-836](#)

5 Investigatory Powers Bill: Committee Stage Report

Government are justified in seeking the powers contained in the Bill, none of which are unnecessary or disproportionate.⁴ He raised the three issues considered by the ISC to be the most significant:

- The ISC continued to be concerned about the inconsistent safeguards applicable to the different procedures for obtaining communications data. Specifically, the lack of safeguards in relation to communications data obtained as a by-product of bulk interception capabilities;
- The ISC accepted the need for bulk equipment interference capabilities on the basis of further evidence from the agencies, but would wish to see safeguards and controls in detail;
- The ISC continued to believe that class based authorisations for retaining and examining bulk personal datasets should be removed from the Bill and that there should be a requirement that Ministers should authorise the obtaining and periodic retention of each dataset.

Mr Grieve also reiterated the ISC's request to see the list of operational purposes for which bulk warrants may be issued, and the suggestion that the Committee should be able to refer any concern about the use of any investigatory power to the Investigatory Powers Tribunal (IPT) on behalf of Parliament.

Joanna Cherry for the SNP raised four areas of particular concern:⁵

- The legal thresholds for surveillance, which are unnecessarily broad and vague and dangerously undefined;
- The authorisation process, which should not be limited to judicial approval of the Secretary of State's decision on judicial review principles;
- The collection of ICRs, which would be extremely intrusive but also ineffective for law enforcement purposes;
- Bulk powers, which represent a radical departure from both the common law and human rights law.

Nick Clegg for the Liberal Democrats agreed with the concerns raised by the ISC about the Bill's insufficient privacy protections. He also raised principled objections to the retention of ICRs and suggested that the Government should explore alternative means of achieving the same objectives before pursuing such an intrusive policy.

1.2 Joint Committee on Human Rights

The Joint Committee on Human Rights published its pre-legislative scrutiny report on the Bill on 2 June 2016.⁶ The Report welcomed the Bill, describing it as a significant step forward in human rights terms. The JCHR concluded that the bulk powers in the Bill are not inherently incompatible with the right to privacy, but recommended that the operational case for the powers produced by the Government should be

⁴ [HC Deb 15 March 2016, c836](#)

⁵ [HC Deb 15 March 2016, c839-847](#)

⁶ Joint Committee on Human Rights, [Legislative Scrutiny: Investigatory Powers Bill](#), HL Paper 6, HC Paper 104, 2 June 2016

reviewed by the independent reviewer of terrorism legislation (David Anderson QC). The key issues of concern for the Committee were:

- The drafting of the provisions on thematic warrants;
- The power to make modifications to warrants without judicial approval;
- The safeguards in relation to: MPs' communications; material subject to legal professional privilege; and journalists' sources;
- The separation of the oversight functions of prior judicial authorisation and subsequent inspection and review

1.3 This paper

This paper considers the amendments tabled in Public Bill Committee and examines the most significant issues that were the subject of debate. It does not cover every amendment or every clause of the Bill. The [Explanatory Notes](#) provide a clause by clause description of the Bill, and Briefing Paper 7518 [Investigatory Powers Bill](#) provides background and an overview of the Bill. A copy of the Bill with amendments marked up is available on the Bill page.⁷

⁷ [Investigatory Powers Bill: As Amended In Public Bill Committee](#), parliament.uk

2. Part 1: General Privacy Protections

Part 1 of the Bill would set out an overview of the Act; define interception and lawful authority; and provide for a number of offences and penalties for misuse of the powers contained in the Bill.

Independent review

Keir Starmer raised the issue of an independent review of the bulk powers contained in the Bill,⁸ which he suggested should conclude in time to inform Report and Third Reading. This was a recommendation of the Joint Committee on the draft Bill,⁹ and was raised by the shadow Home Secretary in a letter to the Home Secretary on 4 April.¹⁰

The Minister (John Hayes) wrote to the Committee in response to this suggestion that it would not be “feasible or desirable to seek to establish a review on such important issues that would need to report in a matter of weeks.” He also pointed to the operational case for bulk powers, which was published alongside the Bill; the fact that the IPT has repeatedly found the powers to be necessary and proportionate; and that the ISC has indicated its approval for the use of the powers.¹¹

However, Andy Burnham has since reported that the Home Secretary wrote to him indicating that David Anderson QC would be asked to undertake a review of the operational case for the bulk powers.¹²

Overarching privacy clause

Keir Starmer also raised the need for an overarching privacy clause,¹³ as recommended by the ISC. He referred to paragraph 4.7 of the draft code of practice, which states:

No interference with privacy should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means.¹⁴

He suggested that equivalent provision should be included Bill, and that as currently drafted, there are inconsistencies in the way the Bill deals with proportionality, necessity and privacy. An overarching provision would help in cases where there is an absence of a specific reference to privacy, or an inconsistency, he suggested.

Offences and sanctions

The SNP tabled two new clauses which would have introduced civil wrongs of unlawful interception and of unlawfully obtaining communications data. Joanna Cherry explained that the first of these would replicate provisions in the *Regulation of Investigatory Powers Act*

⁸ [PBC Third Sitting, 12 April 2016, c92](#)

⁹ [Joint Committee on the Draft Investigatory Powers Bill](#)

¹⁰ Andy Burnham MP, [Letter to the Home Secretary on the Investigatory Powers Bill](#), 4 April 2016, [andyburnham.blogspot.co.uk](#)

¹¹ Security Minister, [Letter to Public Bill Committee](#), 19 April 2016

¹² [HC Deb 24 May 2016, c502](#)

¹³ C93

¹⁴ [Interception of Communications: Draft Code of Practice](#), Home Office, 2016

2000 (RIPA).¹⁵ The Solicitor General (Robert Buckland) responded that the equivalent provision in RIPA applies in very limited circumstances, but agreed to give the matter further consideration. Mr Buckland suggested that the second proposal would not be practicable, because of the wide range of circumstances in which an individual could acquire communications data without lawful authority (he gave the example of reading an envelope). He also noted that there are a number of statutory and common law provisions that would be relevant in the circumstances.

Keir Starmer suggested that the Government should consider an overarching offence of misuse of the powers in the Bill.¹⁶

In relation to clauses 7, 8, 11 and 12, which restrict the use of powers in the Bill, Keir Starmer questioned why there are no specified sanctions for breach of these provisions.

The Minister subsequently wrote to the Committee setting out all of the existing criminal and civil offences that may be relevant to misuse of the powers in this context.¹⁷ He suggested that it would be undesirable and unnecessary to provide for new offences that overlap with existing provisions.

¹⁵ C102

¹⁶ C108

¹⁷ Security Minister, Letter to the Public Bill Committee, 19 April 2016

3. Part 2: Lawful interception of communications

Part 2 of the Bill would provide for the provision of warrants for the interception of communications.

Targeted examination warrants

A number of amendments were tabled to clause 13. Clause 13 sets out the three types of interception warrant that would be available under the Bill: a targeted interception warrant; a targeted examination warrant; and a mutual assistance warrant.

The amendments would have required an examination warrant in order to look at secondary data in relation to communications obtained under a bulk interception warrant. At present under the Bill an examination warrant would be required to examine the content of communications of a person known to be in the British Isles obtained under a bulk warrant, but not the secondary data. Keir Starmer explained that this would align the requirements of a targeted interception warrant, which would cover both content and secondary data, with the requirements of a targeted examination warrant, which at present would cover only content.¹⁸

Amendments were also tabled that would have removed the distinction between those in the UK and elsewhere for the purposes of requiring an examination warrant. At present, an examination warrant would only be required in relation to communications obtained by bulk interception where they belonged to an individual known to be in the British Isles.

These amendments were also supported by the SNP. Joanna Cherry noted that the ISC had raised concerns about the lesser protection afforded to secondary data collected via bulk interception.¹⁹

Responding, the Minister suggested that the provisions in question reflect the recommendations of David Anderson QC. He also pointed to the fact that the IPT has recently considered the equivalent provisions under RIPA and concluded that they are consistent with the UK's obligations under the European Convention on Human Rights (ECHR). He further explained that under the proposed arrangements, at the point that a bulk warrant was applied for, the Secretary of State and the Judicial Commissioner would authorise the operational purposes that determine what content and secondary data can be examined. He suggested that an additional safeguard exists in relation to the examination of the content of communications of individuals known to be in the UK, in that a further warrant would be required in order to examine that content. He also explained that the reason that a further warrant is not required in order to examine the secondary data of individuals known to be in the UK, is that it is often not possible to know where a person is without looking at that data.²⁰

¹⁸ Cc113-116

¹⁹ C118

²⁰ Cc118-120

In relation to the amendments that would require a targeted examination warrant to examine the content of a communication regardless of where in the world the sender and recipient were, the Minister suggested that this would fundamentally alter the operation of the bulk regime. It would, he suggested, inhibit the ability of the security and intelligence agencies to identify new and emerging threats from outside the UK.²¹

Thematic warrants

Amendments were tabled to clause 15 by the SNP which would have circumscribed thematic warrants, so that they could only apply to identifiable individuals or premises, rather than groups or organisations made up of unspecified individuals. Joanna Cherry argued that as drafted, clause 15 may not comply with a recent ruling of the European Court of Human Rights (ECtHR),²² and pointed to concerns raised about thematic warrants by the ISC, David Anderson, the Interception of Communications Commissioner, the Surveillance Commissioner and the Joint Committee on the draft Bill. Keir Starmer spoke in support of the amendments.²³

In response the Minister argued that thematic warrants have a specific utility in the context of certain investigations. He also suggested that the Bill imposes strict limits on the scope of warrants in relation to organisations, requiring that they must be for the purpose of a single investigation or operation.²⁴

Authorisation

Amendments were tabled to clause 17 which would have removed the role of the Secretary of State from the process of authorising warrants. These amendments were supported by Labour and the SNP.

Keir Starmer explained that the amendments were intended to reflect the recommendations of David Anderson. He pointed out that 70% of warrants dealt with by the Secretary of State are in fact police warrants that do not raise issues of national security or matters of foreign affairs, and are no different from the sorts of powers that the police exercise when using other powers available to them through the Crown Court.²⁵

He also questioned the argument that the Secretary of State's role is important from the perspective of political accountability, on the basis that no examples have been provided of a Secretary of State ever accounting to Parliament for an individual warrant.

Joanna Cherry supported these arguments,²⁶ and further suggested that one-stage judicial authorisation is the norm in comparable jurisdictions, and that it would encourage cooperation from US technology firms,

²¹ [PBC Fourth Sitting, 12 April 2016, cc124-131](#)

²² *Zakharov v Russia*, App. no. 47143/06

²³ Cc 134-138

²⁴ Cc 140-143

²⁵ Cc 144-149

²⁶ Cc 149-150

who are unfamiliar and uncomfortable with the UK model of political authorisation.²⁷

Responding, the Minister stated that the Secretary of State is able to talk about specific warrants to the ISC, and that the ISC does conduct detailed investigations into particular cases, such as the murder of Lee Rigby.²⁸ He suggested that elected politicians are accountable to the electorate for the decisions they make, and are therefore more influenced and affected by the views of the wider public.²⁹

The Minister subsequently wrote to the Committee to confirm that clause 50(2) is intended to provide for the Secretary of State to be able to disclose the existence of a warrant to the ISC. It replicates the existing position under RIPA.³⁰

Keir Starmer spoke to an amendment which would have put on the face of the Bill a statement that if the information required could reasonably be obtained by other means, a warrant would not be proportionate (as in para 4.7 of the code of practice).³¹

The Solicitor General responded that the code of practice was the correct place for this provision because it would be more easily amendable in light of experience and practice. He suggested that including the provision in the Bill might lead to a situation whereby it would only be possible to obtain an interception warrant when all other avenues had been exhausted, and this would be undesirable.³²

Definitions of national security and economic wellbeing

Amendments were tabled to clause 18 which would have tied the threshold for the issue of warrants to a reasonable suspicion of criminal behaviour, and removed “economic well-being” as a separate ground for the issue of a warrant.

Joanna Cherry argued that the term “national security” should be defined, as recommended by the Joint Committee on the draft Bill. She suggested that, left undefined, it was so broad as to allow the arbitrary exercise of the Secretary of State’s decision making powers, and lacked legal certainty.³³

Christian Matheson and Keir Starmer argued that the inclusion of “economic well-being” as a separate ground raised the possibility that the powers might be used to target the legitimate activities of trade unions. Keir Starmer also made the argument, as did the ISC, that if economic harm to the UK is so serious as to be a threat to national

²⁷ For further information on jurisdictional differences, see Murray, A., ‘[Comparing Surveillance Powers: UK, US, and France](#)’, *LSE Law Policy briefing Paper No. 2703852*, December 2015

²⁸ [Report on the intelligence relating to the murder of Fusilier Lee Rigby](#), Intelligence and Security Committee of Parliament, HC 795, 2014

²⁹ Cc 150-155

³⁰ Security Minister, [Letter to Public Bill Committee](#), 19 April 2016

³¹ C 156

³² Cc 156-157

³³ Cc 158-160

security, then it would already be covered under that head, and it is thus superfluous as a separate head.³⁴

The Minister responded to the effect that any change to the definitions of these terms might create rigidity that could impact on operational effectiveness. It might also raise questions as to why the language had been changed from that used in RIPA.³⁵

In response to concerns about powers being used in relation to trades union for political purposes, the Minister proposed in response to meet with Frances O'Grady of the TUC to discuss the matter further. It has subsequently been reported that the Home Secretary has written to the shadow Home Secretary indicating that the Government may be willing to insert a new clause into the Bill specifically addressing this amendment.³⁶

Approval of warrants by Judicial Commissioners

Amendments were tabled by Labour and the SNP which would have altered the role played by judicial commissioners in approving warrants.

Under the Bill Judicial Commissioners would be required to review the Secretary of State's decision to approve a warrant, applying Judicial Review principles.

An amendment was tabled which would have required the judicial commissioner to determine for him or herself the necessity and proportionality of the warrant, rather than reviewing the Secretary of State's determination. Another amendment would have removed the reference to "judicial review" principles from clause 21(2).

Keir Starmer pointed to the evidence of Lord Judge, who suggested that the term "judicial review" should be defined in the Bill because it is subject to different interpretations in different contexts.³⁷ He argued that although some judges might regard the test as one requiring intense scrutiny of the decision, in the given context, there was no guarantee without further guidance that all would do so. He also suggested that, as a matter of judicial accountability, it would be better to have a clearly defined test, so that judges understood what they were being asked to do and were comfortable operating within those parameters. He pointed out that clause 21 does not require the judicial commissioner to decide whether a warrant is necessary and proportionate, but to review the Secretary of State's conclusions that it is, applying judicial review principles. Therefore, it would be possible for a judge to conclude personally that a warrant was not necessary and proportionate, but to nonetheless uphold it on the grounds that the Secretary of State had exercised his or her powers in a way that was reasonable. He concluded that the only way to create a true double - or equal - lock would be for the judicial commissioner to make a

³⁴ Cc 161-164

³⁵ Cc 164-166

³⁶ HC Deb 24 May 2016, c502

³⁷ C 168

substantive determination on proportionality and necessity on the same basis as the Secretary of State.

Joanna Cherry suggested that it would be hard for judicial commissioners to review the Secretary of State's decision according to judicial review principles in the absence of a reasoned decision, which is not required to be given.³⁸

The Solicitor General suggested in response that it is appropriate that the role of the judicial commissioners is one of review, rather than making the decision afresh, in terms of the separation of powers, and that judicial review principles would allow flexibility.

Appointment of special advocates

Amendments were tabled by Labour and the SNP which would have enabled judicial commissioners to appoint special advocates to represent the interests of the subject of a warrant, or the wider public interest. Keir Starmer suggested that if the Bill did not include such a provision, the court may try to use its inherent jurisdiction to appoint an *amicus curiae*, and this approach could cause complications because some courts have inherent jurisdiction and others do not.³⁹

The Solicitor General was opposed to the creation of a special advocate scheme, but said that he would give further consideration to the point about *amicus curiae* and inherent jurisdiction.⁴⁰

Urgent warrants

Amendments were tabled by the SNP which would have circumscribed the use of urgent warrants, so that they would only be available in an emergency situation that poses an immediate danger of death or serious physical injury. They would also have reduced the time period within which an urgent warrant would need to be approved by a judicial commissioner to 24 hours (from three days, at present).

Joanna Cherry pointed to a recent ECtHR case in support of the proposition that a 48 hour time limit would be the maximum that would be acceptable.⁴¹

Additional protections for sensitive professions

Amendments were tabled that would have introduced additional safeguards in relation to material subject to legal professional privilege (LPP), journalistic material, and parliamentarians' communications.

Keir Starmer made the point that the Bill does not contain any protections for journalists' materials in relation to intercept warrants. Instead, the code of practice suggests that special attention should be given to necessity and proportionality when dealing with confidential journalistic content.

In relation to legally privileged communications, Keir Starmer cited evidence provided by the Bar Council, that legal professional privilege

³⁸ C 173

³⁹ C 178

⁴⁰ C 179

⁴¹ C 182

does not apply to communications made with the intention of furthering a criminal purpose, whether the lawyer is acting unwittingly or culpably (the “iniquity exception”). Therefore, he suggested that legally privileged material should not be targeted, as is currently permitted under the Bill. He acknowledged that it would not always be possible to avoid inadvertently picking up legally privileged material, and that there should be safeguards to deal with that eventuality.⁴²

Joanna Cherry explained that the purpose of the amendments was to provide a consistent approach to the protection of these classes of material. At present, the Bill provides additional safeguards in relation to interception and equipment interference warrants for accessing MPs’ communications and legally privileged material, but not in relation to journalistic materials. Whereas, there are safeguards in relation to access to communications data to identify a journalistic source, but not in relation to communications data connected to legally privileged or MPs’ communications.⁴³

The Solicitor General suggested that there is a difficulty in coming up with a satisfactory statutory definition of “journalism”. He also indicated that the Security Minister was meeting with representatives of the National Union of Journalist to discuss the matter.⁴⁴

With respect to legal professional privilege, the Solicitor General suggested that there are risks inherent in trying to define such concepts in legislation, including that any attempt might have the effect of circumscribing it. He also argued that there might be some circumstances in which intercepting communications between a lawyer and client revealed information which could be used as an evidential lead to prevent the commission of an offence, but discussion of which did not constitute the furtherance of a criminal purpose.⁴⁵

Modification of warrants

Labour and the SNP tabled a number of amendments to clause 30, which provides for the modification of warrants. Under the Bill, major modifications can be made without judicial involvement, adding individuals and premises on the basis of authorisation by the Secretary of State or a senior official. Keir Starmer argued therefore that modifications could be made to bring an MP’s communications, or LPP material within the warrant without the involvement of a judicial commissioner.⁴⁶

Minor modifications, which can include material selected for examination under a bulk warrant, can be made by officials, without the involvement of a judicial commissioner, and without the need to consider necessity and proportionality.

The amendments would have circumscribed the power to modify warrants, limiting who could authorise modifications, and ensuring that

⁴² Cc 190-191

⁴³ Cc 191-192

⁴⁴ C 193

⁴⁵ Cc 193-94

⁴⁶ C 211

certain modifications, including those touching on legally privileged material and MPs' communications, would require judicial approval.

The Solicitor General argued in response that the modifications permitted under clause 30 would in fact be more limited than the opposition parties suggested. He also argued that requiring judicial approval of all modifications would limit operational efficiency. However, he agreed to give further consideration as to whether the drafting could be amended to make it clearer that only thematic warrants may be amended by the addition of a name, as specific individuals become known during an investigation.

Implementation of warrants

Labour tabled amendments to clauses 34 - 36, which would have created an assumption that, where a mutual legal assistance treaty (MLAT) is in place, overseas communications service providers (CSPs) would not be required to assist in the implementation of a warrant under clause 34. Keir Starmer explained that this was at the behest of a number of technology companies, who have concerns about being subject to different, and potentially conflicting, legal regimes.⁴⁷

The Minister responded to the effect that the current MLAT system is not capable of dealing with the requirements of an ongoing investigation, and that the Government is in the process of agreeing more appropriate arrangements.⁴⁸

The Committee divided on the question of whether clauses 35 and 36 should stand part, with the SNP voting against the clauses.

Disclosing the existence of a warrant

Clauses 49 – 51 would impose a duty not to make an unauthorised disclosure of the existence of a warrant; provide for a number of exceptions to this principle; and would create an offence of making an unauthorised disclosure.

During the stand part debate, Keir Starmer questioned how the provision would enable the Secretary of State to disclose the existence of a warrant to the ISC under the “excepted disclosure” provisions.

The Minister subsequently wrote to the Committee to explain that clause 50(2) is intended to provide for the Secretary of State to be able to disclose the existence of a warrant, and replicates an existing provision in RIPA.⁴⁹

⁴⁷ Cc 227-229

⁴⁸ Cc 229-232

⁴⁹ Security Minister, [Letter to Public Bill Committee](#), 19 April 2016

4. Part 3: Authorisations for obtaining communications data

Part 3 would provide for the process for public bodies to obtain communications data from CSPs.

Authorisations for access to communications data

Clause 53 would provide for the power to grant authorisations to access communications data. Amendments were tabled to provide for judicial authorisation for access to communications data, rather than the current internal authorisation procedure, and to increase the threshold for access, to serious crime.⁵⁰

Speaking to the amendments, Keir Starmer argued that the threshold for accessing communications data would be set very low by the Bill,⁵¹ and that this might be subject to legal challenge in light of developing EU and ECHR case law.⁵²

The Solicitor General suggested in response that raising the threshold for access to serious crime would mean that the powers would not be available in relation to certain offences which may not be designated as serious but nonetheless have serious consequences for the victim. He also noted that none of the reports on investigatory powers proposed changing the authorisation regime for access to communications data.⁵³

Internet connection records

During the stand part debate on clause 54, which sets out the definition of internet connection records (ICRs), Joanna Cherry indicated that SNP object to ICRs in principle, on the basis that they represent an expansion of the indiscriminate collection of data that no other comparable jurisdiction has found necessary. She was also critical of the drafting, suggesting that it did not reflect the position of the technology industry as to what would be feasible.⁵⁴ Keir Starmer also raised concerns over the way the definition is drafted, suggesting that it may be wider than the Government intend it to be.⁵⁵

Request filter

Clauses 58-60 would provide for the establishment and use of a “request filter” to gather and analyse communications data. This would enable public authorities to conduct searches of databases of information in relation to complex inquiries. The SNP opposed these provisions on the basis that the filter would represent an unacceptable intrusion into privacy.⁵⁶

⁵⁰ Currently, communications data may be accessed for the purpose of preventing or detecting any crime, as well as a number of other purposes such as preventing damage to a person’s physical and mental health.

⁵¹ [PBC Sixth Sitting, 14 April 2016, cc 258-263](#)

⁵² For example, the Davis/Watson case: *R (Davis & Ors) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin); currently being appealed

⁵³ Cc 263-267

⁵⁴ Cc 270-272

⁵⁵ Cc 272-274

⁵⁶ Cc 277-278

Public bodies able to access communications data

Clause 61 and Schedule 4 set out the public bodies that would be able to access communications data. Labour and the SNP tabled amendments that would have limited the range of these bodies. Keir Starmer explained that the amendment would tighten up the drafting of the Bill to limit the number of relevant public authorities and to tie the powers more closely to the purposes for which communications data may be accessed.⁵⁷

In response the Solicitor General explained the number of bodies that would be able to access communications data had already been reduced, and that each body listed in Schedule 4 had made a case for the need and utility of the powers prior to inclusion.⁵⁸

Single Point of Contact

Clause 67 would provide for the use of a single point of contact (SPOC), to be consulted by the designated senior officer before granting an authorisation to access communications data.

The SNP laid amendments seeking to make SPOCs independent of the organisations requesting the data, by requiring that they should be appointed by the Investigatory Powers Commissioner. Joanna Cherry explained that this was necessary in the absence of judicial authorisation for access to communications data.⁵⁹

In response the Solicitor General explained that SPOCs would be independent of the investigation in question, and suggested that the oversight arrangements would prevent abuse.

Safeguards for journalists

Clause 68 would provide that the authorisation of a judicial commissioner must be sought in order to access communications data, the purpose of which is to identify a journalistic source.

Labour tabled amendments which sought to improve safeguards relating to the identification of journalistic sources, making them equivalent to those contained in the Police and Criminal Evidence Act 1984, which apply in relation to search and seizure warrants. This would include a prior notification requirement, except in exceptional circumstances.

Keir Starmer suggested that the test contained in the Bill – whether there were reasonable grounds for considering that the requirements of the Part are satisfied – does not provide any real protection for journalists and their sources. The judicial commissioner must only consider whether the test that applies generally has been applied. He pointed to the test set out in the code of practice, and suggested that it should be included within the Bill:

⁵⁷ Cc 288-289

⁵⁸ Cc289-291

⁵⁹ Cc 299-300

Where an application is intended to determine the source of journalistic information, there must therefore be an overriding requirement in the public interest.⁶⁰

Responding, the Solicitor General suggested that the approach proposed by the amendments would not be practicable and could hamper investigations.⁶¹ He suggested that safeguards contained in the code of practice were sufficient to meet the concerns raised. He also pointed to the finding of the IPT that the existing regime is compatible with the right to freedom of expression set out in article 10 of the European Convention on Human Rights.⁶²

Further amendments would have made safeguards for journalists, legal professional privilege and MPs' correspondence consistent throughout the Bill.⁶³

Joanna Cherry raised the issue of whether communications data is regarded as being capable of being legally privileged material in any context. The Solicitor General suggested that communications data "will rarely, if ever, attract legal professional privilege".

He also noted that sensitive professions would be dealt with by the code of practice, and that different considerations apply in relation to communications data as compared with the other more intrusive powers contained in the Bill.

Extraterritorial application

Clause 76 would provide for the extraterritorial application of Part 3 of the Bill, meaning that authorisations for access to communications data may relate to CSPs operating outside of the UK.

Labour tabled amendments which were intended to address concerns raised by technology companies. These would have made it clear that a CSP would not be required to comply with a notice where doing so would be contrary to the laws of the jurisdiction in which it was established. There would also be a presumption in favour of using a mutual legal assistance treaty where this was feasible.⁶⁴

Keir Starmer explained that the amendments reflected concern on the part of CSPs that under the Bill they will be required to cooperate with warrants and therefore would like clarity as to how the procedure will operate and what they will be expected to do where there is a conflict of laws.⁶⁵ They were intended to foreshadow future working arrangements with other jurisdictions, plans for which, the Government have indicated, are progressing following work undertaken by Sir Nigel

⁶⁰ [PBC Seventh Sitting; 19 April 2016](#), Cc 309-312; [Communications Data: Draft Code of Practice](#), para 6.5

⁶¹ Cc 312-315

⁶² [News Group Newspapers v Metropolitan Police](#) [2015] UKIPTrib 14_176-H

⁶³ Cc 321-324

⁶⁴ Similar amendments were tabled with respect to other clauses dealing with extraterritoriality.

⁶⁵ Cc 330-332

Sheinwald, the Prime Minister's Special Envoy on Intelligence and Law Enforcement Data Sharing.⁶⁶

The Minister subsequently wrote to the Committee on the issue of extraterritoriality. He suggested that the Bill maintains the existing position, and does not extend extraterritorial jurisdiction. He also pointed to the fact that companies will only be required to comply where doing so would be reasonably practicable, including considering whether doing so could be in conflict with the domestic laws of the jurisdiction where they are based.

He further explained that requests for assistance could be made to overseas CSPs under the Bill with respect to seven powers, but that the duty to comply could only be enforced with respect to three powers: targeted and bulk interception and targeted requests for communications data. This reflects the position under existing legislation. He stated that the Bill makes clear that the laws of the jurisdiction in which the CSPs is based must be taken into account in considering whether the action required might involve a breach of those laws.⁶⁷

⁶⁶ [Summary of the Work of the Prime Minister's Special Envoy on Intelligence and Law Enforcement Data Sharing](#), Cabinet Office, 25 June 2015

⁶⁷ [Letter to the Public Bill Committee](#), Security Minister, 26 April 2016

5. Part 4: Retention of Communications Data

Part 4 sets out the powers under which the Secretary of State would be able to require CSPs to retain communications data.

Powers to require the retention of communications data

Both Labour and the SNP were critical of the breadth of the powers provided for by the Bill. Keir Starmer suggested that, although the Government has indicated that the provisions on ICRs in Part 3 of the Bill would not permit access to web browsing histories, these provisions would not preclude their retention.⁶⁸ He suggested that this could have a chilling effect.

A number of amendments were tabled by Labour and the SNP. One set of amendments would have provided that the power of the Secretary of State to issue retention notices, and related provisions, be replaced by data retention warrants issued by judicial commissioners.⁶⁹

An alternative set of amendments would have provided that the Investigatory Powers Commissioner should be required to approve data retention notices before they would come into force.

The SNP tabled an amendment that would have provided for the explicit exclusion of third party data from retention notices.⁷⁰ This is currently provided for by the draft code of practice, which defines third party data as data that a CSP is able to see

in relation to applications or services running over their network ... but does not process that communications data in any way to route the communication across the network.⁷¹

The SNP also raised principled objections to the retention of ICRs, suggesting that it would be incompatible with the right to privacy.

⁶⁸ C 340

⁶⁹ Cc 341-342

⁷⁰ C 349

⁷¹ Para 2.69

6. Part 5: Equipment interference

Part 5 of the Bill would provide for warrants for equipment interference.

Equipment interference warrants

Amendments were tabled by Labour to clause 88, supported by the SNP, which sought to provide for additional safeguards in relation to equipment interference warrants on the face of the Bill. They would have circumscribed the material that could be obtained under an equipment interference warrant, and specified that a targeted examination warrant would be required in order to examine all material obtained under a bulk equipment interference warrant.⁷²

The Minister suggested in response that the draft code of practice contained sufficient safeguards, requiring that the warrant should contain:

details of the purpose and background of the application, be descriptive and clearly identify individuals where that can be done. Those requirements also necessitate an explanation of why equipment interference is regarded as essential and refer to conduct in respect of the exercise of such powers, collateral intrusion, and so on.⁷³

Thematic warrants

Labour tabled a number of amendments to clause 90, with the support of the SNP, which would have limited the subject matter of equipment interference warrants. These reflected concerns that thematic equipment interference warrants would allow a very broad range of matters to be included in a targeted warrant. Keir Starmer noted that David Anderson had suggested that these warrants would be so wide that it was difficult to suggest anything that could not be included in a thematic warrant.⁷⁴ He suggested that they were therefore tantamount to bulk powers.

The Minister responded to the effect that the powers are necessary, and already exist, to deal with cases which may be very fast moving, where a limited amount might be known at the outset when the warrant is first applied for. He pointed to the detail contained in the code of practice, which states that warrants should be as specific as possible.⁷⁵

Amendments were tabled to clause 91 which would have circumscribed the purposes for which equipment interference warrants could be issued.⁷⁶ These reflected similar concerns to those raised during the debate on Part 2 of the Bill, in relation to the purposes for which interception warrants could be issued.⁷⁷

⁷² [PBC Eighth Sitting, 19 April 2016](#), C 369

⁷³ PBC 19 April 2016, c 374

⁷⁴ C 381

⁷⁵ Cc 382-384

⁷⁶ [PCB Ninth Sitting, 21 April 2016](#), c 389

⁷⁷ See page 10

Members of Parliament

Labour tabled amendments to clause 94, which would provide that the Secretary of State must consult the Prime Minister before approving an equipment interference warrant, the purpose of which is to intercept an MP's communications. The amendments would have provided for more extensive safeguards for this and other categories of confidential and privileged material.⁷⁸

The debate reflected concerns raised in relation to similar clauses elsewhere in the Bill.⁷⁹ This Minister indicated that the Government were giving the matter further consideration.⁸⁰

Power to issue warrants by law enforcement chiefs

Labour tabled amendments which would have removed the power of law enforcement chiefs to issue warrants, provided for by clause 96, requiring instead that the decision be made directly by a judicial commissioner. Keir Starmer suggested that the arguments advanced by the Government in support of the Secretary of State's role in warrants did not apply to law enforcement chiefs, and that the threshold for access was too low.⁸¹

The SNP tabled a number of related amendments. Joanna Cherry suggested that clause 96 amounted to self-authorisation by public bodies and that this represented an anomaly in the context of the most intrusive power provided for by the Bill.⁸²

The Minister responded to the effect that the Bill reflected the current arrangements and that none of the Committees that scrutinised the Bill recommended changing these arrangements. He also suggested that law enforcement chiefs were well suited to making these decisions on the basis of their understanding of the investigations in question.⁸³

Other matters

Amendments were tabled to other clauses in Part 5 reflecting the same concerns as arose in the context of intercept warrants, for example in relation to urgent warrants, modifications, and extraterritorial jurisdiction.

⁷⁸ Cc 400-402

⁷⁹ See page 12

⁸⁰ C 403

⁸¹ C 406

⁸² C 406

⁸³ Cc 407-409

7. Part 6: Bulk warrants

Part 6 of the Bill would provide for warrants for bulk interception; acquisition of communications data in bulk; and bulk equipment interference.

Amendments made

Clause 128 was amended to provide that major modifications to bulk warrants could be signed by a senior official where the Secretary of State was unavailable. The Minister explained that the modification must still be personally and expressly authorised by the Secretary of State, and that the difference was one of practicality, rather than emphasis.⁸⁴

Clauses 138 and 144 were amended to clarify the scope of modifications that may be made to warrants, and to provide that modifications may be signed by a senior official where necessary, as in relation to clause 128.⁸⁵

Other debate

Bulk powers

Labour tabled an amendment which would have provided that Part 6 of the Bill would not come into force until an independent review of the operational case for bulk powers had been undertaken and the conclusions published.

Keir Starmer described the powers as “intentionally breathtakingly wide”, and thus requiring a high level of justification for their use.⁸⁶ He acknowledged that the powers are already in use and that their inclusion in the Bill would have the effect of increasing accountability. However, he suggested that this does not negate the need for Parliament to scrutinise the powers, having had no opportunity to do so previously, and that the first step would be to consider the operational case. The new clause is required because the operational case published by the Government is inadequate, he suggested.

The SNP tabled leave out amendments on the entirety of Part 6. Joanna Cherry explained that the SNP would wish the powers to be removed from the Bill until a convincing case has been made for their necessity, and the legality of the powers has been determined by the courts.⁸⁷ She reiterated Keir Starmer’s assertion that the operational case published by the Government was inadequate, and questioned whether the case studies included did in fact demonstrate a need for bulk powers. She also cited two independent reviews carried out of bulk powers in the USA, which concluded that they made a minimal contribution to counter-terrorism operations.⁸⁸

⁸⁴ [PBC Tenth Sitting, 21 April 2016](#), c436

⁸⁵ An equivalent amendment was made to clause 164, in relation to bulk equipment interference warrants.

⁸⁶ C435

⁸⁷ By which she was referring to the ongoing litigation in the Davis/ Watson case and other cases pending before the ECtHR.

⁸⁸ C 440

Both Keir Starmer and Joanna Cherry suggested that the apparent safeguard of limiting bulk powers to overseas communications was illusory, given that overseas communications would include searches and messages sent via companies based abroad, including Facebook and Google.

In response, the Minister pointed out that David Anderson had stated in his evidence to the Committee that he was not convinced of the need for a further review, given that the ISC had considered these issues. He quoted Dominic Grieve, who spoke during the Second Reading debate as Chair of the ISC, as saying that that Committee was satisfied that none of the powers in the Bill were unnecessary or disproportionate.⁸⁹

He also explained that a Google search by a person based in the UK would not be classed as overseas-related under the provisions of the Bill.⁹⁰

The Minister indicated that the Government might be willing to consider providing further detail on the operational case for bulk powers.⁹¹

Safeguards

Labour tabled further amendments to Part 6 with the aim of strengthening the safeguards on the face of the Bill. Keir Starmer explained that Labour did not wish to reduce the existing capabilities of the security and intelligence agencies, but that it was important that the public were convinced of the justification for the powers, and that there were sufficient safeguards.⁹² He acknowledged that the code of practice contained additional safeguards. These would include requiring sufficient detail with respect to the objectives in a bulk warrant application to enable a meaningful assessment of the necessity and proportionality of examining material obtained under the warrant. Because the same warrant application would cover the bulk interception (or acquisition or interference) and the subsequent selection for examination of specific material, Keir Starmer suggested that it should be made clear that a higher threshold would apply to the selection for examination phase (it being more intrusive). He reiterated arguments put forward in respect of earlier provisions, that safeguards should be set out in the Bill, and that the code of practice should be used for detailed implementation and guidance on those safeguards.

In response the Minister agreed to give the matter further consideration.

Labour tabled amendments which would have strengthened the role of the judicial commissioner in approving warrants. These were consistent with amendments tabled with respect to other clauses in the Bill, and the arguments were not repeated.

Similarly, amendments were tabled with respect to modifications, urgent warrants, extraterritorial jurisdiction, and legal professional

⁸⁹ C451

⁹⁰ This is in contrast to the corresponding powers under RIPA – see c451-452.

⁹¹ It has subsequently been reported that the Home Secretary has written to the Shadow Home Secretary, indicating that she has asked David Anderson to conduct a review of the bulk powers.

⁹² Cc 454-457

privilege, consistent with amendments relating to those provisions elsewhere in the Bill.

Bulk equipment interference

During the clause stand part debate on clause 154, which was opposed by the SNP (along with all other clauses in Part 6), Joanna Cherry expressed concerns that the bulk equipment interference powers contained in the Bill could have the effect of undermining online security generally.⁹³ She noted that David Anderson had indicated in his evidence to the Committee that his report did not reach any independent conclusions about the necessity and proportionality of bulk equipment interference, and that the ISC had recommended in its report that the powers be removed from the Bill.

In response, the Minister highlighted the importance of equipment interference in light of the increasing use of encryption, which limits the utility of interception. He also noted that the IPT had considered the EI Code of Practice and concluded that it strikes a proper balance between the need for the agencies to protect the public and the protection of individual privacy and freedom of expression.⁹⁴

⁹³ [PBC Eleventh Sitting, 26 April 2016](#), c508

⁹⁴ [PBC Twelfth Sitting, 26 April 2016](#), cc516-517

8. Part 7: Bulk personal datasets

Part 8 of the Bill would provide for the retention and examination of bulk personal datasets.

Amendments made

Clause 186 was amended to allow for a senior official to sign off a major modification to a warrant where it is not possible for the Secretary of State to do so, in line with amendments made elsewhere.⁹⁵

Clause 192 provides for the Secretary of State to give a direction that a BPD acquired using a capability provided for under another part of the Bill (such as interception) should be subject to the retention and examination regime provided for by Part 7. It was amended to make clear that the Secretary of State cannot vary a direction given under the clause without the approval of a Judicial Commissioner. It was further amended to make clear that the offence of unauthorised disclosure would continue to apply to a BPD acquired by interception but retained under the Part 7 regime. The Government explained that these amendments were intended to strengthen the safeguards in relation to BPDs.⁹⁶

Other debate

The SNP was opposed to Part 7 in its entirety, in the absence of a convincing operational case made by the Government for the inclusion of the powers. Joanna Cherry suggested that the power to acquire BPDs does not currently exist. She described BPDs as “essentially databases held by either the private or the public sector”.⁹⁷ She highlighted concerns about the powers being used to access health, and in particular mental health, records. She also pointed to the fact that the ISC recommended that class-based warrants should be removed, and that David Anderson had not reached any conclusion on the necessity or proportionality of their use.⁹⁸

Keir Starmer suggested that the Bill should follow the same approach as the *Data Protection Act 1998* in distinguishing between sensitive and non-sensitive data, with additional safeguards applying to sensitive data.⁹⁹ Amendments were tabled that would have required that a higher threshold would be applied in relation to patient information and that retention and examination is only permitted where there are exceptional and compelling circumstances to justify it. He indicated that the agencies had briefed the Committee, to the effect that such a distinction is already made as a matter of internal policy.

Both Joanna Cherry and Keir Starmer raised the concern that the prospect of records being obtained may put people off seeking help with mental health problems.

⁹⁵ C 556

⁹⁶ C 559

⁹⁷ C533

⁹⁸ Cc 533-537

⁹⁹ Cc 537-538

The Minister pointed out in response that the Bill does not provide for the agencies to acquire BPDs, which may be acquired by other means, such as interception. He suggested that the purpose of Part 7 was to ensure that where BPDs have been acquired, procedures are followed with respect to their retention and examination.¹⁰⁰

He indicated that the Government would give further consideration to the issue of sensitive data.

Amendments were tabled in relation to judicial authorisation, warrants in urgent cases, modifications, and greater specificity with respect to operational purposes, in line with amendments elsewhere in the Bill.

9. Part 8: Oversight arrangements

Part 8 would provide for a new oversight regime, in the form of the Investigatory Powers Commissioner, assisted by a number of judicial commissioners. It would also provide for a right of appeal from the IPT.

Oversight body

Labour tabled overarching amendments to Part 8 which would have altered the oversight arrangements. Under the Bill, there would be an Investigatory Powers Commissioner assisted by a number of judicial commissioners. The amendments sought to create a body corporate known as the Investigatory Powers Commission, and would have split the Commission's judicial and audit functions. The amendments were supported by the SNP.

Keir Starmer noted that David Anderson had recommended a new independent surveillance and intelligence commission, and that the Joint Committee on the draft Bill had questioned why this had not been done. It suggested that the work of the body would be significantly enhanced by the creation of a commission with a clear legal mandate.¹⁰¹

Responding, the Solicitor General suggested that the creation of a new Commission would incur additional costs without additional benefits. Furthermore, the proposed arrangements would be equally capable of promoting public confidence; and uniting the judicial and inspection functions would facilitate dialogue throughout the process.¹⁰²

Appointment of Commissioners

Labour tabled amendments to clause 194 which sought to alter the appointment arrangements with respect to judicial commissioners, so that they would be appointed by the Lord Chancellor on the recommendation of the Judicial Appointments Commission (JAC), rather than by the Prime Minister.

Keir Starmer suggested that having the Prime Minister appoint commissioners would be very unusual, and pointed to the recommendation of the Joint Committee that the Lord Chief Justice should be responsible, in consultation with the JAC. He explained that the proposals were principled amendments based on the separation of powers, and that they would be essential if the public were to have confidence in the double lock.¹⁰³

Responding, the Minister pointed out that, to qualify as a judicial commissioner, an individual would have to be or have been a High Court judge, and would therefore already have been through the JAC process. He also suggested that it was important to avoid any sense of patronage, and that the Prime Minister's role emphasised the significance of the Executive's engagement in the matter. He did however indicate an openness to further "fine tuning".¹⁰⁴

¹⁰¹ [PBC Thirteenth Sitting](#), 28 April 2016, c 566

¹⁰² Cc 567-570

¹⁰³ Cc 572-573

¹⁰⁴ Cc 573-576

The Solicitor General made the point that, because the individuals concerned would have already been through the JAC process, the issue was one of deployment rather than appointment, and that for that reason the Prime Minister should be involved.¹⁰⁵

Referrals to the Investigatory Powers Tribunal

An amendment was tabled which would have enabled judicial commissioners to make referrals to the IPT without the need for a complaint to have been made.

Joanna Cherry spoke to the amendment, explaining that it reflected a recommendation of the Joint Committee. She noted that the Government had not accepted the recommendation, but that the draft code of practice on interception appeared to accept such a procedure. She suggested that the amendment would help avoid ambiguity on the issue.

In response, the Solicitor General suggested that it would not be possible for the IPT to consider a complaint without a claimant, and that it would be inappropriate if the commissioner ended up being a party to the proceedings. The proper role of the judicial commissioners, he suggested, would be to inform the subject of an error and provide sufficient information to enable them to bring a complaint.

Reporting requirements

Keir Starmer spoke to amendments to clause 201 which would have required that annual reports should be made to Parliament, rather than the Prime Minister; that more detail could be included in the reports; and that would have restricted the grounds on which material could be excluded from reports.¹⁰⁶

The Minister indicated that the Government might be willing to give further consideration to how the oversight arrangements could be strengthened in this respect.¹⁰⁷

Funding arrangements

Amendments to clause 204 would have provided that the oversight body should receive funding directly from the Treasury, rather than through the Secretary of State.

The Solicitor General suggested in response that the Home Office would be better placed to make an assessment of the resources needed because it would be more familiar with the work of the IPC, and that comparable non-departmental public bodies receive funding via that route.

Keir Starmer suggested that judicial commissioners' role in the double lock would be compromised by the arrangements given their particular function of overseeing decisions of the Secretary of State.¹⁰⁸

¹⁰⁵ C 577

¹⁰⁶ [PBC Fourteenth Sitting](#), 28 April 2016, c610

¹⁰⁷ C 611

¹⁰⁸ C 613

Investigatory Powers Tribunal

Amendments were tabled to clause 208 which would have allowed an appeal on any point of law from a decision of the IPT. This would remove the restriction in the Bill, that appeals are only permitted on a point of law where the appeal raises an important point of principle or practice, or where there is another compelling reason to allow it.

Keir Starmer explained that this reflected recommendations of both David Anderson and the Joint Committee.¹⁰⁹

In response, the Solicitor General suggested that the clause already represented a significant change, in allowing a domestic right of appeal, and that permitting appeals on any point of law would waste time and resources. He further explained that the approach is modelled on restrictions that apply to judicial reviews from decisions of an upper tribunal.

Further amendments would have enabled the IPT to make declarations of incompatibility with the ECHR, and would have created a presumption that hearings should be open where possible. The latter reflects a recommendation of David Anderson.

The Solicitor General responded to the effect that the Tribunal Rules could be amended to reflect the fact that in practice the IPT regularly hold open hearings. However, he suggested that the creation of a default presumption might go too far and damage the public interest, for example by compromising the Government's neither confirm nor deny policy, which is used to protect sensitive capabilities.

In relation to declarations of incompatibility he noted that the ability to issue them was reserved to a small number of the most senior courts, and no tribunals have the ability. He suggested that there was no justification for departing from that practice and that if such a declaration was sought then the new appeal procedure would be the most appropriate course.¹¹⁰

¹⁰⁹ C 618

¹¹⁰ Cc 620-625

10. Part 9: Miscellaneous and general provisions

Cost recovery

Amendments were tabled to clause 213, which deals with compliance costs. The clause provides that CSPs must receive an “appropriate contribution” towards their costs of complying with the requirements of the Bill. The amendments would have provided for full cost recovery.

Speaking to the amendment, Keir Starmer explained that this reflected industry concerns about the costs of compliance.¹¹¹

The Minister responded by explaining that in practice the Government do meet 100% of costs under the current arrangements and will continue to do so, and that providers will be consulted on any changes to the cost model.¹¹²

Technical capability and national security notices

Labour tabled amendments to clauses 216, 217 and 220, which would have introduced judicial involvement into the process of issuing technical capability and national security notices.

National security notices would be issued by the Secretary of State where necessary in the interests of national security to require a CSP to engage in conduct to facilitate the capabilities provided for by the Bill.

Technical capability notices may be issued to oblige CSPs to maintain a permanent capability, so that when a warrant is served, the company has the infrastructure in place to give effect to it.

Keir Starmer suggested that the notices could impose very broad requirements without meaningful safeguards. The amendments would have required a judicial commissioner to approve a notice on the grounds that it was necessary and proportionate.¹¹³

The Solicitor General suggested in response that the reason why the involvement of judicial commissioners was not necessary or appropriate at this stage was that the notices deal with preparatory steps rather than the actual privacy intrusion. The role of the Secretary of State in issuing notices reflects the responsibility of the Executive with respect to protecting national security, and the role of judicial commissioners in approving warrants reflects the sensitivity regarding interference with privacy.¹¹⁴

Encryption

Labour tabled further amendments to clause 217, supported by the SNP, relating to the requirements that could be imposed on CSPs to remove encryption.

¹¹¹ [PBC Fifteenth Sitting](#), 3 May 2016, C 632

¹¹² Cc632-633

¹¹³ Cc 634-635

¹¹⁴ C 635

Keir Starmer explained that there was concern within industry as to what they might be required to do to give effect to the provision. He noted that the code of practice states that a company may only be obliged to remove encryption that it has itself applied (or has been applied on its behalf), but suggested that this limitation was not provided for on the face of the Bill. He also highlighted paragraph 8.28 of the code of practice, which would require a CSP to give the Government notice of new products so that the Government can consider whether technical capability should be provided on the new service. He suggested that these provisions would in effect mean the Government taking control of CSPs' services for the purposes of the Act.¹¹⁵

Keir Starmer explained that the amendments would

provide clarity and legal certainty for industry that the Government will not require back doors to be installed into products and services, is not seeking to weaken or restrict the use of encryption and that companies cannot be required to remove encryption if they do not have the means to do so at the disposal.

They would also require the Secretary of State to provide evidence that the notice is justified, necessary practicable and proportionate.

In response the Solicitor General affirmed the Government's recognition of the importance of encryption. He explained that the provisions replicate the position under RIPA, with further detail provided in the code of practice. He indicated that further thought could be given to making it clear that the encryption provisions could not be used to require CSPs to remove encryption applied by third parties. He also explained that a CSPs could ultimately bring a legal challenge against a notice to determine whether it could be enforced.¹¹⁶

Review of the Act

A new clause was proposed by the SNP as an alternative to clause 222. The new clause would have provided that the review of the Act should be carried out by an independent reviewer, rather than the Secretary of State, as clause 222 would provide.¹¹⁷

The Minister suggested in response that the new clause was unnecessary. The intention behind clause 222 would be that a joint parliamentary committee would be responsible for conducting post-legislative scrutiny, but this could not be provided for on the face of the Bill because the Government cannot direct the work of future committees. The role of the Secretary of State would be to ensure that post-legislative scrutiny is carried out according to the timetable set out in the Bill.¹¹⁸

Overarching privacy clause

New clause 25, tabled by Labour and supported by the SNP, would have provided an overarching obligation to have regard, in exercising powers

¹¹⁵ Cc 641-644

¹¹⁶ Cc 645-653

¹¹⁷ C 657

¹¹⁸ Cc 659-662

under the Act, to certain matters in the public interest, including privacy.¹¹⁹

Keir Starmer described it as an overriding privacy clause that would be consistent with the recommendations of the ISC. He explained that it was important that somewhere in the Bill there was recognition of the real rights and interests that are affected by the powers in the Bill, and that consistency was ensured throughout the Bill. He explained that the clause sets out four important public interests: protecting national security; the prevention and detection of serious crime; the protection of the privacy and integrity of personal data; and the security and integrity of communications systems and networks. It also sets out principles to be applied: necessity; proportionality; due process, accountability and respect for the human rights of those affected; and notification and redress. He suggested that the intention was to probe whether in principle there ought to be an overarching privacy clause, if so, what ground it should cover.¹²⁰

In response, the Minister indicated that the Government would introduce a clause along the same lines.

¹¹⁹ PBC Sixteenth Sitting, 3 May 2016, C 681

¹²⁰ Cc 682-686

11. Committee members

Chairs: Nadine Dorries and Albert Owen

Membership:

- Victoria Atkins (Conservative)
- Robert Buckland (Conservative), Solicitor General
- Joanna Cherry (Scottish National Party), Shadow Home Affairs Spokesperson
- Byron Davies (Conservative)
- Suella Fernandes (Conservative)
- Lucy Fraser (Conservative)
- John Hayes (Conservative), Security Minister
- Sue Hayman (Labour)
- Simon Hoare (Conservative)
- Stephen Kinnock (Labour)
- Simon Kirby (Conservative)
- Peter Kyle (Labour)
- Christian Matheson (Labour)
- Gavin Newlands (Scottish National Party)
- Keir Starmer (Labour) Shadow Home Office Minister
- Andrew Stephenson (Conservative)
- Jo Stevens (Labour) Shadow Solicitor General
- Matt Warman (Conservative)

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publically available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcinfo@parliament.uk.

Disclaimer - This information is provided to Members of Parliament in support of their parliamentary duties. It is a general briefing only and should not be relied on as a substitute for specific advice. The House of Commons or the author(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice.

The House of Commons accepts no responsibility for any references or links to, or the content of, information maintained by third parties. This information is provided subject to the [conditions of the Open Parliament Licence](#).