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GENERAL COMMITTEES

Public Bill Committee

INVESTIGATORY POWERS BILL

Fifth Sitting

Thursday 14 April 2016

(Morning)

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Monday 18 April 2016

The Committee consisted of the following Members:

Chairs: †Albert Owen, Nadine Dorries

† Atkins, Victoria *(Louth and Horncastle)* (Con)
† Buckland, Robert *(Solicitor General)*
† Cherry, Joanna *(Edinburgh South West)* (SNP)
† Davies, Byron *(Gower)* (Con)
† Fernandes, Suella *(Fareham)* (Con)
† Frazer, Lucy *(South East Cambridgeshire)* (Con)
† Hayes, Mr John *(Minister for Security)*
† Hayman, Sue *(Workington)* (Lab)
† Hoare, Simon *(North Dorset)* (Con)
† Kinnock, Stephen *(Aberavon)* (Lab)
† Kirby, Simon *(Brighton, Kemptown)* (Con)
† Kyle, Peter *(Hove)* (Lab)
† Matheson, Christian *(City of Chester)* (Lab)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Starmer, Keir *(Holborn and St Pancras)* (Lab)
† Stephenson, Andrew *(Pendle)* (Con)
† Stevens, Jo *(Cardiff Central)* (Lab)
† Warman, Matt *(Boston and Skegness)* (Con)

Fergus Reid, *Committee Clerk*

† attended the Committee

Public Bill Committee

Thursday 14 April 2016

(Morning)

[Albert Owen *in the Chair*]

Investigatory Powers Bill

11.30 am

The Chair: Before we continue with line-by-line scrutiny of the Bill, I have a number of announcements to make. First, some amendments appear as starred amendment on this morning's notice of amendments. One group—amendments 252 to 256, concerning clauses 34 to 36—were tabled on time, but there was an error and an oversight. They have been published today, however, and I have decided to use my discretion and select them as a single group this morning.

Amendments 250 and 251 to clause 30 are also starred. They are not new amendments, but have been disaggregated from amendment 94, which has been shortened. They will be marshalled for debate on clause 30, which they seek to amend, and have been selected in the first group of amendments.

New clause 7 is also starred but is not new and was previously tabled as amendment 163. The thrust of the new clause is exactly the same and I have selected the clause for debate as part of the group led by amendment 164.

Finally, I have spoken to the Minister about this, but I want to make it clear to the Committee that he can move that a clause stand part of the Bill formally, but that does not shut down debate. If other members of the Committee wish to debate it, they can do so, whether or not it is moved formally, and the Minister will have the right to reply before I put the question. I hope that is helpful to Members.

Clause 30

Modification of warrants

Keir Starmer (Holborn and St Pancras) (Lab): I beg to move amendment 68, in clause 30, page 23, line 41, leave out paragraph (5)(c).

The Chair: With this it will be convenient to discuss the following:

Amendment 69, in clause 30, page 24, line 5, leave out paragraphs (6)(d) and (e).

Amendment 94, in clause 30, page 24, line 8, leave out subsection (7)

This amendment, and others to Clause 30, seeks to circumscribe the power to modify warrants without judicial authorisation.

Amendment 70, in clause 30, page 24, line 8, leave out subsections (7) and (8).

Amendment 95, in clause 30, page 24, line 32, after "major", insert "or minor".

Amendment 96, in clause 30, page 24, line 32, leave out from "warrant" to end of line 33 and insert—

"pursuant to subsection (5) or (6), if a Judicial Commissioner determines".

Amendment 71, in clause 30, page 24, line 46, leave out subsection (11) and insert—

"(11) In any case where a major modification of a warrant is sought under paragraph (4)(a), section 21 (Approval of warrant by Judicial Commissioners) applies to the decision to modify a warrant as it applies in relation to a decision to issue a warrant.

(11A) In a case where any modification under subsection (4) is sought to a warrant to which section 24 (Members of Parliament etc.) or section 25 (Items subject to legal privilege) applies, section 21 (Approval of warrant by Judicial Commissioners) applies to the decision to modify the warrant as it applies in relation to a decision to issue the warrant."

Amendment 250, in clause 30, page 24, line 46, leave out subsection (11)

This amendment, and others to Clause 30, seeks to circumscribe the power to modify warrants without judicial authorisation.

Amendment 72, in clause 30, page 25, line 3, leave out subsection (12).

Amendment 251, in clause 30, page 25, line 7, leave out subsection (13).

This amendment, and others to Clause 30, seeks to circumscribe the power to modify warrants without judicial authorisation.

Amendment 74, in clause 31, page 26, line 13, at end insert—

"(8) Where, by virtue of section 30(11), section 25 (items subject to legal privilege) applies in relation to the making of a major modification of a warrant pursuant to section 30(7), this section applies as if each reference in subsections (2), (5) and (6) to a designated senior official were a reference to a Judicial Commissioner."

Keir Starmer: In the light of the statement you have just made, Mr Owen, I want to thank the Bill Office team for the hard work they have done on tracing down the amendments—particularly amendments 252 to 256—so that they can be starred for today's purposes. They are working extremely hard and we are all really grateful. I also thank the Government, because although some of these amendments do not add a great deal to other amendments that have been tabled, amendments 252 to 256 are substantive. The Government could have taken the view that they have not had sufficient time to prepare for them, through no fault of their own. I also thank you, Mr Owen, for starring them and allowing us to debate them so that we can move on through the Bill today.

Let me turn to the amendments to clause 30, which deals with modifications. As you will remember, Mr Owen, on Tuesday we debated at some length the necessity and proportionality tests when a warrant is to be issued, as well as the role of the Secretary of State, the scrutiny that the Secretary of State applies to a warrant and the role of the judicial commissioners. Although there was disagreement between us on who should exercise precisely which function, there was agreement that there should be intense scrutiny at all stages to ensure that the warrant is necessary and proportionate and correctly identifies the people, premises and operations to which it relates.

That can be seen in clause 15(1) and (2), which we touched on on Tuesday and which relate to the subject matter of warrants. Clause 15(1) states that a warrant may relate to

"a particular person or organisation"

or

"a single set of premises".

Then there is the thematic targeted interception warrant in clause 15(2), which sets out the group of persons who could be identified.

Clause 27 complements clause 15 by setting out the requirements that must be met by the warrants. I draw attention to clause 27, because clause 30, dealing with modification procedures, relates back to it. The requirements that must be met under clause 27 are as follows. A warrant that relates to a particular person or organisation must name or describe that person or organisation. A warrant that relates to a group of persons related by a purpose or activity must describe the purpose or activity. A warrant that applies to more than one organisation must describe the investigation and name or describe the persons involved. Therefore, on the face of it, there is scrutiny in the process. Then there is a requirement to set out in some detail on the face of the warrant what it actually relates to—the people, activity and premises, as set out in subsections (3), (4) and (5) of clause 27.

Clause 27(8) sets out that

"Where…a targeted interception warrant or mutual assistance warrant authorises or requires the interception of communications…or…a targeted examination warrant authorises the selection of the content…the warrant must specify the addresses, numbers, apparatus, or other factors, or combination of factors, that are to be used for identifying the communications."

That is important because it sets out the higher level of protection for content, either under a targeted intercept warrant itself or under an examination warrant on the back of a bulk warrant. The requirements under clause 27 sit with all the scrutiny, checks and safeguards of the double-lock mechanism. They are all additional important safeguards.

We then get to clause 30, which states:

"The provisions of a warrant issued under this Chapter may be modified at any time by an instrument issued by the person making the modification."

This is to modify any of the warrants I have just described, which will have set out, on the face of the warrant, the details of the application of the warrant. The modifications that can be made are set out under clause 30(2)(a) and (b). Subsection (2)(a) relates to adding, varying or removing names, descriptions and premises. Those are the three subsets under clause 27—in subsections (3), (4) and (5)—which are all required. Clause 30(2)(b) relates to the factors that are relevant to content warrants, either as a targeted content warrant or as an examination warrant following on from a bulk one.

Clause 30(2) states:

"The only modifications that may be made under this section are",

suggesting that it is rather limiting. However, if we go back to clause 27, I think—I will be corrected if I am wrong—that the only thing that is left out in relation to modification is the testing and training activities. Everything else is up for grabs in relation to modification. It is "only" those provisions, but what is not said is that that is practically everything that will ever be on the face of any warrant, save for a training warrant and a testing warrant. Therefore, the scope of modification is very wide.

Then there is a subdivision in clause 30(4) between "major" modifications and "other" modifications. That does not quite sit with clause 30(2), but a major modification is essentially clause 30(2)(a), but without the removing: if a name is removed, it is not a major modification, but if a name, description, organisation or premises is added or varied, that is a major modification. Everything else, which is what is left in clause (30)(2)(a) and the factors in clause 27(8), is described as "minor".

I want to trace through the journey of a modification, starting with a major modification. These are considered to be the most important modifications. The first issue that crops up is who can make a modification. Under clause 30(5), it is the Secretary of State, a member of the Scottish Government in certain cases or a senior official. The first, obvious point is that there is no double lock. There is no reference to a judicial commissioner. There is no notification requirement and no requirement for the judicial commissioner to consider the warrant; it simply is the Secretary of State and this additional senior official in certain circumstances.

I should mention in passing that a major modification can even be made in an urgent case by someone described in clause 30(6)(d) and (e) as

"the person to whom the warrant is addressed, or…a person who holds a senior position in the same public authority".

That is in addition to a senior official. In an urgent case, they can add a name, a premises or an organisation.

We then move on to the purposes. For major modifications, we jump straight to clause 30(9), where I acknowledge there is a necessity and proportionality test—the decision maker has to think about the necessity and proportionality of the amendment. Where the decision is made by a senior official rather than the Secretary of State, there is a duty to notify the Secretary of State. That is it for major modifications. The Secretary of State—there is separate provision for Scotland—or a senior official makes the decision on necessity and proportionality grounds. They can add practically anything that could have been on the face of the warrant, apart from testing and training. I read into the duty to notify the Secretary of State that by implication she must consent to it, because otherwise she would presumably reverse the decision, although that is not expressed on the face of the Bill.

There is no duty to go to a judicial commissioner, no reference to a judicial commissioner and no notification to a judicial commissioner of the modification, which can be very wide. A warrant could be issued on day one to cover a given individual. On day two, three or four, another individual, premises or organisation can be added without the need to go through the double-lock process. That cuts so far through the safeguards as to make them practically meaningless in any case that comes up for modification.

Joanna Cherry (Edinburgh South West) (SNP): The hon. and learned Gentleman will have seen David Anderson's supplementary written evidence. In relation to clause 30, he wrote:

"New persons, premises or devices…may be added on the say-so of a senior official, without troubling…the Judicial Commissioner…I adhere to my opinion that any such additions should be approved by the Judicial Commissioner."

Is that the general thrust of the hon. and learned Gentleman's amendments?

Keir Starmer: It is, and it is why not only David Anderson, but many others have expressed concern about the provision. Stepping back for a minute, even if a sensible case can be made for a modification process, a modification process that allows anything on the face of the warrant to be amended—save for training and testing—without the need for that modification to go through the double lock cuts so far through the whole point of the double lock. Through modification, everything that it was feared would happen without a double lock can take place.

The only other thing relevant to a major modification is subsection (15), which states:

"Nothing in this section applies in relation to modifying the provisions of a warrant in a way which does not affect the conduct authorised".

That is not a limiting, but an excepting subsection.

I want in particular to highlight clause 30(11). On Tuesday we debated the issue of Members of Parliament and legal privilege. Although there was a difference of approach among members of the Committee, there was a general consensus that special protection is needed when it comes to MPs' communications and legal professional privilege, yet subsection (11) states:

"Sections 24 (Members of Parliament etc.) and 25…apply in relation to a decision to make a major modification of a warrant by adding a name or description as mentioned in subsection (2)(a) as they apply in relation to a decision to issue a warrant; and accordingly where section 24 applies only the Secretary of State may make the modification."

Two things are clear from that provision. First, for minor modifications to warrants that touch on MPs' communications and for minor modifications that deal with legal professional privilege, the decision does not need to be made by the Secretary of State and it does not go a judicial commissioner. Secondly, clauses 24 and 25, which are specifically referenced in clause 11, do not require the judicial commissioner to be involved.

If I am wrong, I will stand corrected right now, but on any reading of that, I cannot see how a modification to a warrant that brings it within the otherwise special protection for MPs and/or legal professional privilege is required to be put back through the judicial commissioner. I invite the Minister to correct me on this, because otherwise it is a worry that a warrant could be modified and taken into that otherwise protected territory without any notion of a double lock and simply the safeguard of having the Secretary of State making the decision, not a senior official.

11.45 am

The Solicitor General (Robert Buckland): I am sure that in due course we will outline where we are with regard to the role, or lack thereof, of the commissioner. With regard to a warrant involving a Member of Parliament, if that relates to a single individual—let us say a single Member of Parliament—that cannot be modified to have other people added in that category. There would have to be a fresh application relating to separate names. That is an important caveat that deals with a lot of the hon. and learned Gentleman's genuine concern.

Keir Starmer: I am grateful for that intervention; I am happy to be intervened on. I think that comes from paragraph 5.61 of the code, on page 33, which says:

"A targeted warrant that relates to just one specified person, organisation or location, for example, cannot be modified to go beyond the original scope of the warrant."

Slightly further down it says:

"Whilst this can be subject to modification, it cannot be modified to move beyond or outside of the scope of the original thematic warrant."

This is an important point. First, something as important as that needs to be in statute—that is critical. In other words, if someone has a warrant for person A on a Monday and they want to add person B on a Tuesday, they must get a new warrant, not modify the existing warrant. That should be in statute, not in a code. There is obviously the question of what goes in the code, but that safeguard is important. If, for an example, a warrant touched on A on a Monday and could be modified in a way that might touch on an MP or go into prohibited legal privilege on a Tuesday, that requires more than a paragraph in a code of practice, because it is really important.

Again, I invite an intervention, but the code says:

"A targeted warrant that relates to just one specified person, organisation or location, for example, cannot be modified to go beyond the original scope of the warrant."

That is a carefully drafted sentence. What is the position when there is a targeted warrant that relates to two people and the idea is to add one, and that one is an MP or a solicitor? I invite an intervention because that is not covered by the code's wording.

The Solicitor General: I think I can assist. Perhaps there is a bit of a misconception about the current situation. If a warrant says, let us say, person A and others are known, the Regulation of Investigatory Powers Act 2000 does not require an amendment to the warrant even if another person becomes known and therefore becomes a potential target. We are tightening that up and making it a requirement that if person B becomes known, even though the ambit of the warrant at the moment covers others unknown, there has to be an amendment where we know the identity of individuals. The answer to the hon. and learned Gentleman's question is that it can only be amended if there is an unknown part to the original warrant, as opposed to specific names.

Keir Starmer: I am grateful for that intervention. This is an improvement on RIPA, but that is setting the bar pretty low when it comes to modifications.

The Solicitor General: Let us not forget that modifications to add MPs can only be authorised by the Secretary of State. That is another important safeguard. I would not pooh-pooh what we are doing by saying that we are improving on RIPA. This is a significant improvement from where we are.

Keir Starmer: I look forward, on Report or Third Reading, to somebody informing MPs that a modification of the warrant that includes them can be made by the Secretary of State, without the involvement of a judicial commissioner. Understandably, great play was made of the role of the judicial commissioner when colleagues on both sides of the House were concerned about their communications with constituents. They were assured

that there was a double lock and that a modification could not happen without a judge looking at it as well. Somebody has to stand up, be honest with them and say, "Well, it can actually, because it can be modified to bring you within it." There is nothing on the statute or in the code to prohibit that. That is a very serious proposition because these are not urgent modifications. They are permanent and, in many cases, slower-time modifications.

I understand that, in a fast-moving case, urgent procedures are needed and urgent modification procedures may be needed, but these include slower-time, considered, permanent modifications to a warrant. Somebody needs to tell our colleagues that they can be included in the warrant by modification, and that it starts and ends with the Secretary of State and goes nowhere near a judge. They need to know that.

Somebody also needs to address the legal privilege point because I do not think that is addressed at all on the face of clause 30 or, as far as I can see, in the modifications part of the code of practice. Again, if I am wrong about that I will be corrected. From my reading of the Bill, a modification could be made to allow intercept in the otherwise protected area of legal professional privilege. The Secretary of State has to apply the higher test—I accept that—but it will never go to a judge. A sort of comfort is being held out to lawyers that, even in the extreme case where they will be targeted, it will at least be seen by a judge. That comfort is shot through by this provision. The clause really needs to be taken away and reworked in the light of the significant flaws—that the code is not clear enough and is not the right place for protections for MPs or for legal professional privilege. That should be on the face of the statute through an appropriate amendment.

I turn to the so-called minor amendments. We must remember that although they are called minor amendments, they are not minor. Clause 27(8) is really what comes within in the ambit of a minor amendment, and that is all the detail about how the content will be examined. There is a bulk warrant, which, by its very nature, hoovers up a lot of communications. Then there is an examination warrant, which is intended to be a check and balance, and that is why there is a requirement to set out how the examination warrant will work—the address, the numbers, the apparatus, and a combination of other factors and so on. That is the really important safeguard. It is the only safeguard for bulk warrants accessing content, yet all of that is deemed to be a minor amendment. The amendments to the examination warrant—which, in truth, is the most important warrant for the bulk powers after the wide bulk warrant in the first place, as this is where we are actually looking at stuff—are all deemed to be minor.

What is the route for a so-called minor amendment? Let us trace it. Who can make the decision on a minor amendment? Clause 30(6) states that a minor amendment may be made by the Secretary of State, the relevant Scottish Government Minister, a senior official, the person to whom the warrant is addressed or a person who holds a senior position in the same public authority as that person. There is no urgency requirement. Real-time, slow amendments to the way bulk warrants will be subjected to examination can be made in the ordinary, run-of-the-mill case by the person to whom the warrant is addressed—they can modify their own warrant—or by a person who holds a senior position in the same public authority as them. With no disrespect to the individuals in those positions, we have dropped a long way down the ranking when it comes to the authority for sign-off of an amendment to an examination warrant that allows my content or anyone's content to be looked at where it has been scooped up under a bulk provision.

I am afraid it gets worse. Whereas for a major modification there is a requirement for the decision maker to look at necessity and proportionality, there is no such requirement for minor amendments. That is astonishing and very hard to justify. I will listen carefully in due course to what is said, but why is there no need on the face of the Bill to consider whether a so-called minor modification to an examination warrant in relation to bulk powers is necessary or proportionate? Subsection (9) is clearly drafted only to catch major modifications.

Consider that a minor amendment to a warrant that applies to an MP or that touches on legal professional privilege could be made by the person to whom the warrant is addressed or someone in a senior position in the same public authority. I ask Members to inform their colleagues of that. There is no requirement that a minor amendment even goes to the Secretary of State, and certainly nowhere near a judicial commissioner.

The approval mechanism in clause 31 is only for major modifications. There is a low level of authority for making minor modifications, and there is no test. If I were a senior official in the public authority, I might say, "You just asked me to make a modification. What am I supposed to take into account?" but on the face of the Bill, there is not even a test to be applied. There is no duty—again, I am happy to be corrected—to inform the Secretary of State. For major modifications, there is such a duty, but for minor ones, there is not. Someone in a senior position in a public authority can therefore make the modification and not notify the Secretary of State. There is certainly no double lock. It is no wonder the Joint Committee was so concerned about this provision, and it is no wonder so many others have raised such concerns.

Matt Warman (Boston and Skegness) (Con): In the Joint Committee's examination of this provision, one crucial point we raised was exactly the one the hon. and learned Gentleman raises. We were told that the crucial phrase is in clause 30(2)(a):

"adding, varying or removing the name or description of a person".

It is the description of a person, not the person. This is about aliases for individuals; it is not about changing the individuals themselves. I wonder if he has considered that point, which the Joint Committee was assured of in its evidence.

Keir Starmer: I would be interested in the Government's position on that, because it does not sit with what is in the code of practice. If all clause 30 intends is to say, "We thought he was called Keir Starmer; now we know he's called Steve"—I have always wanted to be called Steve—"but the warrant applies to exactly the same person," or, "We thought it was 137 Charlton Road; we now realise it's 172, but it's the same premises", I will sit down now and invite an intervention.

The Solicitor General: For minor ones.

12 noon

Keir Starmer: No, I think the intervention is suggesting major modifications—subsection (2)(a) only applies to major modifications. That is, apart from the removing, it is the description of a major modification. If a major modification is only intended to allow the name of the same individual to be swapped—where it is appreciated that it is the same person, now called not X, but Y—that is one thing, but the code of practice then does not make much sense, because it is written on the basis that individuals are being added.

I am inviting an intervention, but I am not getting one. I would quite like one, because I would be less concerned. If this is right and that is what the Joint Committee was told—that that was the intention—then the measure clearly needs to be rewritten, which would remove a lot of concern. That is why I invite some clarification. I suspect that the non-intervention is because that understanding is not the right answer.

The Solicitor General *rose—*

The Chair: Order. I gently remind the Minister that he has the opportunity to respond on behalf of the Government at the end of our debate on the group. We do not need to have a ding-dong on each point.

The Solicitor General: I will help! I thought that I had made the point clear. What we are dealing with here is major modifications, which will allow for the warrant to be amended to include the names—for example, of a kidnap gang—as they become apparent. At the moment, RIPA does not allow for that—there is no such provision. We are putting that in the Bill, so that when names become known we may amend the warrant, because we think that that is fairer and more proportionate. The warrant will have been authorised initially against all of the gang, say, but we are then providing the specificity that should have been there anyway.

The Chair: For that very reason, Minister—interventions have to be short. The debate is continuing and Keir Starmer has the Floor; then there is the opportunity to respond.

Keir Starmer: I am grateful to the Solicitor General. That was helpful, because if the previous intervention is right, a lot of my concern would be focused elsewhere and save a lot of time—but I am afraid it is not. On the face of the Bill, and consistent with the code of practice, named—*[Interruption.]* I want to be clear, to have clarity about what we are arguing about, because the point is a very serious one. As everyone can see, there is the real potential for all the careful checks and balances devised under the Bill to be shot through by the modification process. That is the real concern, and I think it is a shared concern, certainly in the Joint Committee, but also in other places.

To be clear, I think that the Solicitor General is accepting that the measure is not simply about re-identifying with a different name a person who is already specified on the warrant; he is suggesting that it would be used if a warrant was issued in relation to a gang of some sort, when some members are known and others become known, and a mechanism for adding them is needed. If that is what was intended, why is that not what has been written in the clause?

Clause 30, as drafted, does not limit in that way. If it did, the subheading would be "Modification of thematic warrants", then it would state that where a thematic warrant has been issued naming a person, an organisation or whatever, and it becomes necessary to amend it, to clarify further the persons within the organisation, and so on, then that would be a much more restricted clause. That would probably have met some of the concerns of the Joint Committee and be a very different proposition, but that is not what has been drafted. In the code of practice, it is true, there are some warm words, but—

The Solicitor General: The hon. and learned Gentleman knows that the code of practice is much more than that and makes it clear that the measure is about thematic warrants. The mischief that he is worried about here is cured by the fact that if a sole named person is on the warrant, it cannot be modified to add another name; we would have to apply for a new warrant.

Keir Starmer: The question for the Minister is, if that is the purpose, why is the measure not limited to thematic warrants? It is impossible to answer that question unless one wants to keep open the option of modifying non-thematic warrants. It is a simple amendment, that the provisions of a warrant issued under whatever the relevant clause is may be modified by an instrument. In subsection (1), we could achieve exactly what the Solicitor General says is the clause's purpose by amending it to "themed warrants", but it has not been done, notwithstanding the concerns of the Joint Committee.

Lucy Frazer (South East Cambridgeshire) (Con): I wonder whether the hon. and learned Gentleman's concerns are addressed by the last five words of subsection (2)(a):

> "The only modifications that may be made under this section are adding, varying or removing the name or description of a person, organisation or set of premises to which the warrant relates".

The Home Secretary, or someone else, will receive a warrant relating to a particular person, course of action or premises, and only if that warrant relates to those things could someone then be added—it must relate to the warrant itself.

Keir Starmer: I have considered that, and it is fair to say that subsection (2)(a) would not allow, in essence, a completely fresh warrant to be issued under the modification procedure. There has to be a relationship between the modification and the warrant, so someone could not say, "I want a warrant against X today, and I'll modify it to include Y, which has nothing to do with X but it is handy to modify this warrant, as we have it before us." There has to be a relationship, which I accept is the intention and the purpose of clause 30, but the drafting is still far too wide. What if an MP or a solicitor is involved? What if it becomes known that there is a gang and we think that X, Y and Z are involved—we do not know the others—and we then learn that one of them is talking to their solicitor? The solicitor is then related. A modification would allow something to be brought in, and there is nothing to prevent it.

With all due respect to everyone who has worked hard on clause 30, of all the clauses in the Bill it is the one that the further I went through it, the further my jaw dropped because of just how wide and unlimited it is. In an area such as this, where we are talking about safeguards, it is not enough simply to point to what are in fact limited words in the code of practice. I will not invite the Minister to do something now, but I am curious—I may have misunderstood—that paragraph 5.64 of the code says:

"Minor modifications that are made by the warrant requesting agency are valid for five working days following the date of issue unless the modification…is endorsed within that period by a senior official…on behalf of the Secretary of State. Where the modification is endorsed in this way, the modification expires upon the expiry date".

I cannot find any reference to that anywhere in the Bill. If I am wrong, I will happily be corrected, but I do not know where that comes from. Obviously, my amendments would restructure the clause to try to make it workable, but I do not see paragraph 5.64 anywhere in the clause. It would help to have that clarified.

That brings me to the amendments, which I will address briefly. In the spirit of constructive dialogue, I have tried to propose a restructuring of the clause in a way that would narrow it while leaving a workable modification provision. My amendments are not intended to be unhelpful. Amendment 68 would leave out subsection 5(c) so that the modification for a major case sits with the Secretary of State. Amendment 69 would leave out subsections (6)(d) and (e) to cut out people below senior official level so far as minor modifications are concerned. Amendment 70 would leave out subsections (7) and (8) because they are not necessary. Amendment 71 would make it clear that, in relation to MPs and legal professional privilege, all modifications must go through a judicial commissioner—if a modification goes into a protected area, it would have to go through a judicial commissioner. Amendment 72 would leave out subsection (12) because it would no longer be relevant, as senior officials would be taken out of the equation. Amendment 74 would make it clear that certain modifications have to go through the judicial commissioner. I tabled those amendments as a serious attempt to improve clause 30, which is seriously deficient for all the reasons that I have outlined. For the Government to nod this through at this stage, without standing back and asking if they have got it right, would not be the right approach.

The Solicitor General: Although we have only heard one speaker, we have covered the ground on the issues at hand. The hon. and learned Gentleman's points about the importance of warrantry and the involvement of commissioners are interesting and important. This is all about fine-tuning what I regard to be an important step forward from RIPA in ensuring that we do not end up undermining the vitally important world-leading double-lock system that this Government want to introduce, by allowing the system of modification to be a back-door route. I am absolutely with him on that and know that he and other members of the Committee have advanced these amendments in that spirit.

The hon. and learned Gentleman is absolutely right to set the context of this debate and talk about the three areas of thematic warrantry that we are talking about—targeted interception, targeted assistance and mutual assistance warrants. He made the point about trying to make that clear on the face of the Bill and the code of practice not being enough. I will go away and think about that, because I think it is a reasonable point to make. If it needs to be made clearer, we are only too happy to help. I want to ensure that what I am about to say is underlined and made clear; what I say in Committee will greatly help to inform those who will operate in this area in the future.

We must be clear about what can be achieved by a modification in the first place. I have already said that the introduction of the concept of major modifications is an important new safeguard in the Bill, because of the absence of references to that in RIPA. What we had with the Regulation of Investigatory Powers Act 2000 was the authorisation of warrants on a thematic basis. I have given the example of a kidnap gang; RIPA requires that if, for example, the National Crime Agency wishes to intercept the communications of members of such a gang, their telephone numbers must be added to the warrant as they become known—not their names and identities, just that information. I do not think that is good enough and that is why that particular oversight and anomaly—I will be generous in that respect—needs to be corrected, which is what the Bill does. The code of practice makes it clear that names can only be added to a warrant when they are within the scope of the original warrant. For example, the name of a kidnapper could be added to a warrant that relates to a kidnap gang.

Keir Starmer: Is there a reason why paragraph 5.61 states that a

"targeted warrant that relates to just one specified person, organisation… cannot be modified",

which is pregnant with the idea that there is a different position when it is not just one? Was that a carefully drafted sentence that means exactly what it says, in which case what the hon. and learned Gentleman has just said has limited it, or was a wider application intended?

The Solicitor General: I do not think it was. I can give an example; let us say you and I are named on a warrant—God forbid—then that is a restricted warrant. There is no wriggle room. It is a bit like a conspiracy, where we might plead a conspiracy between A and B and others are known, which is perfectly permissible and very often the case in a conspiracy. But if it was a much more limited warrant naming you, me and perhaps one other named person, that does not give space to use the modification procedure to add another name because it has already been limited in its terms of reference.

Keir Starmer: I understand the Solicitor General's point. However, let us say that there was a warrant that named him and me, and a third person was then identified as being in league with us, whatever we were believed to be doing. What provision in the Bill or sentence in the code would actually prevent a modification to add that person? The Bill does not; paragraph 5.61 does not. The scheme that the Solicitor General describes is not the scheme in the Bill and the code. That is the problem.

12.15 pm

The Chair: Before you continue, Solicitor General, let me remind you that when you say "you", you are making reference to me, and I am impartial in this discussion.

The Solicitor General: You are right, Mr Owen; I stand corrected. I have lived my life speaking in the third person. I do not know why I—

The Chair: I think I can help you now. You are not in court; you are in Bill Committee.

The Solicitor General: That is the thing. The hon. Gentleman and I had this problem in a previous Bill Committee—I think I referred to the ministerial Bill team as "those who instruct me". I have not made that mistake yet, but that is the path I am being led down.

The Chair: I know you get the point. Continue.

The Solicitor General: I do get the point.

Simon Kirby (Brighton, Kemptown) (Con): Thank you, m'Lud.

The Solicitor General: We have not got to that stage yet, Mr Owen. One day, perhaps I will be entitled to address you in those terms, but not yet.

The Chair: Carry on.

The Solicitor General: Let me come back to the point. I disagree with the shadow Minister; I think the language is clear. I want to make it clear, on the record, that we do not seek, through the code of practice or through any sleight of hand in the drafting, to elide or blur divisions so that we can somehow get round the problem. If he and I were named on a warrant, another warrant would be needed in order to add another person, because the original warrant was targeted at named individuals: it did not have "and others unknown". That is why we have introduced this provision to improve the position.

Joanna Cherry: Does it not ultimately boil down to the statutory interpretation of subsection (2)(a)? The Solicitor General, who is a very distinguished lawyer, considers that it does not permit adding a new person. David Anderson QC, an equally distinguished lawyer, has stated in written evidence that he considers it does. The shadow Minister, also a distinguished lawyer, has argued eloquently that he does not believe that the Bill or the code prevent adding a new person. What is required from the Government is absolute clarity, because of the wide ambit of these powers.

The Solicitor General: I am grateful to the hon. and learned Lady. I am not saying that another name cannot be added. With a wider original warrant that says "Persons A, B and others unknown", of course an extra name can be added. If the warrant's original terms of reference are narrow—if they just include A and B—adding person C requires applying for a new warrant. With the greatest respect, I cannot make it any plainer or clearer than that. An ordinary warrant cannot be turned into a targeted, thematic warrant; that is the point. If a new warrant is needed, it must be applied for, and then the double lock will work.

Gavin Newlands (Paisley and Renfrewshire North) (SNP): Will that not be an incentive to make all warrants wide? The Solicitor General is saying that, when the original warrant is narrow, additional warrants will be needed, but when it is wide, names can be added.

The Solicitor General: The hon. Gentleman makes an extremely good point. That is why we are putting clause 30 in—because there is a danger, under the existing legislation, that a warrant can be drafted quite widely without having to come back and amend it in order to add extra names. I take his point, but I do not believe the clause will create a perverse incentive; on the contrary, I think it is vital. For those who draft the terms of the warrants, it will focus their minds on getting it right in the first place, so that we do not end up with the sort of mischief that he quite rightly warns about.

Jo Stevens (Cardiff Central) (Lab): If that is so important—we want to make an improvement—why can we not have what the hon. and learned Lady is asking for, which is some clarity? That would improve what is clearly a defective clause.

The Solicitor General: I take issue with the hon. Lady's assertion that the clause is defective. I do not think it is. There are one or two other points that I was already going to reflect on, and I will come to them later in my speech.

Let us just come back to the point that I know the hon. Lady wanted to make. If we end up with an original application that is too wide, it will not get through the double lock, because the commissioner will say, "Hold on. This is neither necessary nor proportionate. It doesn't pass the test of review. Sorry, Secretary of State, you've got it wrong." That is the whole thing that we are in danger of forgetting. I can see that the hon. and learned Member for Holborn and St Pancras is desperate to get in, so I will give way.

Keir Starmer: I really am desperate, because I want—if possible—to have an answer to the question that I put before, which is this: if what the Solicitor General is now saying is right, why does clause 30 apply to a section 15(1) warrant, because that simply does not come within the formulation?

The Solicitor General: What I would say to the hon. and learned Gentleman is that I am afraid we are forgetting the context. The mischief that he wants to deal with is that somehow an applicant for a warrant has got something in through the back door—it is too loose, too wide, and modification therefore becomes, in effect, a way of getting round the whole system. I do not believe, given my understanding of both the code of practice as drafted and of the proposed legislation as drafted, that we will get near to that nightmare scenario.

A section 15 warrant can be about an organisation. The point that I am seeking to make is that we are already in the realms of thematics, and therefore if someone has a warrant that has been drafted specifically, the process must be started again if they want to include other individuals.

May I deal with the question of the ability to modify warrants themselves? I do not think anybody is saying there should not be an ability to modify warrants; that was not part of the recommendations of any of the Committees that we know about. Also, of course, such a change would be a very significant reduction in the operational effectiveness of the warrantry process. It would mean, for example, that it would be necessary to

seek new warrants each and every time it was identified that an intercepted target got a new telephone or a new phone number. I am afraid that would slow down the process, and we think there is a significant danger that investigative and intelligence opportunities would be lost.

I am not accusing anybody on this Committee of wanting to do anything to endanger an investigation or indeed lives, but we have got to think about this issue in that context. Therefore, getting the balance right is quite clearly what we all want to do.

Suella Fernandes (Fareham) (Con): I sat on the Joint Committee that took evidence from the professionals on the front line, so I know that that very point was emphasised time and again. To quote some of the senior police officers, they are struggling to keep up with the serious criminals and the terrorists, who change their numbers and set up new email addresses and new technological addresses and identities. It is absolutely vital that we do not tie the hands of the police even further.

The Solicitor General: I thank my hon. Friend for the work she did with other colleagues on that important Committee. Of course, the context is that applications will be made on the basis of a warrant that has itself already gone through the double-lock procedure and that has already passed the tests that we know will be applied—that it is necessary and proportionate in the particular context of the case that is being dealt with.

Victoria Atkins (Louth and Horncastle) (Con): I wanted to emphasise that point. If a warrant has in the first instance been granted, it has met the tests of necessity and proportionality, and if a telephone number attributed to a person is added, it seems to me that the purpose of the warrant that was originally granted by the Home Secretary and the judicial commissioner does not change. Am I correct in my understanding of that?

The Solicitor General: My hon. Friend is absolutely right, and to try to manipulate this process to undermine that important procedure would be immediately spotted as a misuse of the processes and the safeguards that we are incorporating into this Bill.

I want to deal with the practicalities because, tempting though it is to impose a requirement on a judicial commissioner to authorise the day-to-day or sometimes minute-by-minute tactical operation of a warrant, it would be unnecessary and operationally damaging. There must be an element of agility when operating the system of investigation and there is real concern that we would fail to do the job of detecting crime and making sure the interests of everyone we represent are protected.

Ordinarily, such modifications will be made by a senior official in the warrant-granting Department, but when, for example, the identity of a gang member becomes apparent only in the middle of the night, it is right that the intercepting agency should be able to make the modification. That deals with the point about the fast-moving threat and the immediacy of the situation.

I will deal with as many as possible of the points the hon. and learned Gentleman raised, starting with the minor rather than major modifications in amendment 69. The amendment would prevent either the head of an agency or a senior official within that agency from making a minor amendment. We are dealing with minor modifications relating to adding a new communication address for warranted targets. An example is MI5 discovering a new mobile telephone number for a warranted target who is plotting to kill someone. The Bill enables the intercepting agency—MI5 in this case—to make the minor modification to the warrant, which will have been through the double-lock procedure, and to add that new mobile number. The danger of the amendment is that it would remove the ability to act swiftly to get coverage of the new subject's communications. With respect, I do not think it is necessary because the Secretary of State and the judicial commissioner will already have considered the necessity and proportionality of targeting interception against the individual. I will not repeat the point, but it is important for public safety.

On parliamentary and legal privilege, I have already indicated that a major modification would not be sought to a warrant against a Member of Parliament or in relation to any warrant that names a specific individual. The code of practice makes it crystal clear that major modifications can be made only to warrants that apply to a group of persons or an organisation.

Keir Starmer: I am grateful for the way the Solicitor General is explaining how the Government intend the modifications to apply. He says they would not be used in that way for legal professional privilege and Members of Parliament, but he cannot say they could not be. If I have missed it, I will sit down sharpish, but I do not think there is anything on legal professional privilege or MPs in the modification parts of the code of practice. It is silent on that. There is no guidance.

The Solicitor General: What I am trying to do is to explain that there is no difference for any member of the public. If the warrant is specifically named, it cannot, as I have explained, use the modification procedure to try to catch other people, whether journalists, Members of Parliament or lawyers. Rather than constantly seeking carve-outs, it is far better to have a general principle about specificity and the danger that the hon. Member for Paisley and Renfrewshire North raised.

Simon Hoare (North Dorset) (Con): So that the position is clear in my mind—I am not entirely sure about it—is the Solicitor General saying that, if new people are added to a warrant without a fresh warrant being applied for, they would have to be related to the event, occasion or surveillance that the original warrant was about? Is it correct that 32 new people from different parts of the country could not just be added if they were not linked to the matters for which the warrant was given?

The Solicitor General: That is right. The word "thematic" gives it away. I am afraid it is clear that the sort of scenario my hon. Friend paints is just not one that would be entertained in the initial application to the Secretary of State and the judicial commissioner.

12.30 pm

Modifications to warrants that would bring in legal professional privilege or, indeed, affect a parliamentarian, cannot, as I have already indicated, be approved unless they are made personally by the Secretary of State, and he or she must be satisfied that there are exceptional and compelling circumstances before such a modification can be made. Of course, in the case of a parliamentarian there has to be consultation with the Prime Minister, so I think that we have a very significant number of safeguards. However, in the spirit of this debate, I will consider carefully everything that has been said, and give it mature reflection.

Amendment 72 would remove the requirement that a major modification made by a senior official must be notified personally to the Secretary of State or a member of the Scottish Government. That is an important safeguard because it ensures that any major modifications to the warrant are visible to the Secretary of State, and gives them oversight.

Amendment 251 seeks to remove subsection (13), which requires a person to modify a warrant if they consider that any factor is no longer required to identify communications to or from the person subject to the warrant. For example, if someone who is subject to a warrant gets rid of a telephone and the intercepting agency knows that that person will no longer be using it, the warrant must be modified to remove that mobile phone. It is an important safeguard, because it makes sure that the agencies are not continuing to intercept a device that is no longer used by the subject of the warrant. That should be preserved in the Bill, bearing in mind the important constraints that we should place on the use of powers that we all agree are significantly and substantially intrusive.

Victoria Atkins: Am I correct in understanding that there is also a further oversight provision, namely the general oversight provisions of the Investigatory Powers Commissioner and the other commissioners under part 8 of the Bill? They have main oversight functions to look at how the powers are being exercised generally, as well as in every single double lock instance.

The Solicitor General: My hon. Friend is quite right about that, and I think commissioners would be concerned if for some reason there was an inappropriate overuse of mechanisms such as the one in question, which might appear in future evidence. I believe that we are getting the balance right and therefore the review will, I think, be a useful backstop, but nothing more, I hope.

Joanna Cherry: The Solicitor General has just said he thinks the Government are getting the balance right, but he has also said he will take the matter away and look at it carefully. When he does that, will he also look at the evidence of Sir Stanley Burnton, who told the Committee that he was concerned that substantial modification could be made to a warrant under the Bill with no judicial approval or even notification that names had changed?

The Solicitor General: I am very well aware of the evidence of Sir Stanley, which is why I have couched my remarks in the way I have. It is of course important to balance what he said against the view of his predecessor, Sir Anthony May, who in the 2015 annual report said:

> "A case could be made however, that it would be appropriate to use thematic warrants more widely against, for example, a well-defined criminal or terrorist group working for a common purpose."

I have said what I have said: my thoughts today are that the clause is perhaps getting an unfair battering. However, I listen to everything that is being said, including the hon. and learned Lady's remarks.

Amendment 95 deals with the question of whether the Bill should require necessity and proportionality with respect to the consideration of minor modifications. I am going to think about it. It is a reasonable point and we may be able to return to it on Report.

To conclude, I think that, in the round, the Government have set out our position clearly. We will consider two points that have been raised, in particular, which I have addressed; but in general terms, while I will resist any amendments that are pressed to a vote today, I want more time to reflect. I hope that that will give Members an opportunity to reflect as well. For those reasons, I urge the hon. and learned Gentleman to withdraw the amendment.

Keir Starmer: I am grateful to the Solicitor General for taking the time to set out how he understands the process will work. As will be clear from our exchanges, my concern is that the comforting way in which he set out how the modifications process is intended to work is not reflected in the drafting of the Bill. Nevertheless, I have listened to what he said about considering the matter further.

At one point during the submissions he just made, he said that the word "thematic" made everything clear. My point is that the word "thematic" is not in the Bill. I would like the Solicitor General to think about whether the provisions could be improved by an amendment that made it crystal clear that the power is intended for modifications to themed warrants and not to other warrants. It may not be quite as simple as that, but that would certainly reflect the gist of what the Solicitor General said.

The Solicitor General: As I have said, I will take that away and consider it.

Keir Starmer: I am grateful for that. To be clear, I accept that in urgent cases there needs to be a process so that the security services, the police and others are not inhibited from doing what they need to do in real time and fast, but what we are discussing is not an urgent modification process. Again, it is about restricting the scope.

I was going to push the amendment to a vote, but I have been mulling it over in my mind and have decided that I am going to withdraw it in the spirit of the Solicitor General's approach.

The Solicitor General: It is good to remind ourselves that the codes of practice have been published in draft and we have ample opportunity to revisit them to make the language even better. I hope that that helps the hon. and learned Gentleman.

Keir Starmer: I am grateful for that intervention. This is one of those matters on which we probably need to do as much of the work now as possible, because when the

code finally comes back for a vote one way or the other, if there is a deficiency over an issue such as this, we will be put in the invidious position of voting down the whole code because we cannot change it. I am very happy to work with the Solicitor General to set out our concerns even more clearly and to see whether we can make improvements. I doubt that all my concerns would be met, but we might be able to draft a vastly improved model. With that, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Joanna Cherry: I was minded to push for a vote on clause stand part, but given what the Solicitor General has said and the very detailed arguments made by the hon. and learned Member for Holborn and St Pancras, I am content not to push the matter to a vote at this stage. Like the hon. and learned Gentleman, I would be very happy to work with the Solicitor General and the Government in looking at this clause.

The Solicitor General: I welcome the hon. and learned Lady's remarks. They are noted, and I am sure we will be able to work on this constructively. I intend to make no more remarks for fear of repeating the observations I made a moment ago.

Question put and agreed to.

Clause 30 accordingly ordered to stand part of the Bill.

Clause 31

Approval of major modifications made in urgent cases

Question proposed, That the clause stand part of the Bill.

Joanna Cherry: Clause 31 is linked to clause 30 and I am minded to oppose it, but I shall not do so at this stage as I would like to see what proposals the Government come back with.

The Solicitor General: I am obliged to the hon. and learned Lady.

Question put and agreed to.

Clause 31 accordingly ordered to stand part of the Bill.

Clause 32 ordered to stand part of the Bill.

Clause 33

Special rules for certain mutual assistance warrants

Question proposed, That the clause stand part of the Bill.

Keir Starmer: No amendments have been tabled, and I do not oppose the clause, but I have a question that I would like the Solicitor General to deal with now, or at some other convenient point. In any event, I understand that these warrants are not particularly common.

Clause 33(1) makes it clear that the provisions apply predominantly where the subject of interception is outside the United Kingdom, and it effectively allows for sign-off at the senior official level. Notwithstanding that the subject is outside the United Kingdom, do the measures permit interception involving individuals in the UK or the British Isles if they are in communication with the subject? I ask for clarification, because I cannot find an answer myself.

The Solicitor General: I am happy to clarify that. The position is that if the Secretary of State or a senior official acting on behalf of the Secretary of State believes that a person, organisation or set of premises named or described in the warrant as the subject of the interception is in the United Kingdom, that person must cancel the warrant. I hope that that answers the question.

Keir Starmer: It is probably my fault for not putting the question clearly enough. I accept that in relation to the target, but the warrant will cover others than the target. Can the Minister clarify what protection there is under this procedure for people in this country who, although they are not the target, might come within the warrant?

The Solicitor General: What I am trying to deal with is anybody within the warrant, whether person, premises or organisation. If they are within that, they will be covered and it will have to be cancelled. I hope that that gives the hon. and learned Gentleman some reassurance.

Question put and agreed to.

Clause 33 accordingly ordered to stand part of the Bill.

Clause 34

Implementation of warrants

Keir Starmer: I beg to move amendment 252, in clause 34, page 28, line 37, at end insert—

"(4A) Subsection (4) shall not apply where the person outside the United Kingdom is established for the provision of services in a country or territory with which the United Kingdom has entered in to an international mutual assistance agreement or is subject to an EU mutual assistance instrument."

This amendment establishes international mutual assistance agreements—as recommended by Sir Nigel Sheinwald and currently under negotiation between the UK and US—as the primary route by which UK agencies obtain data from overseas CSPs. It would continue to enable the imposition of warrant on CSPs in non-MLA countries.

The Chair: With this it will be convenient to discuss the following: Amendment 253, in clause 35, page 29, line 5, at end insert—

"(1A) Where such a warrant is to be given to a person outside the United Kingdom, the warrant shall be served at that person's principal office outside the United Kingdom where it is established for the provision of services."

This amendment would make the Home Secretary's confirmation at Second Reading — that a UK agency would only serve a notice on an overseas entity that is capable of providing assistance under the warrant — clear on the face of the Bill (as well as being in the relevant code of practice) clarifying provisions in the Bill. UK agencies today routinely use secure means of communication to transmit notices directly to the main office of overseas CSPs.

Amendment 254, in clause 35, page 29, line 6, at beginning insert—

"Where it is considered unfeasible or inappropriate in the circumstances,".

See the explanatory statement for amendment 253.

Amendment 255, in clause 36, page 29, line 44, at end insert—

"which for a relevant operator outside the United Kingdom shall include—

(a) any steps which would cause the operator to act contrary to any laws or restrictions under the law of the country or territory where it has its principal office for the provision of telecommunication services; or

(b) where a warrant could be served pursuant to an international mutual assistance agreement or subject to an EU mutual assistance instrument."

Amendment 256, in clause 36, page 30, line 1, leave out subsection (5).

This amendment clarifies the reasonableness test for overseas CSPs and establishes that international mutual assistance agreements, where they exist, should be the primary route to obtain data from these CSPs.

Keir Starmer: I will be straight and open with the Committee about where the amendments come from. I have been contacted by and have discussed the issues in the Bill with a number of service providers and tech companies in this country and in America. As the Minister will know, they are concerned about how the Bill will operate; no doubt they have been having discussions with the Government as well. They have drafted the amendments and want the Committee to consider them in relation to the operation of the provisions. The amendment have been proposed jointly by Apple, Facebook, Google, Microsoft, Twitter and Yahoo!, as well as techUK, which have clubbed together to raise their concerns through me. It seems to me that their concerns are perfectly legitimate and need serious consideration. That is the context of the amendments.

The first point that the companies make is that companies providing digital services to users are increasingly global in their corporate structure, so it will be rare for the provisions in clauses 34 to 36 to be applied to providers that are completely within the United Kingdom; it is likely that they will touch on others in other jurisdictions. For the record, the companies accept that the current legal framework is fragmented and needs modification. They also say that the mutual legal assistance treaties have not been adapted to handle the huge increase in demand, and that there are already delays and difficulties, particularly in relation to extraterritorial jurisdiction. The background is that various Governments around the world are now aggressively asserting extraterritorial jurisdiction. The word "aggressive" is not intended for this Government, I think, but a number of Governments are going down the road of asserting extraterritorial jurisdiction in different ways over service providers.

In the UK, the Data Retention and Investigatory Powers Act 2014 made explicit extraterritorial powers that the Government said were implicit in the Regulation of Investigatory Powers Act 2000. Those are restated and further extended to the avowed powers. Therefore, the provisions are important for the companies. Their concerns can be set out in the following way. First, they are concerned that if there is a model in this Bill that either does not work or goes further than is appropriate, others will look to it and adopt the same approach. Therefore, other countries and jurisdictions will assert the same extraterritorial jurisdiction, which will create overlapping and conflicting laws. One of the points that they pressed on me—if there is an answer to this, I am all ears—is that if we assert extraterritorial jurisdiction over someone in silicon valley, who is subject to various US laws, and another country does the same, that person's main headquarters will be subject to a number of different legal regimes, which will create huge problems of conflict for the entities concerned.

12.45 pm

The companies point to the Sheinwald review. I think that the next big challenge in this field will be how the extraterritorial provisions work in practice. Clauses 34, 35 and 36 go together and put in place a framework under which the person to whom the warrant is addressed can serve the warrant. By doing so, they require tech companies to comply with various operational demands. The failure to comply is a criminal offence, which is why the tech companies are so concerned. It is anticipated under the Bill that they will be served with warrants and be expected to carry out the required activities. If they fail to do so, they will be committing a criminal offence, notwithstanding the fact that they are not within the jurisdiction. In the end, if they are sitting in a different jurisdiction and a number of different countries assert the same sort of extraterritorial powers, there is the potential for such conflict that only international agreements will be capable of cutting through this in a way that makes it workable not only for the tech companies but for the security and intelligence services.

That is why reference was made to the Sheinwald process. The Prime Minister engaged Sir Nigel Sheinwald back in 2014—that was welcome—to examine this issue and to move it forward. So far, that review has concluded that the mutual assistance provisions have not kept pace, so we are behind on international mutual assistance.

Victoria Atkins: This is just a gentle observation to those who have lobbied the hon. and learned Gentleman. It is a very great shame that they did not feel able to give oral evidence to the Joint Committee to explain those points themselves. They declined our invitation, and now they are relying on the hon. and learned Gentleman to make those points for them. Is it not a shame that they declined the opportunity to make those points themselves?

Keir Starmer: I am afraid I am not in a position to answer one way or the other. I do not know the background to that. I will make the points to the best of my ability in the time available, but I will also encourage them—

The Chair: Order. The hon. and learned Gentleman tabled the amendments in his own name, and they are in order.

Keir Starmer: I am grateful for that guidance, Mr Owen. If there is any further information that the tech companies can provide, they will do so. To be absolutely clear, these concerns were raised with me by a particular company

but, after reflecting on them, I put them forward in my own name because I think they are genuine concerns. The conflict of laws is a real concern.

This comes up in a later clause, so we can look at it in detail then, but the problem the companies foresee is that if they are asked to do something that puts them in breach of the law in the country in which they are based, they will have a real dilemma. The Bill as drafted does not give them a way out of that dilemma. I am raising their concerns; it is appropriate for a scrutiny Committee to know the real concerns of those who are going to be called upon to implement the warrants, and to consider them.

Amendment 252 states:

"Subsection (4) shall not apply where the person outside the United Kingdom is established for the provision of services in a country or territory with which the United Kingdom has entered in to an international mutual assistance agreement or is subject to an EU mutual assistance instrument."

It intends to ensure that, where there is a mutual legal systems' provision that bites, this Bill should not be the route for enforcing the requirements of the warrant. It is a perfectly practical and sensible provision; if that enforcement is provided for by an international mutual assistance arrangement, that should be the primary route, because it will, one hopes, have in-built ways of dealing with the conflict point that I articulated.

Amendment 252 is to clause 34. I will deal with the amendments to clauses 35 and 36 when we get to them, if I may. There is a theme running through.

The Minister for Security (Mr John Hayes): Thank you, Mr Owen, and I welcome you to the chair.

There are two points at the outset. I am grateful to the hon. and learned Gentleman for being clear about the genesis of these amendments. I also asked my officials that question; I assumed that the amendments had come from that source. Secondly, he will be aware that extra-territorial matters regarding overseas organisations or companies are always challenging, but, equally, he will recognise that in this context it is critically important that we address that point, because the ownership of companies that have a profound effect on the matters we are debating is often outside the UK.

Mindful of those points, let me move to the amendments. Amendment 252 seeks to remove the ability to serve warrants on an overseas provider, where a mutual legal assistance agreement is in place. It is important to understand that that would have several consequences. One possible consequence would be to slow the process down. The second, more fundamental, consequence would be for us to lose the ability to serve a search warrant on a company based outside the UK that provides services to users in the UK. Contextually, many of the people who pose the greatest threat to us use services which are based in companies outside this country, especially, as the hon. and learned Gentleman suggested in his opening remarks, in the United States of America. The mutual legal assistance treaty does not provide a course for interception warrants. It is a route to secure evidence, as he will be very much aware from prosecutions. It is used to obtain communications data and store them for use in prosecution. It is of little or no use in very fast-moving counter-terrorism circumstances or in serious crimes operations, which we are frequently dealing with. I do not need to go into immense detail because, I think, the demand for brevity is such that that would be superfluous. Any number of the pieces of evidence offered in the work done so far on the Bill make it absolutely clear that, in both of those kinds of cases, communications data are absolutely central, which is true to an increasing degree, and it is often provided by companies from outside the United Kingdom.

In his report, with which you will be familiar, Chairman, David Anderson addresses that point precisely. He argues that the mutual legal assistance treaty route is

"currently ineffective. Principally this is because it is too slow to meet the needs of an investigation, particularly in relation to a dynamic conspiracy"

of the very kind I have described in relation to organised crime and terrorism. He argues that it does not address intelligence needs. He notes that progress has been made and he cites the Irish Government in the context of the EU protocols for legal assistance. The hon. and learned Member for Holborn and St Pancras made reference to the work that the Prime Minister's envoy is doing in this regard, but the Prime Minister's envoy has said:

"While we should improve our current Mutual Legal Assistance Treaty, it will never be fast enough or have a scope wide enough to allow for urgent counter-terrorism and similar requests."

The final point is critical. As well as being too slow, the MLAT route is limited to a request for evidence in relation to serious crime prosecutions; it does not provide for national security or investigations that are at an intelligence-gathering stage rather than those in which the focus is on obtaining evidence. As I said, it is essentially about prosecutions, so it cannot deal with that earlier work. Other similar agreements—for example, the European mutual legal assistance convention—have similar drawbacks. Although I appreciate that the amendment is probing, relying on this route simply would not deliver the effectiveness that we need.

Clause 35 makes provision for the service of a targeted interception warrant or a mutual assistance warrant on a person outside the UK. The amendment would require a warrant to be served on an overseas communications provider at their principal overseas office in the first instance. The ways in which an interception warrant may be served on a person outside the UK are already set out in the clause, providing a number of alternative methods, allow flexibility.

It is interesting that the hon. and learned Gentleman spoke about companies that have been deep in discussion. He will know that there is quite a difference of opinion among companies about this. Some want flexibility and some take a different view. It is a mixed picture. He will also know that we have had extensive discussions with the sector and providers over a considerable period of time about various aspects of the Bill, including this one, and there is a difference of opinion among companies about that. Service to the principal office overseas is already possible under the clause, so there is nothing added to the Bill in that sense, but stipulating a mandatory method for how a warrant is served is unnecessary and possibly even unhelpful.

On the amendments to clause 36, I have set out the importance of the need for flexibility, and I hope that I have also made the case about vital intelligence work and so on. I can see the hon. and learned Gentleman beginning to stir.

Keir Starmer: The last time I was in a Bill Committee, I moved my arm in a particular way and somebody thought it meant I wanted to intervene. On this occasion, I do.

On clause 36, there is a concern, and anything the Minister can say on the record would be helpful. The problem is subsection (5), which is an attempt to help or to get round a problem, but does not go all the way. It states:

"In determining for the purposes of subsection (4) whether it is reasonably practicable for a relevant operator outside the United Kingdom to take any steps in a country or territory outside the United Kingdom for giving effect to a warrant,"—

because it is only reasonable steps they must take—

"the matters to be taken into account include the...requirements or restrictions under the law of that country".

The concern is about asking for something that is unlawful.

Mr Hayes: I was going to refer to that, of course, because that is the part of the Bill that explicitly deals with the legal conflict issue, as he describes.

The Chair: Order. Just to help the Minister, we are still on amendments 252 to 256 to clause 34. We will come to the future clauses.

1 pm

Mr Hayes: Without question, we will return to the matters in hand. The hon. and learned Member for Holborn and St Pancras is very helpful, but I appreciate your guidance, Mr Owen.

The effect of removing subsection (5) would leave the company alone to decide what reasonable steps were required to be taken for giving effect to the warrant. I do not think we should accept that position. Our engagement with overseas companies over the past few years has been clear. They require certainty of their obligations, and I know that is what the hon. and learned Gentleman is seeking. For that reason, Parliament enacted the Data Retention and Investigatory Powers Act 2014 as emergency legislation, to remove uncertainty.

I am not sure, given the threats we face, whether it is appropriate to leave a private company to determine whether it is obliged to do what is asked of it by legal instrument. The Bill already requires any requirements and restrictions under the law of the country where a company is based to be taken into account. In my view, it is wholly right that the UK Secretary of State makes that decision rather than a corporation.

The effect of the amendments in practice would be to transfer fundamental decision making to the corporation and I am not comfortable with that. I think it is right that these companies providing communications services to users in the UK should be required to comply with our law. I know that is not necessarily always their view but it is certainly mine and the Government's. That must include UK warrants requesting the content of criminal and terrorist communications.

Members might recall the Home Secretary's comments on Second Reading that made clear that we are working with the United States—I know the hon. and learned Gentleman wanted that assurance—to establish a new framework, which would release American companies from any perceived conflicting legal obligations.

The hon. and learned Gentleman makes a perfectly reasonable point about balancing a range of possibly competing or conflicting legal requirements but, frankly, multinational companies deal with that kind of thing all the time. These are companies dealing with all kinds of legal provisions and demands from all kinds of places in the world. This is not uncharted territory for them.

Joanna Cherry: It is incumbent on me to challenge something the Minister has just said. As I understood him, as far as possible it is desirable for the law of the UK in this respect to have effect abroad. How would the Minister feel if the French passed legislation that they wanted to have effect in England and Scotland?

Mr Hayes: That would be a more appropriate question to put if we were debating different amendments. I do not want to stray too far from your guidance, Mr Owen, so I will stick strictly to the amendments, rather than being encouraged down a tributary that I would not necessarily seek or want to navigate, particularly as it is implicitly about the European Union.

Let me return to the subject in hand. I accept that this is challenging but we need flexibility in the way we go about these things, coupled with determination that everyone must play their part, including these corporations, in helping to deal with the threat we face. We are trying to do that as much as we can through co-operation, as the hon. and learned Member for Holborn and St Pancras knows. It is vitally important that we retain the ability to take action against companies that do not comply with their obligations.

Once an agreement is reached it will be placed before Parliament under the Constitutional Reform and Governance Act 2010 in the normal way. On that basis, notwithstanding the hon. and learned Gentleman's perfectly proper desire to probe the matter, I invite him to withdraw the amendment.

Keir Starmer: Of course, I accept the need for arrangements to be made with service providers and others in other jurisdictions. If that were not provided for, a lot of the Bill simply would not work or have any meaningful effect. I accept that proposition. I also accept that there are problems with the existing mutual legal assistance arrangements. The amendment—it was a probing amendment, so I shall not push it to a vote—envisaged further arrangements in due course. In truth, the sooner they can be progressed and agreed, the better.

I accept the proposition that we cannot necessarily leave it to the companies themselves to take decisions about which bits of any requirement they ought to comply with. The choice set up by the provisions, which may be a stark choice, is not whether to comply but which offence to commit. I am sure that, in reality, and hopefully in the consultation discussions, there will rarely, if ever, be a requirement that puts a company in breach of the law where they operate, but if it does, the company will have to make a choice: "Either we breach US law or UK law." That is pretty invidious.

Companies do not want to be put in that position, but they will read carefully what the Minister has said. They are following progress carefully, and I know that

progress is being made. On that basis, I will withdraw all three amendments, which address all three clauses, but I hope that I have made clear those companies' concerns, which I share. Everything that can be done to fast-forward an international legal framework for this sort of requirement should be done as soon as possible. If it is not, not only tech companies but, I fear, the security and intelligence services, will be the losers. The more difficult it becomes to comply with a requirement in real time, the more likely it is that things will be lost while disputes are had about the requirements. I beg to ask leave to withdraw the amendment.

The Chair: Mr Starmer has indicated that he wishes to withdraw the amendment. Ms Cherry, did you wish to catch my eye?

Joanna Cherry: Yes. I do not have any amendments, but I wish to speak on these clauses.

Amendment, by leave, withdrawn.

Clause 34 ordered to stand part of the Bill.

Clause 35

SERVICE OF WARRANTS OUTSIDE THE UNITED KINGDOM

Question proposed, That the clause stand part of the Bill.

Joanna Cherry: I wish to speak about the service and implementation of warrants outside the UK. What I have to say applies equally to clauses 35 and 36. The genesis of my submission is not corporate concerns but strict legal principle. Violation of that principle would have important international political and commercial implications.

The Minister said a moment ago that everyone must play their part; I presume that he meant in fighting terrorism and serious crime. I wholeheartedly agree, but everyone must play their part in accordance with law. Clauses 35 and 36 seek to replicate provisions that are already in DRIPA. At the time when DRIPA was passed, the Government claimed that RIPA had always had extraterritorial effect and that the provisions in DRIPA were simply intended as clarification, but that claim was misleading and ill-founded in law.

As I tried to indicate in my intervention a moment ago—it was partly in jest, as Conservative Members frequently complain about legislation from continental Europe, but it was also serious—in general terms, legislation passed by the UK does not have direct effect in other jurisdictions, just as we would not expect the law of France to have direct effect in the United Kingdom. For the Government to claim that RIPA had extraterritorial effect without the Act even saying so makes absolutely no sense.

The Minister referred to David Anderson's report, "A Question of Trust". David Anderson noted at paragraph 11.17 of the report that

> "overseas service providers are generally unhappy with the assertion of extraterritoriality in DRIPA 2014, which they did not necessarily accept (despite the view of the UK Government) to have been implicit in the previous law and had not encountered in the laws of other countries."

As a Scottish nationalist, I forebear from commenting on the unique assertion of the United Kingdom that its law applies in everyone else's country when others do not claim that, but I will move on with the quote from David Anderson:

> "While legal compulsion was in principle preferable to voluntary compliance, it was thought that the unilateral assertion of extraterritorial effect would be met by blocking statutes, was not 'scalable to a global approach' and was viewed as 'a disturbing precedent' for other, more authoritarian countries."

There is a concern that, if the United Kingdom decides to tell the world that its legislation applies in other countries, it would be a spur for more authoritarian regimes to do likewise.

David Anderson went on to note that when countries seek to enforce their legislation extraterritorially, such powers might come into conflict with the legal requirements in the country in which the company that has been asked to comply through a legal request is based or stores its information. Companies explained to David Anderson that they did not consider it was their role to arbitrate between conflicting legal systems. That must be right. The protection of human rights should not be left to the good will and judgment of a company, nor indeed should the enforcement of important powers to fight terrorism and serious crime be left to the judgment of a company.

David Anderson went on to say that principled concerns had been expressed by companies:

> "They expressed concerns that unqualified cooperation with the British government would lead to expectations of similar cooperation with authoritarian governments, which would not be in their customers', their own corporate or democratic governments' interests."

During discussion of David Anderson's reports, about the draft Bill and on Second Reading on the Floor of the House, we have heard frequently that the Bill, if the British Parliament gets it right, could be an international template. That is what worries me about the clauses: the example is not a good international one to set, unilaterally to declare that our law must apply in other countries, because there is a real risk that authoritarian regimes might do likewise. We would not want that.

Lucy Frazer: I am looking at the clause, which is not massively dissimilar to all the provisions in the White Paper about service on companies in or out of jurisdiction. The clause is on service, so I am struggling with the hon. and learned Lady's talk about extraterritoriality.

Joanna Cherry: As I said, I am dealing with clause 35, "Service of warrants outside the United Kingdom", and with clause 36, "Duty of operators to assist with implementation", which serves clause 35 and imposes a duty on operators to assist with implementation outside the UK. That is why, as I said at the beginning of my submission, clauses 35 and 36 have to be discussed together.

I want to be clear that I am not saying that we should not have provisions that deal with extraterritorial enforcement, or that we should not have allowance for it. Clearly, we have to have that, but the question is how we go about it. Mutual legal assistance agreements have already been mentioned and, in my submission, the most appropriate and probably most successful way for the British Government to seek to access information

[Joanna Cherry]

held overseas or by companies based overseas, or to have provisions that will allow the Government to do so, is to extend and improve the use of the mutual legal assistance agreements.

In "A Question of Trust", David Anderson concluded in recommendation 24 that

"the Government should…seek the improvement and abbreviation of MLAT procedures, in particular with the US Department of Justice and the Irish authorities"—

Ministers alluded to that—

"and…take a lead in developing and negotiating a new international framework for data-sharing among like-minded democratic nations."

David Anderson's report also referred to the work of Sir Nigel Sheinwald, and we have heard a bit about that already. David Anderson suggested that Sir Nigel's could be the "decisive voice" in the matter. In a written statement in response to the Anderson review on 11 June last year, the Prime Minister said:

"the Government will be taking forward Sir Nigel's advice, including pursuing a strengthened UK-US Mutual Legal Assistance Treaty process and a new international framework. As David Anderson recognises in his report, updated powers, and robust oversight, will need to form the legal basis of any new international arrangements."

It is most regrettable that, in the light of what the Prime Minister said, this Bill is completely silent on the promised new framework. Instead, it simply returns to what I would submit is a rather lazy and potentially dangerous assertion of extraterritorial effect. It is concerning that a piece of legislation that purports to be comprehensive on this matter is silent on the significant issue of how surveillance operates in the global communications environment, despite the fact that the Prime Minister outlined the need for reform.

My argument is that these two clauses are wholly inadequate to achieve what the Government say they want to achieve. They fly in the face of legal principle and, importantly, they could cause international political difficulties as well as international commercial difficulties.

1.15 pm

Mr Hayes: I can deal with this in two minutes. First, of course these things are challenging. I said that at the outset. Secondly, David Anderson is very clear in recommendation 25 of his report—the recommendation after the one that the hon. and learned Lady quoted—that:

"Pending a satisfactory long-term solution to the problem, extraterritorial application should continue to be asserted in relation to warrants and authorisations…and consideration should be given to extraterritorial enforcement in appropriate cases."

That was his consideration, and that is right. These are challenging matters, but, frankly, companies have to make grown-up decisions about where they operate. Conflicts and other issues are already dealt with in the Bill, and we are working with the US to address concerns and to negotiate a new framework.

I think it would be extraordinary, given the current state of multinational business and the increasingly global online environment, if we did not put provisions in the Bill to provide powers to take action where necessary. I commend the clause to the Committee.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 2.

Division No. 1]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	Warman, Matt

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 35 ordered to stand part of the Bill.

Christian Matheson (City of Chester) (Lab): On a point of order, Mr Owen. A Division was called and the Doorkeeper announced a Division in Committee Room 14, at which point I made my way back into the room. I am not clear on the rules for Divisions, so I seek your guidance, but I was in the room at the time that my name would have been called. It was not called. I would have abstained anyway, but I seek your guidance on why my name was not called.

The Chair: You have done my job for me. I indicated to the Opposition Whips that we were ready to take the vote, and they said yes. If you have an issue, it is with your own Whip. You have it on the record.

Christian Matheson: I am grateful, Mr Owen.

Clause 36

DUTY OF OPERATORS TO ASSIST WITH IMPLEMENTATION

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 2.

Division No. 2]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	Warman, Matt

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 36 ordered to stand part of the Bill.

Clauses 37 to 43 ordered to stand part of the Bill.

Ordered, That the debate be now adjourned.—*(Simon Kirby.)*

1.21 pm

Adjourned till this day at Two o'clock.