Investigatory Powers Bill

Legislative Consent Memorandum

Equality and Human Rights Commission
Response to Justice Committee call for evidence

12 August 2016

Contact details:

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1. The Equality and Human Rights Commission is the National Equality Body for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We are an ‘A Status’ National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

2. The Commission welcomes the opportunity to comment on the Legislative Consent Memorandum (LCM) for the Investigatory Powers Bill (the Bill).

3. The Commission engaged in detail during the Bill’s passage in the House of Commons. All relevant written evidence and parliamentary briefings are published on the Commission’s website.1

Introduction

4. A number of the rights contained in the European Convention on Human Rights (the Convention rights) are engaged by the Investigatory Powers Bill, including Articles 2 (right to life), 8 (respect for private and family life), 10 (freedom of expression), 14 (non-discrimination in the enjoyment of Convention rights) and Article 1 of Protocol 1 (the right to property), as well as relevant case law.

5. In the Commission’s analysis, the proposals in the Bill go some way towards meeting the human rights requirements that there should be clear and detailed rules governing the scope of investigatory powers

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and robust legal and operational safeguards against arbitrary use and misuse of powers.

6. In scrutinising the Bill, we have had particular regard to the need to protect the right to privacy. The right privacy is not absolute – it can, and must, be balanced against the need to, for example, fight crime and protect the public. However, the powers in the Bill, which are highly intrusive of privacy, must be subject to careful scrutiny to ensure that they are necessary and proportionate.

Part 1 - General Privacy Provisions

7. The Commission considers that the Bill’s provisions must be compatible with the following principles:

- The powers set out in the Bill are intrusive of privacy and therefore the scope and limits to those powers should be construed narrowly.
- The Bill must permit only necessary and proportionate covert capabilities, exercised by authorised individuals and bodies, in compliance with the Human Rights Act 1998 and the rights set out in that Act.
- Intrusion into the privacy of persons who are not suspected of wrongdoing is unlawful unless absolutely necessary and proportionate to the intended legitimate purpose.
- A power under this Bill may only be exercised where it is the most limited and least privacy intrusive power available to achieve a specified lawful purpose including in relation to:
  i. the type of power used
  ii. the number of people to whom it applies
  iii. the duration of the authorisation
  iv. the way in which the power is exercised.

- Information obtained by the exercise of these powers must:
  i. only be retained for the minimum period necessary for the purpose for which it was acquired.
ii. not be shared unless that can be done without breaching the rights guaranteed under the European Convention on Human Rights (Convention rights).

- The exercise of the powers in this Bill, where they are intrusive of privacy, must be independently authorised in accordance with clear, necessary and proportionate laws, providing sufficient safeguards for Convention rights.
- Rigorous oversight arrangements must be exercised to deter, prevent and address misuse of powers in breach of Convention rights.
- The exercise of intrusive powers under this Bill must be kept under continuous democratic, judicial and other forms of independent review, to uphold privacy safeguards and to ensure the security, intelligence, law enforcement and other State agencies are supervised and, when required, held to account when using the powers in this Bill.

8. These principles are derived from human rights law, including rights to privacy and freedom of expression. These rights are not absolute but require that any interference with them must be in accordance with clear and transparent laws, necessary and proportionate.

Part 2 – Lawful interception of communications

Thematic warrants

9. Under the Bill, thematic targeted interception warrants can be sought in relation to a group of people, organisations and premises. The draft Code of Practice makes it clear that "there is not a limit to the number of locations, persons or organisations that can be provided for by a thematic warrant" and that "the warrant does not have to identify the subjects of the warrant any more than is possible at the time of issue of the warrant"\(^2\). This suggests that thematic warrants may be issued with quite generalised descriptions of their scope, making them more like bulk powers than targeted powers.

\(^2\) Draft Interception of Communications Code of Practice paragraph 5.12
10. Both the ISC and the Draft Bill Committee raised concerns about these provisions\(^3\). The Draft Bill Committee recommended amending Clause 15 so that thematic warrants concerning a very large number of people cannot be issued. The ISC recommended that thematic warrants should be used sparingly and subject to greater safeguards and as a minimum should be issued for a maximum period of one month to ensure greater scrutiny.

11. The Commission supports these recommendations and would wish to see amendments made to give effect to them. The issue of warrants against generalised thematic targets may breach Article 8 ECHR in two ways. First, on the grounds that they are not sufficiently clear to be “in accordance with law” as required by Article 8(2). Second, because they may be more invasive of privacy than necessary and therefore not proportionate, particularly if they result in significant collateral intrusion into the privacy of individuals against whom there are no grounds of suspicion.

*Consistent safeguards for legally privileged communications, journalistic material held in confidence and communications of or to parliamentarians*

12. The Commission has endorsed the ISC recommendation that there should be consistent protection for the sensitive professions, such as lawyers and journalists, in relation to all investigatory powers on the face of the Bill.\(^4\) For further detailed analysis, see pages 3-5 of the *Commission’s briefing for Committee stage, dated 12 April 2016*.

*Power to modify warrants*

13. As the Bill stands, certain major modifications to warrants, for example by adding a new name, does not require approval through the “double lock” mechanism by a Judicial Commissioner. Clause 32 permits a major modification to be made by a senior official acting on behalf of the Scottish Ministers or in an urgent case by the person to whom the warrant is addressed. The Commission considers this


\(^4\) ISC report recommendation B at page 3.
undermines the principles of independent authorisation of surveillance powers. This is a very important factor that the courts look for in a human rights compliant framework. There is a significant risk that the Clause as currently drafted may not be found to have the necessary element of independent authorisation and may therefore be held to be in breach of human rights. We consider that Clause 32 should be amended to require major modifications of warrants to be authorised by a Judicial Commissioner. Further analysis is contained at pages 5 and 6 of the Commission’s briefing for Committee stage, dated 12 April 2016.

Retention periods and destruction of data

14. Under the Bill, information gained through interception powers only has to be destroyed when, for example, there are “no longer any relevant grounds for retaining it” (Clause 51(5)) meaning “retention is not necessary or not likely to become necessary” (Clause 51(6)).

15. This means such information can be retained even where there is no current utility, if it is considered it may be of future utility. This is very broad, too vague and unlikely to be compliant with human rights law under Article 8 ECHR and under EU law.

16. The Commission recommends introducing additional safeguards which ensure data retention periods are proportionate in relation to all powers. We also recommend an amendment requiring that data must be destroyed when retention is no longer necessary and proportionate.

Safeguards for sharing information abroad

17. Concerns have been raised by both the Draft Bill Committee and the ISC that the provisions in the Bill governing the sharing with overseas agencies of information obtained using investigatory powers are too broad and need further definition and improved safeguards.

5 See Digital Rights Ireland in the context of access to communications data that “above all, the access by the competent national authorities to the data retained was not made dependent on a prior review carried out by a court or by an independent administrative body”. In the ECHR, see for example the case of Iordachi v Moldovia (Application no. 25198/02), 10 February 2009, in which the court referred to Dumitru Popescu v. Romania in which the Court expressed the view that the body issuing authorisations for interception should be independent and that there must be either judicial control or control by an independent body over the issuing body’s activity.
The Commission agrees that further safeguards are needed. Compliance with Convention rights requires safeguards concerning the retention, use and disclosure of information. In order to ensure real and effective protection of Convention rights, this protection must extend to decisions about disclosure of information abroad.

**Parts 6 and 7: Bulk powers**

18. The use of bulk powers inevitably means the private information of many innocent people is obtained and potentially examined, resulting in considerable intrusion into qualified privacy rights. Such mass surveillance powers are different from targeted powers, requiring a much higher standard of justification.

19. The Commission’s view is that a sufficiently compelling case has not yet been made out for the present Bill proposals for bulk surveillance powers, both their extent and the safeguards applicable to their exercise. As presently drafted, we consider they are likely to constitute an unjustifiable interference by the State with the individual’s right under Article 8 of the Convention to respect for private life. Further analysis is set out at pages 8 and 9 of the Commission’s response to the Public Bill Committee call for evidence, dated 23 March 2016.

**Part 8 – Oversight arrangements**

*Power of Judicial Commissioners to refer matters to the Investigatory Powers Tribunal*

20. The Commission has called for improvements to the oversight provisions in the Bill, in particular that Judicial Commissioners should have the power to refer any matter the Commissioner considers may involve the unlawful use of investigatory powers to the Investigatory Powers Tribunal (IPT).

21. The Commission believes that giving the Judicial Commissioners power to ensure that issues of concern are brought to the IPT without having to rely on a complaint being brought would increase accountability and transparency in the oversight arrangements. The
Judicial Commissioners are much better placed to identify issues of systemic concern and issues of law requiring resolution by the IPT that the subjects of surveillance, who will often be unaware of the measures being taken. A power to allow Judicial Commissioners to make referrals to the IPT on any matter of concern would therefore provide an additional safeguard against unlawful exercise of the powers in the Bill. It would also promote compliance with human rights law, in particular that the exercise of powers should be clear and in accordance with the law. In depth analysis of this issue is contained in pages 2-4 of the Commission’s briefing for Committee stage in the House of Commons, dated 28 April 2016.

Power for the IPT to make a declaration of incompatibility

22. The Draft Bill Committee recommended that the IPT should be able to make a declaration of incompatibility under the Human Rights Act.\(^6\) The Commission endorses this recommendation. The UK Government’s response is that this provision is unnecessary because the Court of Appeal has this power on appeal.\(^7\) The Commission considers that making it necessary for an appeal to be brought in a clear cut case solely for the purpose of securing a declaration of incompatibility is cumbersome and unnecessarily costly and time-consuming. Further analysis is included at pages 6 and 7 of the Commission’s response to the Public Bill Committee call for evidence, dated 23 March 2016.

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\(^7\) Government response to pre legislative scrutiny at page 73.