



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Investigatory Powers Bill (HC Bill 143) – Human Rights aspects

Introduction

The Northern Ireland Human Rights Commission (NIHRC) is one of three A status National Human Rights Institutions (NHRIs) in the United Kingdom and is required by section 69(1) of the Northern Ireland Act to “keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights”. The purpose of this paper is to brief MPs and Peers on the potential human rights issues raised by the Investigatory Powers Bill (IPB) which is currently at Report Stage. The IPB is due to replace the Data Retention and Investigatory Powers Act which, by virtue of a ‘sunset’ clause is to be repealed on 31 December 2016.

The IPB intends to consolidate and extend the powers of intelligence services and other public authorities (such as HMRC, Department for Work and Pensions, etc.) to acquire, retain and intercept communications and other forms of personal data and equipment. The main features of the Bill are as follows:

- Creating offences of unlawful interception (clause 2) and unlawful obtaining of communications data (clause 9).
- Legislating for the lawful interception of communications.¹ Interception will be permissible only when a warrant has been requested by an ‘intercepting authority’ which includes heads of

¹ ‘Communications’ are defined in clause 118(1) of the Bill as: “(a) anything comprising speech, music, sounds, visual images or data of any description, and (b) signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus”.

intelligence services and chief constables.² Requests are made to the Secretary of State who must obtain authorisation from a Judicial Commissioner (the so-called 'double-lock').³

- Warrants may be obtained on grounds of "national security", "preventing or detecting serious crime" or "economic well-being".⁴
- Warrants may be renewed, modified or cancelled where certain requirements have been met.⁵
- Authorities are under no obligation to notify individuals who have been subject to investigation on the back of a warrant, even when the investigation has been closed unless there was an error in the process (clause 198). Material obtained under a warrant is also inadmissible in legal proceedings except for certain circumstances such as closed material proceedings or immigration commission appeals proceedings.⁶
- The same framework applies in relation to warrants requiring retention of communications data (part 4) and equipment interference (otherwise known as hacking) (part 5).
- 'bulk warrants' may be issued to intercept or acquire large volumes of data or for mass equipment interference (part 6). 'Bulk personal dataset warrants' may also be issued (part 7), personal datasets being defined in the original draft Bill as "set[s] of information that includes personal data relating to a number of individuals [and where] the nature of the set is such that it is likely that the majority of the individuals are not, and are unlikely to become, of interest to the intelligence services".⁷
- A Prime Ministerial-appointed Investigatory Powers Commissioner and Judicial Commissioners are established to consider warrant issuance applications and report errors (part 8).

A draft IPB was published on 4 November 2015.⁸ The Intelligence and Security Committee of Parliament issued a report on the draft Bill in February 2016.⁹ While supporting agencies' use of investigatory powers

² Investigatory Powers Bill, clause 16.

³ Investigatory Powers Bill, clause 21.

⁴ Investigatory Powers Bill, clause 18.

⁵ Investigatory Powers Bill, clauses 28-32.

⁶ Investigatory Powers Bill, part 2, chapter 3 and Schedule 3 entitled 'Exceptions to section 48'.

⁷ Draft Investigatory Powers Bill, clause 150(1)(b).

⁸ Draft Investigatory Powers Bill, November 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf.

⁹ Intelligence and Security Committee of Parliament, 'Report on the draft Investigatory Powers Bill', HC 795, 2016, available at: <https://b1cba9b3-a-5e6631fd-s->

where necessary and proportionate, it was nonetheless critical as to whether the Bill achieves its aims.¹⁰ The draft Bill was subject to pre-legislative scrutiny by the Joint Committee on the Draft Investigatory Powers Bill set up to analyse the draft Bill who recommended that significant changes be made to the draft Bill.¹¹ Upon issuance of the Joint Committee Report with 86 recommendations on 11 February 2016,¹² the Home Secretary introduced the IPB in the House of Commons on 1 March 2016.¹³ The Public Bill Committee scrutinised the IPB, reporting in April 2016 on potential amendments to the Bill. Accordingly, the revised Bill included the following relevant amendments:

- Providing a consolidated and consistent approach for all special material such as journalistic sources, data subject to legal professional privilege and parliamentary correspondence;
- Requiring 'reasonable suspicion' of a criminal offence before Judicial Commissioner issue a warrant;
- 'Double-lock' required for warrant modification as for authorisation;
- Notification via an error reporting power given to Commissioners;
- Domestic right of appeal from IP Tribunal.¹⁴

The Joint Committee on Human Rights (JCHR) published a legislative scrutiny report on the IPB on 2 June 2016, detailing what it considered to be the most important human rights issues under the Bill. The Home Secretary introduced amendments in response to these recommendations as well as those of the Public Bill Committee and the Intelligence and Security Committee (ISC) by making clear that warrants should not be granted where less intrusive means are available to obtain information.

sites.google.com/a/independent.gov.uk/isc/files/20160209_ISC_Rpt_IPBill%28web%29.pdf?attachauth=ANoY7cr8zFQIbTKPCtxQSVwUqz2PDITXkINgP9cfkjdIf7Ki6SR0ZDA_D39MkUcuba4oD1NoPyLxNAuWi7CwV93mAkPXg4nbnc5A3IPaMZ0zELwnvUnXefc833MjP_Gzbg9j7WIKIQLJG8n4vbi6NHnDEPk04EP6Zj3jEwIL1kSIw_pD9VYf1B00binvgcxXpfOfyI0ntWlhiHkDrww8GqdVhgLe6YHHADNjLNQQ9AxuB6Y-anzM67rsLiwqVQuaqJcHYPePay&attredirects=0.

¹⁰ Intelligence and Security Committee report, para. 2.

¹¹ Joint Committee on the Draft Investigatory Powers Bill, 'Draft Investigatory Powers Bill Report', HL Paper 93, HC 651, 11 February 2016, available at: <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf>, pp 7-24.

¹² Joint Committee on the Draft Investigatory Powers Bill report.

¹³ Full text available at: <http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0143/16143.pdf>.

¹⁴ For list of all proposed amendments, see Public Bill Committee, 'Investigatory Powers Bill', 12 April 2016, available at: http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0143/amend/investigatory_day_pbc_0411.pdf.

The Home Secretary also confirmed that Judicial Commissioners must consider the “overriding public interest” when authorising the use of communications data to identify journalistic sources and that only in “exceptional and compelling” cases must bulk personal datasets and medical records be examined and retained.

Human rights aspects

For its part, the Home Office has issued an ‘ECHR Memorandum’ outlining which rights are engaged by the Bill and it considers that these are adequately safeguarded within the legislative framework.¹⁵ In summary, it claims that the right to privacy under Article 8 ECHR, the right to freedom of expression under Article 10 ECHR and the right to property under Article 1 Protocol 1 ECHR are engaged by the Bill.¹⁶ The Home Office refers to various in-built general safeguards against the abuse of such investigatory powers by the Executive including the need for judicial approval of warrants, the oversight function of Investigatory Powers and Judicial Commissioners and the procedural rules of the Investigatory Powers Tribunal. It also outlines how the main features of the Bill (interception of communications data, equipment interference, bulk interception and retention, etc.) are in accordance with the law, necessary and a proportionate means of achieving a legitimate aim. This is a position reiterated by the JCHR, stating that the Bill represents

a significant step forward in human rights terms towards the objective of providing a clear and transparent legal basis for the investigatory powers being exercised...[.]¹⁷

Principally, the main rights in issue are the right to respect for privacy and the right to freedom of expression. Whilst the Home Office has mentioned the right to property in its ECHR memorandum, human rights organisations have not dealt with this in detail. Instead, equipment interference has been addressed in the context of individual privacy rights. Moreover, and while unmentioned in the ECHR memorandum, several aspects of the Bill engage the right to a fair trial under Article 6

¹⁵ Home Office, ‘Investigatory Powers Bill: European Convention on Human Rights Memorandum’, 8 March 2016, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506171/ECHR_Memo_-_Introduction.pdf.

¹⁶ ECHR Memorandum, para. 18.

¹⁷ Joint Committee on Human Rights, ‘Legislative Scrutiny: Investigatory Powers Bill’, HC 104, 2 June 2016, para. 1.21, available at: <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/104/104.pdf>.

ECHR and Article 14 ICCPR. The Home Office also provided an 'Operational Case for Bulk Powers' briefing paper, justifying in further detail the need for such powers, but presenting no human rights analysis.¹⁸ The JCHR recommended in its legislative scrutiny report that this case be reviewed by the Independent Reviewer of Terrorism Legislation, David Anderson QC.

(a) *Right to privacy*

The JCHR considers privacy to be the "most relevant right engaged by the Bill".¹⁹ Various parts of the Bill engage the right to privacy which encompasses not only the consequences of accessing large volumes of (potentially sensitive) personal data but also issues of clarity, precision and foreseeability considered under Article 8(2) ECHR.

- Bulk interception, acquisition and retention of communications data and personal datasets, and bulk interference with equipment:

The general position on the Bill's impact on the right to privacy is outlined in Liberty's written evidence to the Joint Committee:²⁰

Liberty believes that Article 8 requires that individuals' privacy should not be interfered with unless there is clear reason to suspect crime, and as such, expansive distributed databases of innocents' communications are unlawful. Liberty believes that further processing personal data, without judicial authorisation and for purposes unconnected with serious crime would constitute a further unjustified interference with Article 8 rights.

Whilst the interception and retention of communications data, and equipment interference may engage the right to privacy, this is potentially even more acute in cases of bulk warrants (part 6) and bulk dataset warrants (part 7). In particular, the written evidence of three UN Special Rapporteurs has noted that the failure to link the issuance of warrants to specific offences may "heighten the risk of excessive and disproportionate

¹⁸ Home Office, 'Operational Case for Bulk Powers', available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504187/Operational_Case_for_Bulk_Powers.pdf.

¹⁹ Joint Committee on Human Rights report, para. 1.13.

²⁰ Joint Committee on the Draft Investigatory Powers Bill report, p. 851, available at: <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20written%20evidence%20on%20the%20Draft%20Investigatory%20Powers%20Bill%20%28December%202015%29.pdf>.

interception” in violation of Article 8 ECHR.²¹ In a subsequent report by the UN Special Rapporteur for privacy, it is claimed that bulk surveillance and bulk hacking (equipment interference) should “be outlawed rather than legitimised” given the findings of the CJEU and the ECtHR to the effect that such measures are “disproportionate” and “privacy-intrusive”.²² Moreover, in a report on surveillance published after a visit to the UK in January 2016, the Council of Europe’s Commissioner for Human Rights stated that “from a privacy point of view, equipment interference is very problematic”.²³

Bulk personal datasets may also engage Article 8 ECHR in light of their indiscriminate nature. In its written evidence, Liberty emphasises that such data includes the data of deceased persons and “any information which is not data” although this latter interpretation was removed in the IPB introduced in March 2016.²⁴ It is therefore possible that such mass acquisition and retention of data is unnecessary and disproportionate to the legitimate aim being pursued. The fact that data collected is bulk, not individual, makes it “probably impossible to do a proper proportionality assessment” as noted by Martin Scheinin in his oral evidence to the JCHR although other academics did not consider such powers to be inherently incompatible with the ECHR, a view adopted by the JCHR.²⁵ The JCHR did however note that the provisions on thematic warrants are “too broadly drafted” and recommend that the Bill be amended to ensure the description in the warrant is sufficiently specific.²⁶ It also recommended

²¹ Joint Committee on the Draft Investigatory Powers Bill report, p. 1313. This was the written evidence of 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.

²² Human Rights Council, Joseph Cannetaci, ‘Report of the Special Rapporteur on the right to privacy, Joseph Cannetaci’, UN doc. A/HRC/31/64, 8 March 2016, available at: <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjF7-SXoffLAhWCwBQKHxDiCUsQFgqqMAE&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FPrivacy%2FA-HRC-31-64.doc&usq=AFQjCNHYwGVmdH7luFsx87x-Zv8kqgoHLw>, para. 39, citing *Maximilian Schrems v Data Protection Commissioner*, C-362/14, Grand Chamber, 6 October 2015 and *Roman Zakharov v Russia*, [47143/06](#), 4 December 2015.

²³ Council of Europe Commissioner for Human Rights, ‘Memorandum on surveillance and oversight mechanisms in the United Kingdom’, Comm DH (2016) 20, 17 May 2016, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2919538&SecMode=1&DocId=2375752&Usage=2>, para. 38.

²⁴ Liberty’s written evidence, para. 96.

²⁵ Joint Committee on Human Rights report, para. 2.5.

²⁶ Joint Committee on Human Rights, para. 3.9.

that periodic review of the continuing necessity for bulk powers take place.²⁷ Amnesty International went further in its written evidence to the Joint Committee claiming that indiscriminate mass surveillance practices “are never a proportionate interference with the rights to privacy”.²⁸

Within the context of Article 8(2) ECHR and “in accordance with the law”, the Bill may engage the principles developed in ECtHR jurisprudence since *Klass v Germany* [1978] such as the requirements that legislation must be clear and precise, and provide adequate and effective safeguards against abuse of power. Both Liberty and JUSTICE have raised concerns about the imprecise nature of legislation which is designed to collect bulk rather than targeted data.²⁹ This was outlined in *Davis and Watson v SS Home Office* [2015] and before this in *Liberty and others v GCHQ and others (No. 2)* [2015] where the Investigatory Powers Tribunal held that “the legal regime governing the intelligence services had not complied with the requirements of legal certainty under Articles 8 and 10 ECHR”. Notably, the Council of Europe Commissioner for Human Rights has highlighted the ineffectiveness of mass surveillance for countering terrorism, making it “not only dangerous for the respect of human rights, but also a waste of resources”.³⁰

- Legal professional privilege:

The Bill raises an issue of legal privilege. Notably, when warrants are sought for the interception of (bulk) communications data or (bulk) equipment interference, items subject to or likely to be subject to legal privilege may be included where there are “exceptional and compelling circumstances”.³¹ In addition to the potentially broad parameters for acquiring such data, it has been noted by the UK government itself that “since January 2010, the policies and procedures for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material have not been in accordance with human rights legislation specifically Article 8(2) ECHR”.³² The JCHR commented that there was no rationale behind the “targeting of lawyer-client

²⁷ Joint Committee on Human Rights report, para. 2.17.

²⁸ Joint Committee on the Draft Investigatory Powers Bill, p. 43, para. 6.

²⁹ Liberty’s written evidence, para. 34; Joint Committee on the Draft Investigatory Powers Bill report, p. 33, para. 84.

³⁰ Council of Europe surveillance report, para. 56.

³¹ Investigatory Powers Bill, clauses 25, 100, 135 and 171.

³² Liberty’s written evidence, para. 127, citing <http://www.reprive.org.uk/press/government-concedes-polices-on-lawyer-client-snooping-were-unlawful/>.

communications when communications which further a criminal purpose are not covered by legal privilege (the so-called 'iniquity exception')".³³ The JCHR therefore recommended that this power be removed from the Bill given it does not satisfy the test of necessity.

- Risk of hacking/leaks:

A final aspect of the right to privacy is the potential security risk to the people whose personal data has been stored in the event that this data is hacked, leaked, etc. This is particularly worrisome where the bulk nature of the data is such that the majority of people subject to surveillance may have no connection or likely connection to criminal activity. The potential impact on individuals has already been outlined above in relation to the definition of bulk personal datasets. In addition to raising concerns as to the necessity or proportionality of such measures, these practices may expose individuals to privacy breaches where others are able to use their data in a malicious way. Liberty, in particular, refers in its written evidence to the Joint Committee, to the multiple instances of hacking in the UK in recent years including those involving Talk Talk and Vodafone.

(b) Right to freedom of expression

The right to freedom of expression may be engaged by the Bill specifically in relation to clauses on journalistic sources. As with other sources of data, warrants may be authorised where it is necessary and proportionate for purposes of, *inter alia*, "national security", "economic well-being" and "public health". The UN Special Rapporteurs have outlined the vague nature of such reasons and the fact that these are "not tethered to specific offences".³⁴ The Special Rapporteurs claim that such broad justifications for collecting communications data to identify or confirm journalistic sources may go beyond the Article 19(3) ICCPR exceptions. In addition, the right of journalists not to disclose information as well as the right of non-disclosure are potentially engaged by clause 68 of the Bill, as emphasised by the Equality and Human Rights Commission in reference to section 12(4) HRA. The Special Rapporteurs further draw attention to the broad powers of the Secretary of State to establish communications regulations which may lead to "blanket restrictions on encryption that affect massive numbers of persons".³⁵ Consequently, both this and the

³³ Joint Committee on Human Rights report, para. 6.7.

³⁴ UN Special Rapporteurs' written evidence, para. 11.

³⁵ UN Special Rapporteurs' written evidence, para. 17.

clauses on journalistic sources might have a “chilling effect” on the freedom of expression and opinion. Moreover, the Joint Committee scrutinising the Bill recommended reconsidering the level of protection the proposed legislation affords to journalistic sources and materials and to ensure the relevant clauses meet the requirements of Article 10 ECHR.³⁶

Despite amendments to provide further protections of such data, the Council of Europe Commissioner for Human Rights remains concerned at the inadequate protections for journalists.³⁷ The JCHR made the following important point in relation to protection of journalistic sources:

the safeguard of independent review by a Judicial Commissioner provided in the Bill is inferior to the equivalent safeguard in PACE and the Terrorism Act 2000 because the hearing before the Commissioner will not be on notice. In our view, this gives rise to a risk of incompatibility with Article 10 ECHR. We accept that notification should not prejudice the investigation but consider that this can be dealt with by the wording of the clause.³⁸

The JCHR submitted that the same protections afforded to journalists under the search and seizure provisions of PACE should be replicated in the IPB.³⁹ In relation to MPs communications, the JCHR noted that the requirement that the Prime Minister be consulted before MPs communications are intercepted was insufficient, advocating an “additional safeguard” that the Commons Speaker or Presiding Officer of devolved institutions be given this role.

(c) Fair trial rights

The procedure for ministerial and judicial authorisation of warrants (the so-called ‘double-lock’) gives rise to concerns regarding the right to a fair trial under Article 6 ECHR and Article 14 ICCPR. An innovative part of the Bill requires that, subsequent to a Secretary of State application for issuance of a warrant, approval must be obtained by a Judicial

³⁶ Joint Committee on the Draft Investigatory Powers Bill, ‘Draft Investigatory Powers Bill Report’, HL Paper 93, HC 651, 11 February 2016, available at: <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf>, paras 554, 556.

³⁷ Council of Europe surveillance report, paras 43-45.

³⁸ Joint Committee on Human Rights report, para. 7.11.

³⁹ Joint Committee on Human Rights report, para. 7.12.

Commissioner or in “urgent cases” retrospectively within three working days.⁴⁰ A number of fair trial issues arise from this procedure. First, the Investigatory Powers Commissioner and Judicial Commissioners are appointed by the Prime Minister rather than the Judicial Appointments Commission.⁴¹ The Council of Europe Commissioner for Human Rights has stated explicitly that this arrangement “may compromise their [Judicial Commissioners’] independence and impartiality, recommending that they be appointed by an independent body such as the Judicial Appointments Commission”.⁴²

Second, the effectiveness of the ‘double-lock’ has been questioned by the Equality and Human Rights Commission, Liberty, JUSTICE and others in light of clause 21(2) of the Bill which requires Judicial Commissioners, when deciding whether to authorise the issuance of a warrant, to “apply the same principles as would be applied by a court in an application for judicial review”. It is claimed that this circumscribes Judicial Commissioners’ powers to assess the evidence, permitting them to reject an application only where the Secretary of State has “behave[d] in an extraordinary manner” or unreasonably.⁴³ Given that the ECtHR in *Klass v Germany* [1978] and *Dumitru Popescu v Romania (No. 2)* [2007] has emphasised the need for “effective supervision of State surveillance by an independent judiciary”, the measures proposed in the Bill may not permit adequate oversight.

Third, despite introduction of an error reporting process and a domestic right of appeal from the IP Tribunal, concerns remain over the lack of adversarial proceedings, publically unavailable judgments and the inability to make a declaration of incompatibility under the Human Rights Act 1998.⁴⁴ Fourth, clause 48 of the Bill precludes the disclosure, use or challenge of intercept evidence in legal proceedings. Accordingly, it may infringe the rights of the defence to be unable to challenge evidence which has potentially been unlawfully obtained.⁴⁵ This effect on the conduct of a proper defence is furthered by the exceptions to clause 48 which permit the use of such evidence in closed material proceedings,

⁴⁰ Investigatory Powers Bill, clauses 21 and 22.

⁴¹ Investigatory Powers Bill, clause 194.

⁴² Council of Europe surveillance report, para. 26.

⁴³ Liberty’s written evidence, para. 2; David Davis MP, <http://www.daviddavismp.com/david-davis-writes-for-the-financial-times-about-the-draft-investigatory-powers-bill/>.

⁴⁴ Council of Europe surveillance report, paras 16, 31.

⁴⁵ Liberty’s written evidence, para. 101.

special immigration appeals commission proceedings and others which are subject to greater secrecy and often inaccessible to the public.