



21 December 2015

Submission to the Joint Committee on the draft Investigatory Powers Bill

1. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; UN Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the UN Special Rapporteur on the situation of human rights defenders make the following submission to the Joint Committee of the draft Investigatory Powers Bill, submitted on 21 December 2015. The concerns below have been communicated directly to the Government of the United Kingdom.
2. The Special Rapporteurs welcome efforts of the Parliament of the United Kingdom to initiate a review process aiming towards the adoption of legislation in relation to balancing the collective online rights of the digital community and the need to protect national security and prevent serious and organised crime.
3. We would like to bring to the attention of the Joint Committee on the draft Investigatory Powers Bill a number of specific provisions of the draft Investigatory Powers Bill (from herein the “draft Bill”) that are of particular concern, namely in relation to the legitimate enjoyment of the right to freedom of expression and the right to privacy, as enshrined in the International Covenant on Civil and Political Rights.
4. We are especially concerned that, if adopted in its present form, the draft Bill could result in surveillance, including mass surveillance that lacks adequate independent oversight and transparency that will ultimately stifle fundamental freedoms and exert a chilling effect on the rights to freedom of expression and freedom of association.
5. We share the position, outlined in the statement of 4 November 2015, taken by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, who welcomed the public and legislative scrutiny to which the draft Bill is subject.

Framework for Assessing the Compliance of the Investigatory Powers Bill with International Norms and Standards

6. The Government of the United Kingdom ratified the International Covenant on Civil and Political Rights (ICCPR) on 20 May 1976. Article 19 of the ICCPR protects everyone from interferences with the right to freedom of opinions and protects the right to seek, receive, and impart information and ideas of all kinds, regardless of frontiers and through any media. The right to freedom of opinion is absolute, and no interference, limitation or restriction is allowed.
7. Any restriction on the right to freedom of expression should be narrowly defined and clearly provided by law and be necessary and proportionate to achieve one or more of the legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals, as provided in Article 19(3) of the Covenant. The UN Human Rights Committee offers an authoritative interpretation of the right to freedom of opinion and expression in its General Comment No. 34 (CCPR/C/GC/34).
8. Analysis relative to the relations between the right to privacy and the right to freedom of expression and opinion under international law is provided by the UN Special Rapporteur on freedom of expression in his report on the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression (A/HRC/23/40); his report on the use of encryption and anonymity to exercise the rights to freedom of opinion and expression in the digital age (A/HRC/29/32); his report on the protection of sources of information and whistle-blowers (A/70/361); as well as by the UN High Commissioner for Human Rights in his report on the right to privacy in the digital age (A/HRC/27/37).

Clauses of Concern in the draft Investigatory Powers Bill

9. The clauses of the draft Bill that cause concern from the perspective of the rights to freedom of opinion and expression and freedom of association include at least the following:

Clause 61 on the authorisation of warrants for journalists' communications data

10. *Clause 61* of the draft Bill establishes the authorisation procedure for officials to execute a warrant for collecting communications data for "identifying or confirming a source of journalistic information". Under *Clause 61(7)*, a "source of journalistic information" refers to "an individual who provides material intending the recipient to use it for the purposes of journalism or knowing that it is likely to be so used." After the warrant has been approved by a designated senior official of a relevant public authority, such authorisation must be obtained from a Judicial Commissioner. *Clause 46(7)* provides the reasons for which a Judicial Commissioner may authorise a warrant where it is necessary

and proportionate, including “national security,” “public safety,” “preventing disorder,” assessing and collecting taxes, and “for the purposes of exercising functions relating to ... financial stability.” Additionally, the authorities are not required to give notice of such request or authorisation to the subjects of a warrant for communications data or their legal representatives. Further, the draft Bill exempts the intelligence services from seeking approval for obtaining journalistic information.

11. The purposes for which a warrant for communications data may be executed are vague and not tethered to specific offences. Consequently, the Judicial Commissioner may enjoy authority to approve surveillance beyond the narrow range of circumstances where it would be necessary and proportionate to achieve one or more of the legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals, as provided under article 19(3) of the ICCPR. Also, the authorities’ discretion to withhold notice of such surveillance would deprive individuals and associations of their ability to challenge suspect or illegal surveillance, even after the warrant for such surveillance has been executed and the investigation closed. The exemption of the intelligence services from seeking approval for communications data warrants, would effectively allow the Government to obtain communications data for intelligence purposes without any external or independent oversight. Further, it is unclear who may be deemed “a source of journalistic information”. Such definition does not clarify whether these warrants could encompass information provided by non-traditional news sources, such as civil society organisations, academic researchers, human rights defenders, citizen journalists and bloggers. Such provision may stifle the right to freedom of expression, while also resulting in a chilling effect on its legitimate exercise.

Clauses 71 to 73 on notices for the retention of communications data

12. *Clause 71* permits the Secretary of State to issue a notice requiring telecommunications operators to retain “relevant communications data” for a maximum of 12 months. Under *Clause 71(9)*, such communications data include information identifying the sender, recipient, time and duration of the communication and internet protocol addresses. The Secretary of State may issue such notices as long as they deem retention “necessary and proportionate” for a range of purposes, including “national security”, “public safety”, “preventing disorder”, “assessing and collecting taxes” and for “exercising functions relating to... financial stability”. Under *Clause 73(10)*, the Secretary of State may decide the review after considering the conclusions of the Technical Advisory Board and the Commissioner. *Clause 77(2)* states that a “telecommunications operator, or any person employed for the purposes of the business of a telecommunications operator, must not disclose the existence and contents of a retention notice to any other person.”
13. The procedure and reasons for the retention of communications data in the draft Bill are vague and could permit the Secretary of State to require third party data retention that is excessive and disproportionate. The process lacks any meaningful independent oversight, and while the Secretary of State has a duty to consult the Board and the Commissioner,

their conclusions are not binding and the Secretary of State retains unilateral authority to vary, revoke or confirm the terms and conditions of the notice. The prohibition on telecommunications operators to disclose data retention notices may deprive affected customers of their right to challenge the retention of their data, even after such notice has expired and the investigation concerning such data has been closed.

Clauses 106, 107, 109 and 112 on bulk interception warrants

14. *Clause 106* provides that intelligence services may apply for a warrant to intercept communications and related communications data in bulk “in the course of their transmission by means of a telecommunication system.” Such action may be authorised where the “main purpose” of the warrant must be to intercept communications and related or communications data that are sent to or received by individuals “outside the British Islands.” Additionally, under *Clause 107*, the warrant must be “necessary” to serve at least one of three purposes: the “interests of national security”; the interests of national security and “for the purposes of preventing or detecting serious crime”; or the “interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security” and provided that the information sought to be obtained relates to “the acts or intentions of persons outside the British Islands”. Under *Clauses 107 and 109*, such warrants must be issued by the Secretary of State and approved by a Judicial Commissioner respectively. Under *Clause 112(1)*, a bulk interception warrant is valid for a maximum of six months. However, at any time before or once the warrant expires, the Secretary may renew it subject to the procedures described above.
15. Similar to the criteria for authorising warrants for journalists’ communications data, the provisions on bulk interception warrants are vague and not tied to specified offences, and include ambiguous terms such as “economic well-being”, heightening the risk of excessive and disproportionate interception. Further, the power to renew bulk interception warrants indefinitely is not a meaningful limit on the duration of these activities, which is a critical safeguard against undue interferences with the rights to freedom of expression and privacy.

Clauses 189 to 191 on powers to require the removal of electronic protection

16. Under *Clause 189(4)(c)*, the Secretary of State may make regulations imposing obligations on telecommunications operators “relating to the removal of electronic protection applied by a relevant operator to any communications or data.” *Clause 189(6)* authorises the Secretary to issue a technical capability notice requiring an operator to “take all the steps specified in the notice for the purpose of complying with those obligations.” For operators outside the United Kingdom, such notice may require “things to be done, or not to be done, outside the United Kingdom.” *Clauses 190(3) and 191* establish criteria for issuing and challenging technical capability notices that are materially similar to those for data retention notices described above and *Clause 190(8)*

prohibits the subject of technical capability notices from disclosing the “existence and contents of the notice to any other person”.

17. The lack of substantive limits on the Secretary of State’s power to establish regulations may interfere with the ability of telecommunications operators to protect their users’ communications through end-to-end encryption. In particular, the broad discretion to regulate might lead to blanket restrictions on encryption that affect massive numbers of persons, which would most likely result in a breach of the requirements of necessity and proportionality. The ambiguous purposes permitted to authorise the removal of electronic protections and the non-disclosure of such measures also raise the concerns listed above with regard to *Clauses 71 to 73*.

Clauses 167 to 168 on the appointment of Judicial Commissioners

18. Under *Clause 167*, the Prime Minister appoints Judicial Commissioners, in consultation with various ministers specified and the Investigatory Powers Commissioner (the head of the Judicial Commissioners). Judicial Commissioners are also required to hold or have held a high judicial office. Each Judicial Commissioner is appointed for a term of three years under *Clause 168*, after which the Prime Minister may reappoint a Judicial Commissioner for another term. This power is vested exclusively in the Prime Minister, without input (consultative or otherwise) from the Parliament, judiciary, or any other independent body in the vetting or approving candidates.
19. The power to appoint the Judicial Commissioners compromises the independence and impartiality of the Judicial Commissioners, who oversee the surveillance procedures outlined in the draft Bill.

Concerns with the process of pre-legislative scrutiny

20. The Special Rapporteurs would also like to raise concerns about the review process of the draft Bill, which reportedly fails to provide civil society, the private sector, the technical community and all interested stakeholders with sufficient time to provide meaningful input on such a comprehensive draft Bill.

Concluding Observations

21. We appreciate the importance of this effort to place certain investigatory powers under the sanction of a clear and consistent legal regime governed by the rule of law. Nonetheless, we wish to express serious concern that the above-mentioned provisions of the draft Investigatory Powers Bill, in its current form, contain insufficient procedures without adequate oversight and overly broad definitions that may unduly interfere with the rights to privacy, freedom of opinion and expression and freedom of association, both

inside and outside of the United Kingdom, as provided under articles 17, 19 and 22 of the ICCPR.

22. We urge the Joint Committee on the draft Investigatory Powers Bill to take all steps necessary to conduct a comprehensive review of the draft Investigatory Powers Bill to ensure its compliance with applicable international standards as outlined in this submission.



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