PARLIAMENTARY DEBATES

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GENERAL COMMITTEES

Public Bill Committee

INVESTIGATORY POWERS BILL

Fourteenth Sitting

Thursday 28 April 2016

(Afternoon)

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Monday 2 May 2016

The Committee consisted of the following Members:

Chairs: † Albert Owen, Nadine Dorries

† Atkins, Victoria *(Louth and Horncastle)* (Con)
† Buckland, Robert *(Solicitor General)*
† Burns, Sir Simon *(Chelmsford)* (Con)
† 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)
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 28 April 2016

(Afternoon)

[ALBERT OWEN *in the Chair*]

Investigatory Powers Bill

Clause 197

ADDITIONAL DIRECTED OVERSIGHT FUNCTIONS

2 pm

Joanna Cherry (Edinburgh South West) (SNP): I beg to move amendment 760, in clause 197, page 152, line 27, leave out "directed" and insert "requested".

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

Amendment 761, in clause 197, page 152, line 28, leave out "must" and insert "may".

Amendment 762, in clause 197, page 152, line 39, leave out

"in a manner which the Prime Minister considers appropriate".

Amendment 763, in clause 197, page 152, line 42, leave out

"contrary to the public interest or"

and insert "seriously".

Amendment 764, in clause 197, page 152, line 45, leave out subsections (4)(c) and (4)(d).

Joanna Cherry: The clause deals with additional directed oversight functions. It binds the Investigatory Powers Commissioner to conducting reviews of the work of the intelligence services or the armed forces, subject to the direction of the Prime Minister. While the commissioner may request that the Prime Minister gives such a direction, the Prime Minister will only issue a direction at his or her discretion. The amendments to subsection (1) would make it read as follows: "So far as requested to do so by the Prime Minister and subject to subsection (2), the Investigatory Powers Commissioner may keep under review the carrying out of any aspects of the functions of" the intelligence services and so on.

The amendments to subsection (4) would make it read: "The Prime Minister must publish any direction under this section except so far as it appears to the Prime Minister that such publication would be seriously prejudicial to national security, or the prevention or detection of serious crime".

The amendments would remove the power to direct that such reviews take place, and replace it with the power to request that the Investigatory Powers Commissioner undertake such a review. At present, the Bill provides that any direction made may be published only in such a form as is deemed appropriate by the Prime Minister, and may be redacted for a number of very broad reasons, including that it may be prejudicial to

"the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Investigatory Powers Commissioner."

That could include, for example, the Food Standards Agency.

The amendments to subsection (4) would limit the power to keep any request or direction secret. That would increase the effectiveness of the mechanisms for transparency and accountability in public decision making, including in respect of the conduct of the intelligence agencies and the armed forces. The provision in the Bill for the Prime Minister to direct the commissioner to undertake work that is outside the ordinary scope of its statutory duties would undermine the perception that the commissioner is independent, whereas a power to request, with discretion, keeps the perception—and reality—of the independence of the commissioner. The alternative would be to remove the clause from the Bill completely. I hope that the amendments will be acceptable to the Government, and that there will be no need to vote the clause down.

The Minister for Security (Mr John Hayes): As the hon. and learned Lady says, the clause makes provision for the Prime Minister to direct the Investigatory Powers Commissioner to undertake additional oversight of the security and intelligence agencies. I say "additional" with emphasis, because clause 196 creates a range of oversight functions that are supplemented by clause 197. I think there may be a misapprehension here that the oversight is exclusively at the diktat of the Prime Minister. That is certainly not the case.

The principal oversight functions are given legislative life in clause 196. Clause 197 provides a further opportunity for oversight through investigations, as a result of the direction that the hon. and learned Lady referred to. That has many virtues. It adds alacrity, because of course it would not always be appropriate to wait for the annual report of the commissioner. It means that where matters of imminent concern are drawn to the attention of the Executive through the Prime Minister, or indeed to the attention of the Prime Minister, he can exercise this function with speed and diligence. To take out the whole clause, which would be the effect of the amendment, would take out the additional directed oversight functions that supplement clause 196 in a beneficial way.

Of course, the Prime Minister's ability to make such directions is subject to the public interest and defined by need. It is important to add that anything the Prime Minister does in this regard cannot be prejudicial to national security, the prevention or detection of serious crime or the economic wellbeing of the UK. Indeed, the opposite is true. He acts in defence and promotion of those things. Once again, I understand that the hon. and learned Lady is probing, and it is right that she does so. However, on careful reflection, she will come to the conclusion that rather than adding to the Bill, this literal subtraction would be unhelpful.

The Joint Committee said nothing about this matter. Although it looked at these things with impressive diligence, it came across no evidence of which I am aware that suggested that such a measure was imperative. The amendment certainly would not enhance oversight. Part of my job here is to protect the hon. and learned Lady. The amendments we debated immediately before our brief lunch would have had the effect of minimising consideration of public interest. In this case, she would be minimising the ability to exercise additional oversight.

On that basis, and in defence of the existing provisions, of what is right, and—might I say mildly—of the hon. and learned Lady's own interests, I invite her to withdraw her amendment.

Joanna Cherry: Well, Mr Owen, I am not going to fall into that trap, just as I did not before lunchtime. I am not sure whether it is flattery or compliment, but whichever it is, I will not fall for it. There is good reason for the amendment, as I have explained, and I wish to press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 10.

Division No. 115]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Matheson, Christian	Stevens, Jo

NOES

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

Question accordingly negatived.

The Chair: Does the hon. and learned Lady wish to move each amendment?

Joanna Cherry: On reflection, Mr Owen, I do not think that there is much point in doing so; we all know which way this is going. I think that the marker has been laid down in relation to clause 197.

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

The Committee divided: Ayes 10, Noes 2.

Division No. 116]

AYES

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

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 197 ordered to stand part of the Bill.

Clause 198

Error reporting

Keir Starmer (Holborn and St Pancras) (Lab): I beg to move amendment 773, in clause 198, page 153, line 6, leave out from "aware" to the end of line 9.

The Chair: With this it will be convenient to discuss the following: Amendment 765, in clause 198, page 153, line 6, leave out

"if the Commissioner considers that—".

Amendment 766, in clause 198, page 153, line 8, leave out subsection (1)(a).

Amendment 767, in clause 198, page 153, line 10, leave out subsection (2).

Amendment 774, in clause 198, page 153, line 10, leave out subsections (2) to (5) and insert—

'(2) The Investigatory Powers Commissioner may decide not to inform a person of an error in exceptional circumstances.

(3) Exceptional circumstances under subsection (2) will arise if the public interest in disclosure is outweighed by a significant prejudice to—

(a) national security, or

(b) the prevention and detection of serious crime."

Amendment 778, in clause 198, page 153, line 11, leave out "may not" and insert "must".

Amendment 779, in clause 198, page 153, line 12, after "has", insert "not".

Amendment 780, in clause 198, page 153, line 12, leave out "significant".

Amendment 768, in clause 198, page 153, line 14, leave out subsection (3).

Amendment 781, in clause 198, page 153, line 14, leave out "has" and insert "may have".

Amendment 782, in clause 198, page 153, line 15, leave out "not".

Amendment 769, in clause 198, page 153, line 19, leave out subsection (4)(a).

Amendment 783, in clause 198, page 153, line 19, leave out

"and its effect on the person concerned".

Amendment 784, in clause 198, page 153, line 20, leave out

"contrary to the public interest or"

and insert "seriously".

Amendment 770, in clause 198, page 153, line 24, leave out subsection (4)(b)(iii).

Amendment 771, in clause 198, page 153, line 25, leave out subsection (4)(b)(iv).

Amendment 785, in clause 198, page 153, line 26, at end insert—

'(4A) In subsection (4) any publication will be considered "seriously prejudicial" where it would involve a significant risk to the life or of serious physical injury of any person."

Amendment 788, in clause 198, page 153, line 39, leave out subsection (7).

Amendment 776, in clause 198, page 153, line 45, leave out paragraph (b).

Amendment 772, in clause 198, page 154, line 3, after "public authority", insert

"or a telecommunications operator".

Amendment 777, in clause 198, page 154, line 6, leave out paragraph (b).

Keir Starmer: We deal here with error reporting. The structure and arrangement of the clause distinguishes between serious and other errors. There is a definition of "serious" in subsection (2), and a provision in

[Keir Starmer]

subsection (3) indicating that a breach of the European convention on human rights

"(within the meaning of the Human Rights Act 1998) is not sufficient by itself for an error to be a serious error."

The Joint Committee considered the measures and recommended that the Government review the error reporting threshold. The Government said that they accepted that recommendation, but for my part, I have not seen anything further to that acceptance. In other words, I am not sure that anything about the review has been set out. If I am wrong, I will not pursue the point, but although the Government have accepted the principle of a review, I have not seen the outcome of that review.

In relation to the threshold, the amendments are intended to achieve a number of things. One is to make it clear that a breach of a convention right should be regarded as a serious error, irrespective of what follows from it. We obviously welcome the fact that in clause 198, the Government have responded to recommendation 57 by the Joint Committee, so that commissioners are now capable of exercising the function of error notification without the involvement of the Investigatory Powers Tribunal. That is a response to the Joint Committee, I think, and it is welcome.

However, the Joint Committee suggested that as well as informing those affected by the errors and providing them with adequate information, there should be an ability to refer matters directly to the IPT where unlawful conduct has been identified. In other words, there should also be a power to go to the IPT directly. That was recommendation 66, and it is not reflected in any revision to the clause. It would be an important means of pursuing and preventing further violations involving errors about which it was not in the public interest to inform individuals, but which none the less ought to be brought to the attention of the IPT. We notice that the Government have not made that change, and I would be interested to hear the reasons. David Anderson also supported the ability of an independent oversight body to refer cases to the Crown Prosecution Service or lodge a claim directly with the IPT, again as a way of ensuring an element of direct access. Those issues relate to the first few subsections of clause 198.

2.15 pm

The next batch of amendments in this group deal with subsection (4). I will not take up much time with the amendment that seeks to delete

"the economic well-being of the United Kingdom",

because it is consistent with amendments that we have tabled throughout our proceedings. We also seek to remove subsection (4)(b)(iv)—"discharge of the functions"—which would restrict subsection (4) to "national security" and

"the prevention and detection of serious crime".

We would also tighten the test so that the wording in subsection (4)(b) would be "the extent to which disclosing the error would be seriously prejudicial to" sub-paragraphs (i) and (ii). That would restrict the exclusion.

On reflection, I will not press amendments 772 and 777 to a Division. I am minded to press amendment 773 to a vote, but if I do not win that vote, I will not press the other amendments in this large group.

Mr Hayes: Let us think for a moment about reality. I have never regarded myself as a prisoner of reality, for to imagine is to be human, is it not? But every Member of this House is from time to time approached by members of the public and others whose imagination has got the better of them. Among the skills that one develops as a Member of Parliament is the ability to discern the occasions on which that could either become a matter of embarrassment or absorb undue resource.

These amendments, which would create an obligation to send notification to anyone who had a complaint, however realistic or imaginary it might be, would surely not be a helpful addition to the sense of the Bill. I am sure that this is not the hon. and leaned Gentleman's intention, but if he thinks through the ramifications of shifting the threshold as the amendments would, and requiring individuals to be notified as a matter of course of any error, no matter how small, he will see that the burden placed on those who are determined to deal with significant errors would be significant, undesirable and, in my view, unacceptable.

Keir Starmer *rose—*

Mr Hayes: The hon. and leaned Gentleman is about to intervene to qualify that point.

Keir Starmer I think the Minister is making two points. One is on the imagined wrongs of members of the public, and the other is on the burden created if notification is required for all errors. The second point is, of course, a powerful submission. On the first, the imagination of the affected person does not make a material difference. This pertains to errors found by the commissioner, so surely only the second point—that it is an undue burden—is relevant.

Mr Hayes: Yes indeed. I have not sought to patronise the hon. and leaned Gentleman during the Committee's proceedings, but there is quite a difference between 19 years' experience as an MP and rather fewer. If he thinks through what an error of transposition, the mistyping of a digit in a telephone number or a typographical error might lead to in misassumptions on the part of those with vivid imaginations, I think he will understand the point I am trying to make. Notification of those kinds of petty errors, as the amendment would require, is not only unnecessary but would lead to undesirable consequences.

Keir Starmer: The Minister really does have to give up the habit of suggesting that the way we probe and push the Government on, say, the threshold between serious and ordinary errors has to do with inexperience. Many of us have huge practical experience of the operation of the sorts of powers in the Bill. I dare say I have looked in greater detail at the provisions of the Acts that preceded this Bill than many people on this Committee. I do not say that in self-congratulation; it has been a burden. I have looked at these kinds of provisions in detail over very many years. Part of the purpose of this exercise is to push. The Minister makes a good point on the difference between the thresholds, but if we sit on our hands and never push, this process does not work. That has nothing to do with experience.

Mr Hayes: The hon. and learned Gentleman is being excessively sensitive. I was not commenting on his experience, expertise or diligence on these matters generally.

I was drawing attention to the fact that those of us who have served as Members of Parliament and have dealt with the consequences of the misinterpretation that can unfortunately arise from the most minor of matters—we have all been there in our surgeries, and I think we all know what I mean—have learned that very well intentioned provisions can lead to misassumptions and even fuel vexatious complaint. I am not questioning the hon. and learned Gentleman's right to probe—indeed, I welcome it, and he has exercised it with diligence and courtesy—but the amendment could have the unintended consequence of fuelling the kind of misassumptions and consequent vexatious complaints that we have to deal with by the nature of our job, and be quite discerning about, too.

Christian Matheson (City of Chester) (Lab): I am sure that I do not need to remind the Minister that both my hon. and learned Friend the Member for Holborn and St Pancras and the hon. and learned Member for Edinburgh South West are skilled, high-level criminal prosecution advocates, so they will be well aware of the ability to find fault with legislation. We should be grateful that they will not be the defence barristers finding fault with the legislation.

Mr Hayes: I agree, and that is precisely why, when members of the Opposition probe, it is important that my hon. and learned Friend the Solicitor General and I explain where that probing leads. The interface between members of this Committee is designed for that exact purpose. It allows us to test the Government's arguments, to examine the Bill with care and to identify where it can be strengthened, and as part of that to find out where the Opposition, having probed, will ultimately be satisfied that the Government got it right the first time round. I have been on both sides of this process over many years; I have been in the shoes of the hon. and learned Member for Holborn and St Pancras, so I know exactly what that is all about.

In this case, drawing on my experience as a Member of Parliament, I can imagine where the amendment might lead. I do not think it is the intention, but it could well be the result. Furthermore, although certainly not intended, it is possible that the obligation under the amendment to notify a person of minor errors that did not cause significant harm to any individual would not only be burdensome—the hon. and learned Gentleman acknowledged that fact, which has to be taken into consideration—but might discourage the agencies and others from going about their work in the way that they do. If they felt that even the most minor accidental error would be notified to the individual concerned, it could inhibit or change the way that they went about their work.

Joanna Cherry *rose—*

Mr Hayes: I do not think that is anybody's aim or intention, as the hon. and learned Lady is about to reassure me.

Joanna Cherry: I can reassure the Minister. If he looks at subsection (9), he will see that "relevant error" in subsection (1) is defined as

"an error…by a public authority in complying with any requirements which are imposed on it by virtue of this Act or any other enactment and which are subject to review by a Judicial Commissioner, and…of a description identified for this purpose in a code of practice under Schedule 7, and the Investigatory Powers Commissioner must keep under review the definition of 'relevant error'."

Is he reassured that it is not just any old minor or accidental error, but a relevant error within the description of his own draftsman?

Mr Hayes: The hon. and learned Lady must recognise that the amendments would reduce the discretion that is already in the Bill. To that end, she is right that there is provision in the Bill for the information to enter the public domain via the report that the commissioner is bound to make on both the number of relevant errors and their seriousness, but the discretion that the Bill provides, which I am defending with some confidence, is important in excluding those purely technical, accidental, petty errors whose notification to those who choose not only to tilt at windmills but to invent the windmills they tilt at would be highly undesirable.

Joanna Cherry: Throughout our line-by-line consideration, the Minister has been very keen on referring us to the terms of the codes of practice. Perhaps the definition of "relevant error" in the codes of practice could be addressed to remove the need to include any "minor" or "accidental" error, depending on what one means by accidental. I suggest that the Minister's concerns may be ill-placed when we have the definition of a relevant error and should perhaps be looking at that.

Mr Hayes: I did not expect such a full debate on this matter, but it seems we are going to have one, Mr Owen. Imagine that a minor or technical error was notified to the individual concerned during the course of an active investigation. That has the potential to compromise the way the investigation proceeds. Relevant errors can be minor—I accept the hon. and learned Lady's point—but the real issue is that the commissioner will have the expertise and independence to assess the relevance of the facts and decide what is in the public interest. If we are to have an oversight arrangement that affords the commissioner that kind of authority, to oblige publication as the amendment proposes would add little and might do much worse, which would be undesirable.

The intention behind amendment 776 is unclear to me. Removing subsection (8)(b) would mean that, contrary to what I just said, the commissioner would not be obliged to publish the number of relevant errors. I think that subsection is important, because we want to know the number. We are all interested in the reporting regime's transparency and we are having a very informed debate about this part of the Bill. I am sure that that was not the intention, but it might be the effect.

Keir Starmer: I confess that one reason why I decided not to press amendments 772 and 777 was that when I looked at this group of amendments late last night, I realised that some of them would not have the effect that I intended. This is not a criticism, but for the record and as the Minister knows, the resources and back-up we get our respective positions on the Committee differ markedly. The Opposition work at pace with the resources we have, and occasionally on returning to amendments I have realised that they should not have been proposed.

2.30 pm

Mr Hayes: I can tell that I struck a raw nerve with the hon. and learned Gentleman earlier and I want to try to rebuild the bridge that leads us back to the warm relationship we enjoy. Notwithstanding all that I have said, the clause could be perfected and I would like to look at it in the round to see what more we can do. Both the hon. and learned Lady and hon. and learned Gentleman heard my reservations about the amendments as drafted—indeed, he generously acknowledged that there are some imperfections in the amendments, which is often the way when drawing them up as a shadow Minister, as I know only too well—but they are designed to probe and they have done that successfully.

Notwithstanding my certainty on the point I made about detail, we can look at the clause in the round and make improvements. On that basis—the Bill has a long way to go—I hope that the hon. and learned Gentleman will withdraw his amendment.

Keir Starmer: I am grateful to the Minister for the content and spirit of his remarks. I was intending to press at least one amendment in the group, but in the circumstances I will not do so. We can all reflect on the wording of the clause, so I beg to ask to leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Keir Starmer: I beg to move amendment 775, in clause 198, page 153, line 38, at end insert—

"(c) provide the person with such details of the submissions made by the public authority on the error and the matters concerned pursuant to subsection 198(5) as are necessary to inform a complaint to the Investigatory Powers Tribunal."

The Chair: With this it will be convenient to discuss amendment 791, in clause 199, page 154, line 21, leave out subsections (3) and (4) and insert—

"(3) In any circumstances where the Commission has identified a relevant error pursuant to section 198, the Commission must give such documents, information or other material as may be relevant to the investigation of the error to the Tribunal.

(4) The duty in subsection (3) shall be exercised without request from the Tribunal."

Keir Starmer: I can be brief. The short amendments would provide that when a person is notified so that they can pursue a remedy if so minded or advised, they are given sufficient detail to do so. I think they are self-explanatory.

The Solicitor General (Robert Buckland): It is a pleasure to reply on these amendments. In the spirit of the hon. and learned Gentleman's remarks, I will deal with them as quickly as I can.

The amendments are about a submission prepared by a public authority for the commissioner that relates to an error being shown to an individual affected. With respect, I do not think that is necessary or desirable and I will set out three reasons for that. First, the IPC is already required to provide to the person such details of the error as the commissioner considers necessary. If that test is met by any information provided to the IPC in the course of the submissions made pursuant to clause 198(5), the Bill already requires that the judicial commissioner provide those details to the person. The amendment is therefore unnecessary.

Secondly, I am concerned that the amendment might inhibit disclosure to the commissioner. The submission is intended to assist the commissioner in deciding the seriousness of the error and the impact of disclosure; as such, it will contain a full and frank admission of how the error occurred and what measures have been put in place to prevent it from happening again. If the public authority knows that any submission it makes will be provided to an individual, out of necessity, to preserve the secrecy of its operating systems and methods, it may need to be less candid in its submission to the commissioner. That will force the commissioner to take a decision on whether it is in the public interest for an individual to be informed without, regrettably, knowing the full facts behind the matter.

Finally, if a case is brought to the Investigatory Powers Tribunal, disclosure of the relevant material will occur during the proceedings in the normal way. If the IPT thinks that any part of the submission should have been disclosed, it can order that to be so disclosed. The tribunal is best placed to rule on what should or should not be disclosed as the case progresses, rather than what I would regard as inappropriate disclosure before the initiation of proceedings.

Amendment 791 would remove the requirement for judicial commissioners to consult the Secretary of State before releasing information to any public authority or other person. I have made the point before and make no apology for repeating it that, given the responsibility of the Executive for the protection of the public, it is right that the Executive be given the opportunity to express an opinion on where the public interest lies. For those reasons, I respectfully invite the hon. and learned Gentleman to withdraw the amendment.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 198 ordered to stand part of the Bill.

Clause 199

ADDITIONAL FUNCTIONS UNDER THIS PART

Joanna Cherry: I beg to move amendment 792, in clause 199, page 154, line 17, at end insert—

"(1A) A Judicial Commissioner may refer to the Investigatory Powers Tribunal any matter the Commissioner considers may have involved the unlawful use of investigatory powers.".

This amendment would give the Judicial Commissioners power to refer issues of concern to the IPT without having to rely on a complaint being made.

The amendment, which would insert a new subsection in clause 199, was proposed by the Equality and Human Rights Commission and is jointly tabled by the Scottish National party and the Labour party. It would give the judicial commissioners power to refer issues of concern—matters that came to their notice and about which they were concerned—to the Investigatory Powers Tribunal without having to rely on a complaint being made.

Under the Bill as drafted the unlawful use of investigatory powers may not receive sufficient scrutiny, because often the subjects of surveillance will be unaware of it and so not in a position to make a complaint. The amendment would improve the safeguards in the Bill by addressing that problem so that where judicial commissioners are aware of a concern, they can refer it to the Investigatory Powers Tribunal. The judicial commissioners decide whether to approve the issue of warrants and are well placed to identify issues of systemic concern and of law requiring resolution by the tribunal. They are, in fact, much better placed to do so than those subject to surveillance, because they have an overview of the whole picture. It is therefore sensible to permit them to refer matters of concern to the tribunal.

The amendment is in line with a number of recommendations made during prelegislative scrutiny. Recommendation 66 of the Joint Committee on the Draft Investigatory Powers Bill was that

"The Judicial Commissioners should be able to make a direct reference to the Investigatory Powers Tribunal where they have identified unlawful conduct following an inspection, audit, investigation or complaint."

Recommendation 16 of the Royal United Service Institute's report, "A Democratic Licence to Operate", says:

"The judicial commissioners should have a statutory right to refer cases to the IPT where they find a material error or arguable illegality or disproportionate conduct."

The Interception of Communications Commissioner's Office, in written evidence to the Draft Bill Committee, made similar recommendations.

In their response to prelegislative scrutiny, the Government did not accept those recommendations, but they appear to have agreed that judicial commissioners should have this power, as it is referred to in the draft codes of practice. For example, the draft code of practice on interception of communications states:

"The Commissioner may, if they believe it to be unlawful, refer any issue relating to the use of investigatory powers to the Investigatory Powers Tribunal".

However, there is no express power to do this in the Bill. We argue that the referral power needs to be set out clearly in the Bill for two reasons.

First, such an important power should be in primary legislation, rather than in a draft code of practice that may be subject to revision after the passage of the Bill through Parliament. If it is in the Bill, any change to the power in future would be subject to greater parliamentary scrutiny, requiring the amendment of primary legislation rather than the mere revision of codes of practice. Secondly, providing for the power in codes of practice but not in the Bill creates uncertainty, which the amendment would resolve. Without the amendment, there may be a lack of certainty about whether the judicial commissioners have what would be a crucial power, and it could be argued that the codes of practice cannot create such a power without it being in the Bill.

The confusion over those issues could be resolved in a straightforward manner by the Government accepting the amendment. Their general response to prelegislative scrutiny referred to the fact that courts and tribunals do not usually have the power to carry out investigations on their own initiative, but the amendment would not give the tribunal that power; rather, it would give the judicial commissioners the power to refer an issue to the tribunal, which the tribunal would then investigate on the initiative of the judicial commissioners. In support of that approach, I note that the Investigatory Powers Tribunal explains on its website:

"The Tribunal adopts an inquisitorial process to investigate complaints to get to the truth of what has happened in a particular case, unlike the adversarial approach followed in ordinary court proceedings."

I suggest that that approach is appropriate in situations such as those envisaged in the Bill, where the victims of the measures will not have knowledge of them but the judicial commissioners will. They may therefore refer to the IPT, and because the IPT is an inquisitorial rather than an adversarial body, it is well placed to investigate a referral from the judicial commissioners. I ask the Government to take on board the amendment in the spirit in which it is intended and indicate that they will agree to it.

The Solicitor General: I am grateful to the hon. and learned Lady for the way in which she has sought to persuade the Committee of her case. She is quite right that the IPT has an inquisitorial procedure rather than an adversarial one, but it still needs a claimant. It would be wholly inappropriate if the commissioner ended up being the complainant and therefore a party to the proceedings. With respect to her and those who proposed the amendment, although I appreciate their intentions, they mischaracterise the process. There will indeed be a claimant, but that will be the individual or body that is the subject of the error. Where the error is serious, the judicial commissioner will inform that person or body of their right to apply to the IPT for a remedy. As all authorities are already required to provide the IPT with all the information it needs in the course of its investigations, it is difficult to see the benefit of the amendment.

Suella Fernandes (Fareham) (Con): Does my hon. and learned Friend agree that the heavy common law duty of candour on the authorities that will be the subject of such inquiries is applicable to these jurisdictions? Those authorities will have to disclose everything, even if that militates against the applicability of their evidence. That position was endorsed by the divisional court in the case of Chatwani.

The Solicitor General: I am grateful to my hon. Friend for reminding us about the duty of candour that applies to public bodies, which is of course material.

In addition, the clause has already been amended, pursuant to the Joint Committee's recommendation 59, to make it clear that a commissioner does not need to consult the Secretary of State before sharing information with or providing assistance to the IPT. That is provided for in clause 199(4) and may well address many of the concerns raised by the hon. and learned Member for Edinburgh South West about the Secretary of State being some sort of bar to proper disclosure and sharing of information. That is not the case under the Bill as already amended. As for providing the IPT with all information relating to relevant errors, as I have said, courts and tribunals cannot and will not consider those issues without a party first having brought a claim.

Within the framework of the clause, we have the necessary structure for proper and frank disclosure to the IPT by the commissioners of relevant material that will assist any party in bringing an action where they

[The Solicitor General]

have been subject to an error or some form of wrong. To conflate the two would lead to more confusion and would be unnecessary. With respect, I urge the hon. and learned Lady to withdraw the amendment.

2.45 pm

Joanna Cherry: I hear what the Minister says. I wonder whether the amendment might benefit from tightening up, perhaps by making the referral body the Investigatory Powers Commissioner. I will give it further consideration, but for the time being I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 199 ordered to stand part of the Bill.

Clause 200 ordered to stand part of the Bill.

Clause 201

Annual and other reports

Keir Starmer: I beg to move amendment 808, in clause 201, page 156, line 37, leave out "the Prime Minister" and insert "Parliament".

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

Amendment 801, in clause 201, page 157, line 3, leave out subsection (3).

Amendment 809, in clause 201, page 157, line 6, leave out "the Prime Minister" and insert "Parliament".

Amendment 810, in clause 201, page 157, line 13, leave out subsection (6) and insert—

"(6) The Investigatory Powers Commissioner must lay a copy of the report before Parliament together with a statement as to whether any part of the report has been excluded from publication under subsection (7)."

Amendment 811, in clause 201, page 157, line 19, leave out "The Prime Minister" and insert "The Investigatory Powers Commissioner".

Amendment 812, in clause 201, page 157, line 19, leave out "Investigatory Powers Commissioner" and insert "The Prime Minister".

Amendment 813, in clause 201, page 157, line 22, leave out "Prime Minister" and insert "Investigatory Powers Commissioner".

Amendment 804, in clause 201, page 157, line 23, leave out

"contrary to the public interest or"

and insert "seriously".

Amendment 805, in clause 201, page 157, line 27, leave out subsections (7)(c) and (7)(d).

Amendment 815, in clause 201, page 157, line 28, leave out subsection (7)(d).

This amendment would delete "prejudicial to the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Investigatory Powers Commissioner" as grounds for excluding a part of a report issued under this Part from publication.

Amendment 806, in clause 201, page 157, line 30, at end insert—

"(7A) In subsection (7) any publication will be considered "seriously prejudicial" where it would involve a significant risk to the life or of serious physical injury of any person.".

Amendment 807, in clause 201, page 157, line 40, leave out

"if requested to do so by the Prime Minister".

Keir Starmer: It is welcome that the Government have accepted and implemented recommendation 67 of the Joint Committee on the draft Bill, which was for the annual report to include information on the use and oversight of investigatory powers. However, it is disappointing that there is no provision to require the number of errors to be included in the annual report. A moment ago, in resisting an amendment to a previous clause, the Minister said that the errors could be included in the report; perhaps that should be a requirement under the clause—just the number of errors, of course, not the details. Similarly, there is no requirement for the number of requested authorisations to be reported. That information is vital in gauging the proportion of requests that are granted; without it, the stringency of the double lock cannot realistically be assessed.

The amendments would require that the report be made directly to Parliament and would tighten up clause 201(7), which is very similar to the clause we were looking at a moment ago. Like previous amendments, amendment 804 would leave out the words

"contrary to the public interest or"

and would tighten the test by replacing "prejudicial" with "seriously prejudicial". Amendment 805 is consistent with previous amendments in that it would remove our old friend "economic wellbeing" from the clause. Amendment 807 speaks for itself.

The annual reporting provisions are a step in the right direction; we acknowledge that the Government have taken action as a result of the Joint Committee's recommendations. We have tabled these amendments to suggest that more could be included in the report, that the reporting should be directly to Parliament and that exclusion from publication should be subject to a stricter test than the one currently set out in clause 201.

Mr Hayes: Let me address a couple of factual issues. Clause 198(8)(a) refers to

"the number of relevant errors of which the Investigatory Powers Commissioner has become aware during the year to which the report relates".

The number of errors must be published by dint of that requirement. That is what I was referring to.

Keir Starmer: I am grateful.

Mr Hayes: It is reinforced, for the sake of accuracy, by clause 201(2)(a), which has further details on

"the number of warrants or authorisations issued, given, considered or approved during the year".

I entirely agree that it is important that scale is dealt with in the way the hon. and learned Gentleman requests.

I am quite sympathetic to the amendment. This is one of those discussions in Committee that boils down to—I have used the phrase "boils down to" once, so for the sake of *Hansard*, I will change it, because I do not like to repeat myself. This discussion can be reduced

to—boiling has the effect of reducing, as all those who are cooks will know—a debate about what it is in the codes and what is in the Bill. As the hon. and learned Gentleman rightly says, the Joint Committee looked at this. I have its recommendation before me. He is right to say that the Committee wanted more information about the records kept in this regard.

In essence, as the hon. and learned Gentleman generously suggested, the Government have responded by publishing the draft codes of practice, which address these matters. The amendment would put these matters in the Bill. My argument for rejecting the amendment is that it is adequate for them to be in the codes. We are back to the debate of what we put in the Bill and what we put in supplementary material.

I am not unsympathetic to the amendment. I have no doubt that the hon. and learned Gentleman will want to continue this discussion. I am not sure I want to vote in favour of the amendment today, but in the spirit that I have tried to adopt throughout the consideration of this part of the Bill, I reassure him that the Government remain open-minded to how we get this right.

This is new territory, but not in the sense that there has not previously been oversight. Rather, the reforms to oversight made by the Bill are of some significance. We are in the business, as a Committee and as a Parliament, of considering exactly how to construct that oversight in an effective way. On that basis, I am prepared to listen to argument. I will not accept the amendment, but I am open to further consideration. I hope, given the tone and content of what I said, that the hon. and learned Gentleman will see fit to withdraw his amendment.

Keir Starmer: Again, I am grateful to the Minister for his observations. I record my appreciation that on occasions when we have pressed matters, both the Minister for Security and the Solicitor General have indicated a willingness to look again at clauses or provisions with a view to changing or perfecting them. That is a useful part of the process. I gauge that my chances of success in improving the clause are greater through that process than by pressing the amendment to a vote.

Mr Hayes: Got it in one.

Keir Starmer: Therefore, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Keir Starmer: I rise to speak to amendment 814, in clause 201, page 156, line 42, after "authorisations", insert "requested and"

This amendment would require the Annual Report to include information on the number of requests for warrants or authorisations made.

I have spoken to this amendment in the round and therefore will not say anything more about it.

The Chair: The amendment is not moved.

Clause 201 ordered to stand part of the Bill.

Clause 202 ordered to stand part of the Bill.

Clause 203

INFORMATION GATEWAY

Joanna Cherry: I beg to move amendment 824, in clause 203, page 158, line 33, at end insert—

'(1A) A disclosure pursuant to subsection (1) will not constitute a criminal offence for any purposes in this Act or in any other enactment.

(1B) In subsection (1), a disclosure for the purposes of any function of the Commissioner may be made at the initiative of the person making the disclosure and without need for request by the Investigatory Powers Commissioner."

We had our old friend economic wellbeing a moment ago, and now we have our old friends whistleblowing and the public interest. Clause 203 is, rather intriguingly, titled "Information gateway" and provides that a disclosure to a commissioner will not violate any duties of confidence or any other restriction on the disclosure of information. This amendment would put it beyond doubt that voluntary, unsolicited disclosures are protected and that a whistle-blower is protected from criminal prosecution.

The amendment reflects a concern, which we have already heard in the Committee, that provisions in the Bill may inadvertently risk discouraging or preventing individuals within public authorities or agencies, or in communication services providers, from approaching the Investigatory Powers Commissioner with concerns or communicating with the commission frankly.

The Solicitor General: I am sure the hon. and learned Lady is going to outline her arguments with brevity, but may I assist her? I recognise the sentiment behind the amendment and am of a mind to give them further consideration. On that basis, I invite her to withdraw the amendment.

Joanna Cherry: I am grateful for that. We have had a lot of debate about these issues already, and I am very grateful to the Solicitor General for indicating that he is going to look at them seriously. On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 203 ordered to stand part of the Bill.

Clause 204

FUNDING, STAFF AND FACILITIES

Keir Starmer: I beg to move amendment 833, in clause 204, page 158, line 41, leave out

"The Secretary of State must"

and insert "The Treasury must".

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

Amendment 834, in clause 204, page 158, line 42, leave out

"and subject to the approval of the Treasury".

Amendment 835, in clause 204, page 158, line 43, after "with", insert "funds to cover".

Amendment 836, in clause 204, page 159, line 3, leave out "Secretary of State considers".

The amendments 833 to 836 would remove the role of the Secretary of State in determining the funding, staff and facilities to be afforded to the Judicial Commissioners, leaving this to the Treasury and the IPC.

New clause 17—*Remuneration or allowances for additional directed oversight functions—*

"The Treasury shall make available such remuneration or allowances as necessary to meet the requirements of section 197 (Additional directed oversight functions).".

Keir Starmer: The provision deals with funding, staff and facilities. The Solicitor General has mentioned funding already. We agree with the Joint Committee on the Bill that it is wrong for the budget and resources available to the judicial commissioners to be set solely by the Secretary of State when the primary function of the commissioner is reviewing decisions taken by them. The Solicitor General mentioned other arrangements by which budgets are set for independent oversight bodies, but these particular commissioners oversee the Secretary of State's decisions. That is the whole point of the double lock, and that compromises the situation. The Government's response to this recommendation indicated that they might be willing to consider a role for the Investigatory Powers Commissioner in helping to set the budget. Will the Solicitor General update us on whether that response is now complete and rejected, or whether it is still a consideration that the Government are dealing with? The Opposition's amendment is straightforward and would improve matters by putting them entirely in the hands of the Treasury, in consultation with the commissioner.

New clause 17 is the freestanding clause that says the Treasury

"shall make available such remuneration or allowances as necessary to meet the requirements of section 197.".

It is an in-principle position because of the particular function of the judicial commissioners, which is unlike those of the other oversight bodies. The Government have indicated a willingness to look at a different arrangement involving the Investigatory Powers Commissioner. We think that would be the right way forward, and new clause 17 would provide for that to happen through the involvement of the Treasury.

Mr Hayes: Given the commitment I made earlier to consider closely the construction of these arrangements and, in particular, to the detailed consideration about the role of the new body and its independence, I fully understand why the hon. and learned Gentlemen has raised this issue. I hesitate to cite my experience again. Last time I did that, I fed the caricature that I have been desperately trying to persuade the hon. and learned Member for Edinburgh South West is just that—a parody—through all my kindness, generosity and sensitivity to her concerns. Notwithstanding that hesitation, I have to say that from all my experience as a Minister, the last people you want to involve in these things is the Treasury.

Keir Starmer: In my role as Director of Public Prosecutions, I had to engage with the Treasury. I, therefore, do have that experience, so I join the Minister in that sentiment.

3 pm

Mr Hayes: I knew we would soon get on to common ground again. It took only a few minutes for the ship to go back on to an even keel. I worry that exposing the IPC to direct negotiation with the Treasury, when I suspect that the Home Office would have a closer relationship and understanding of the IPC and of the Treasury, would serve no good purpose. I can see why in theory it would reinforce independence, and I think that is what the hon. and learned Gentleman was getting at; that it is important that the IPC is not seen as merely the creature of the Home Office, and that funding reflects that independence.

I can see where the genesis of the argument springs from but, in practical terms, it would be much more straightforward for the Home Office to assist the IPC by taking the lead in the negotiations. Treasury involvement will ultimately be necessary in order to get sufficient funding for the IPC. Certainly, in terms of the assessment of resources and so on, the intimacy of the relationship between the Home Secretary, her officials and the IPC will be critical to ensuring that the budget is properly constructed and adequate for the job.

For that reason, and in the interests of brevity, I ask the hon. and learned Gentleman to withdraw his amendment.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Keir Starmer: I beg to move amendment 837, in clause 204, page 159, line 4, at end insert—

'(3) The staff of the Judicial Commissioners must include independent technical experts.

This amendment would ensure that judicial commissioners have access to technical experts.

The amendment speaks for itself. It is proposed to ensure that technical expertise is available to the judicial commissioners.

Mr Hayes: Here we can find common ground, in that we entirely agree that it is right that the IPC and the judicial commissioners have access to the right technical expertise. That is essential, certainly on an ongoing basis and, one might argue, particularly at the outset. This is going to be a new process and, while these will be very experienced judges, they will be dealing with matters that they have not had to deal with previously. However, I am not sure that the amendment is necessary to achieve that.

The hon. and learned Gentleman will know that clause 204 provides that the Secretary of State must consult the IPC about staffing, accommodation, equipment and other facilities that are necessary. Of course, that will mean a proper consideration of technical expertise, and I am happy to confirm that now. That process would provide the commissioner with the chance to make it clear if they believe there is a requirement for particular staff and how they want those staff to be employed. It may be that at different points in the work, different levels of technical expertise are necessary. Some of that might require full-time employment of technical experts. On other occasions, I suspect that they would want to consult technical experts on an ad hoc basis. That flexibility would not only add to the official use of resource but add to the effective completion of their functions.

To give one further assurance, I want to be very clear that, should such representations be made to the Secretary of State—we talked in the debate on the previous amendment about the Home Office being the point of contact with our paymasters, the Treasury—it is inconceivable that the Secretary of State would consider that the commissioner did not need the resources requested. While it would not be appropriate to create a statutory obligation in the Bill to provide detail of what staff should, or should not, be employed—because it is important

that the commissioner makes that judgment on a discretionary basis—I can give an assurance that the commissioner will be equipped as they need to be.

The matter might also be one that changes over time. What the IPC considers necessary at a given point in time might reflect its caseload or even case history—it might feel that extra expertise needs to be taken on, depending how things change. We have all said that all such matters that we are considering are highly dynamic, so I want to allow that extra discretion, not least for that reason.

On that basis, I hope that the hon. and learned Gentleman will withdraw his amendments, because I think we are again on the same page.

Keir Starmer: I have listened carefully to what the Minister has said, and it is now on the record, so on that basis I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 204 ordered to stand part of the Bill.

Clause 205

POWER TO MODIFY FUNCTIONS

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

Joanna Cherry: I wish to oppose the clause, in relation to submissions I made earlier about clause 196.

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

The Committee divided: Ayes 10, Noes 2.

Division No. 117]

AYES

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

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 205 ordered to stand part of the Bill.

Clauses 206 and 207 ordered to stand part of the Bill.

Schedule 7

CODES OF PRACTICE

Joanna Cherry: I beg to move amendment 839, in schedule 7, page 216, line 17, at end insert—

"(5A) A statutory instrument for the purposes of paragraph (4) must be accompanied by a report by the Investigatory Powers Commissioner on the content of the draft code and his consultation response."

The Chair: With this it will be convenient to discuss amendment 840, in schedule 7, page 216, line 34, at end insert—

"(5A) A statutory instrument for the purposes of paragraph (4) must be accompanied by a report by the Investigatory Powers Commissioner on the content of the draft code and his consultation response."

Joanna Cherry: The amendments are self-explanatory. They require any code of practice, or any proposed revision to a code, to be accompanied by a report by the Investigatory Powers Commissioner. The report would be on the merits of the proposed revision and be required before any revision was laid before Parliament. The report would allow the commissioner to draw to the attention of Parliament any relevant information about the scope of the code or its potential impact, which to my mind is a sensible and reasonable amendment.

Mr Hayes: Here we are again debating the creative tension between obligation and discretion—how much we oblige bodies to do in the Bill, and how much discretion we afford to those we empower through the Bill. The hon. and learned Lady does the Committee a service in drawing attention to how far we go in that respect. My view is plainly that discretion matters; I am sure she agrees. I emphasise yet again that the published codes of practice are draft codes. We would hope that our work in the coming days and weeks will allow those codes to reflect much of what we have said during our consideration of the Bill.

I am not implying that changes cannot be made to the Bill, but I would hope that they would be considered in concert with changes to the codes. If the Bill becomes an Act, we will soon bring the codes of practice into force, but before doing so, the Secretary of State is required to undertake a consultation process. The Bill specifies that the Secretary of State must consult the Investigatory Powers Commissioner as part of that. The amendment would require the commissioner's response to consultation on any draft codes of practice, and any views on the content of those codes, to be published alongside the statutory instrument that seeks to bring the codes into force. I recognise the intent; I assume the aim is to increase transparency.

Joanna Cherry: The Minister will have looked at written evidence and have received briefings from various organisations, as all Committee members have, and so will be aware that many bodies have grave concerns about the fact that so much relevant information will be in codes of practice. This minor amendment seeks to address that concern. When the codes of practice are crystallised, proposed revisions will be accompanied by a report from the Investigatory Powers Commissioner that will inform parliamentarians about the utility, and the pros and cons, of proposed revisions. That is the only purpose behind the amendment.

Mr Hayes: I said that I understood the intent, and I meant it. I do understand that the hon. and learned Lady's intent is both to inform and to provide transparency, but there is another tension at the heart of our discussion about this part of the Bill, and perhaps more generally: the tension between the independence of the commissioner, and what we oblige him to do. It is not just about obligation and discretion; it is about independence and proper parliamentary engagement, involvement, scrutiny and the power of the Executive.

[Mr John Hayes]

I suppose the point I am making is that the commissioner may well want to publish information in the way the hon. and learned Lady describes, and there is nothing in the Bill that prevents him from so doing. Indeed, the commissioner may take the view that he wants to publish all kinds of things with both surprising and interesting regularity, but that is very much a matter for the commissioner. Indeed, as the hon. and learned Lady knows, some existing oversight commissioners take that approach; they publish without a statutory requirement to take such action.

If the commissioner is, as we wish him or her to be, an independent assessor of those things, the more discretion we give them over such decisions the better, because that allows them to exercise their judgment and, by so doing, affirm their independence.

Joanna Cherry: I hear what the Minister says, but the commissioner will have many demands on his or her time and, as we know, may have a limited budget. The amendment would require the commissioner to furnish parliamentarians with the benefit of his or her expertise and experience when changes are proposed. Does the Minister not accept that such a requirement would be a good thing?

Mr Hayes: I accept that this is a matter for debate, and the way I have approached it reflects that, I hope. These tensions, as I have described them, although creative, are the subject of different opinions. As we have navigated our way through this part of the Bill, it has been clear in our discourse that we are all in the business of trying to perfect the legislation, in the words of the hon. and learned Member for Holborn and St Pancras. I do not think there is an open-and-shut case on very much of this, actually, and you will not often hear a Minister say that, Mr Owen. I hope that we can get to a place where we all feel that the Bill is better for the scrutiny.

3.15 pm

On this occasion, discretion is the right way forward. I want to empower the commissioners to exercise that discretion in a way that recognises their expertise, accounts for the dynamism of the circumstances in which they are working, and affirms their independence. In my view, the Bill as drafted does all that, and on that basis, I ask the hon. and learned Lady to withdraw her amendment.

Joanna Cherry: I would like to press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 118]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

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

Question accordingly negatived.

Schedule 7 agreed to.

Clause 208

RIGHT OF APPEAL FROM TRIBUNAL

Keir Starmer: I beg to move amendment 843, in clause 208, page 160, line 13, after "determination", insert

"or ruling or decision, including relating to a procedural matter"

and leave out

"of a kind mentioned in section 68(4) or any decision of the tribunal or a kind mentioned in section 68(4C)"

This amendment makes clear that all decisions, determinations and rulings can be appealed on a point of law.

The Chair: With this it will be convenient to discuss amendment 841, in clause 208, page 160, line 31, leave out subsection (6).

The Bill provides that an appeal on an error of law will only lie when an appeal raises an important point of principle or practice or there is another compelling reason to grant leave. This amendment would remove this restriction and create a right of appeal against any error in law.

Keir Starmer: The amendments relate to the grounds for appeal. The Bill provides that appeal on an error of law will only lie when an appeal raises

"an important point of principle or practice, or…there is another compelling reason to grant leave."

The two amendments would remove that restriction and create a right of appeal against an error in law.

The history and background of this is that David Anderson raised the issue in his report last year. He suggested that appeals be permitted on an error of law. When it scrutinised the Bill at the tail end of last year and the beginning of this year, the Joint Committee agreed that an appeal should be permitted on any error of law. It is right that appeals should be allowed on errors of law, so that they can be corrected, and so that the right decision is arrived at on the right legal analysis.

The Government have refused to amend the Bill in the light of those recommendations, maintaining that there needs to be an important point of principle or practice or another compelling reason for granting leave. That is unpersuasive. David Anderson and the Joint Committee were absolutely clear—they were right—that an appeal should lie where there is an error of law.

The Solicitor General: I am afraid that I am not persuaded by the amendments. I am concerned that within the Bill the IPT and the appellate court already have the significant discretion necessary when granting permission to appeal. I am worried that the amendments will have a detrimental effect. There is a risk that we will end up with appeals in cases where there is no significant point of law, and that is frankly a waste of everyone's time and resources.

I want to deal with the background to clause 208. The Bill represents a significant step. The only route of appeal currently available to complainants from decisions of the Investigatory Powers Tribunal is by reference directly to the European Court of Human Rights. For

the first time, we have established a domestic right of appeal, which will enable parties to seek redress here in the UK court system. That will also enable appeals to be heard more quickly. I think we would all agree that that is a massive step forward. Appeals will be heard by the Court of Appeal of England and Wales, or the Court of Session in Scotland or the Court of Appeal in Northern Ireland, and ultimately it will be possible for appellants to seek permission to appeal from the appellant court to the Supreme Court.

I understand the sentiment behind the amendments, but there has to be balance and I think our approach is right. The Investigatory Powers Tribunal or relevant appellant court will be able to grant permission to appeal if it considers that it would raise

"an important point of principle or practice",

or additionally, if there are any other compelling reasons to grant leave. That gives the courts an appropriately wide discretion when deciding whether permission should be granted. That makes it possible for any case that raises a significant point of law to be dealt with at appellate level.

As hon. Members are no doubt aware, this type of restriction is not unusual. Our approach in the Bill is directly modelled on restrictions that apply to judicial reviews from decisions of an upper tribunal—that is civil procedure rule 54.7A. I consider that the same restrictions should apply to appeals from the IPT.

It would be helpful for me to take the opportunity to put on record the number of cases that were considered by the IPT in 2015. Two hundred and nineteen cases were considered, of which 47%—nearly half—were deemed to be frivolous or vexatious; 30% were given a "no determination"; 17% were out of the IPT's jurisdiction, withdrawn or not valid; 3% were out of time; and only 4% were found to have any merit to them.

Therefore, although creating an appeal route is very important—I am proud that we are doing that—not having any limits on that route would mean, I am afraid, a considerable amount of taxpayer money and court and agency time and resources frankly being wasted on continuing to manage and defend cases that, sadly, have no grounding in fact or merit in law. That is why I think the appeal route as currently delineated will still allow important cases that need further judicial scrutiny to progress.

Therefore, to strike the right balance, having broken new ground with the domestic right of appeal, I commend the clauses unamended to the Committee and urge the hon. and learned Gentleman to withdraw the amendment.

Keir Starmer: The Solicitor General is right that this is an important step forward, but it also needs to be the right one. I am not convinced that the point about frivolous and vexatious applicants has any bearing or substance, because there has to be an appeal on a point of law and it can be allowed only on a point of law. Therefore, if it is on a point of law, it is difficult to argue that it is frivolous and vexatious. Of course, the amount of those should be reduced—they waste a great deal of time—but this amendment would not increase the number of frivolous and vexatious cases, nor would it give them any grounds for success.

This important point was pressed by David Anderson and the Joint Committee, and I wish to press this amendment to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 119]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

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

Question accordingly negatived.

Keir Starmer: I beg to move amendment 842, in clause 208, page 162, line 22, at end insert—

"(6) After section 68(1) of the Regulation of Investigatory Powers Act 2000, insert—

(1A) Any hearing conducted by the Tribunal must be conducted in public, except where a special proceeding is justified in the public interest.

(1B) Any determination by the Tribunal must be made public, except where a special proceeding may be justified in the public interest.

(1C) A special proceeding will be in the public interest only where there is no alternative means to protect sensitive material from disclosure.

(1D) Material will be sensitive material for the purposes of this section if its disclosure would seriously prejudice—

(a) national security, or

(b) the prevention and detection of crime.

(1E) Publication for the purposes of this section will be seriously prejudicial if it would lead to a significant threat to life or of a serious physical injury to a person.

(1F) The Tribunal shall appoint a person to represent the interests of a party in any special proceedings from which the party (and any legal representative of the party) is excluded.

(1G) Such a person will be known as a Special Advocate."'

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

New clause 20—*Power to make declaration of incompatibility with a Convention right*—

"(1) Section 4 of the Human Rights Act 1998 is amended as follows.

(2) In subsection (5), after paragraph (f), insert—

'(g) the Investigatory Powers Tribunal.'"

This new clause enables the IPT to make a declaration of incompatibility under the Human Rights Act.

New clause 21—*Openness and the Investigatory Powers Tribunal*—

"(1) Within 12 months of the coming into force of this Act, the Secretary of State must make arrangements for an independent review of the procedures of the Investigatory Powers Tribunal to be placed before Parliament.

(2) The Treasury will provide such funds, remuneration or allowances as necessary for the Independent Reviewer appointed to produce his report pursuant to section (1).

(3) The Independent Review in section (1) must consider—

(a) the capacity of the Tribunal to afford redress to individuals when compulsory powers are exercised unlawfully, including in a manner incompatible with Convention Rights protected by the Human Rights Act 1998, and

(b) the conduct of Tribunal hearings and the production of Tribunal decisions which are open, transparent and accessible, except in so far as can be justified in light of a serious risk to life or of physical injury of any person, seriously prejudicial to—

(i) national security, or

(ii) the prevention and detection of serious crime."

Keir Starmer: We have a long-standing principle of openness and open justice in this country. Case law as long as my arm sets out the importance of open justice. I readily accept that that principle, which we all adhere to, is more difficult to achieve in this field than in other fields, but with these amendments we are really arguing about the default position, not the automatic position.

On page 240 of his report, David Anderson recommended that the IPT be changed—I recognise what the practice is—

"to make open hearings the default and disclose the fact that closed hearings have taken place".

The Joint Committee on the Draft Investigatory Powers Bill recommendation 74 is that, when making a decision on whether part of a hearing should be open or not, the tribunal should apply a public interest test.

This amendment would make open hearings the default position, which was David Anderson's preference, but to have a mechanism to change the default position to closed proceedings. It is important that we keep to the principle of open justice. People fought for it for many years, and it is one of the central planks of our justice system. A default position that proceedings are open is in keeping with that principle; the default position set out in the Bill is not. For those reasons, I will press this amendment.

New clause 20 deals with declarations of incompatibility, and speaks for itself. It would amend section 4 of the Human Rights Act 1998 to give the IPT the power to make a declaration of incompatibility. Where there is a problem with legislation and convention rights that cannot be resolved during interpretation, the IPT would have the power to make a declaration of incompatibility, which would then trigger a dialogue with Parliament about what, if any, modifications or alterations to legislation should follow. That has proved worthwhile and effective so far under the Human Rights Act 1998.

The Solicitor General: In prefacing my remarks on the hon. and leaned Gentleman's arguments, I, too, pray in aid my strong and long-held commitment to open justice. Like him, I practiced it for many years, and I believe fundamentally in it. However, as a parliamentarian, I have come to accept that there are occasions, which need to be very carefully prescribed, when that principle has to be departed from, but that must only be in cases where there is a clear public interest and a necessity that everybody would understand. That is why every time these matters arise—whether it was when the Special Immigration Appeals Commission was created nearly 20 years ago, or when the Justice and Security Act 2013 created closed material proceedings three or four years ago—they are the subject of very intense debate and proper scrutiny. I therefore welcome the opportunity to look closely at the position with regard to the new provisions in the Bill.

The amendment seeks to amend section 68 of the Regulation of Investigatory Powers Act 2000 to provide that the Investigatory Powers Tribunal must hold its proceedings in public unless closed proceedings are in the public interest. As has been outlined, the amendment would restrict the circumstances in which that can take place and would require the appointment of special advocates.

First, on the necessity, we are in something of a transitional period, but I will give the Committee some reassurance. Rule 9 of the tribunal rules, pursuant to section 69 of RIPA, currently states that all proceedings, including oral hearings, should be held in private. The problem is that the rules have not been updated to take into account changes that were introduced by the tribunal many years ago. There was a ruling in the 2003 Kennedy case, which is reported at IPT/01/62 and IPT/01/77, that the tribunal has the discretion to order that hearings take place in public. Happily, since then, in practice the IPT have regularly held open hearings, and copies of their judgments delivered in open proceedings are publicly available on its website.

3.30 pm

It is clear, and the hon. and learned Gentleman and all members of the Committee who are legal practitioners will be familiar with this, that the rules should have been updated in order to reflect practice. The Government are committed to reviewing and updating the tribunal rules early next year following the passage of the Bill. RIPA already gives us the power to do that, so there is no need for the amendments. Any amendment to the tribunal rules, including this one, I would imagine, will need detailed consideration. Section 69(8) of RIPA already requires that rules issued by the Secretary of State are subject to the approval of both Houses of Parliament. That ensures that we will have the opportunity to return to this issue and scrutinise amended rules in due course.

I hope I have set out what I would regard as the practical arguments to support my case, but there is a further argument that I want to advance, on which we will perhaps have further debate. While I accept that the tribunal should be able to order that hearings take place in public, and are doing so, I am worried that the amendment goes much further, and might actually damage the very public interest that we all seek to serve. I think the tribunal should have significant discretion when determining whether holding a hearing in public would be damaging to the public interest.

It is already best placed to review the various sensitive issues that are clearly relevant to such an important decision. I am worried that the amendment would serve only to limit that discretion by raising the public interest threshold to a position at which only the most serious threats to national security, or the most serious crime, could justify closed proceedings. There are good reasons why proceedings sometimes take place in private. For example, Her Majesty's Government's long-standing policy on neither confirming nor denying NCNDs—non-circumvention non-disclosure agreements, which are an old friend to many of us—to protect sensitive capabilities. I am afraid that restricting the public interest considerations in this way could prevent that from happening.

I will deal with the question of special advocates. I am always attracted to arguments about making sure that a point of view, position or interest is properly reflected, and very often advocates are the best people to do that. The special advocate system has worked very importantly in closed material procedures and proceedings under the Special Immigration Appeals Commission. In that particular instance, the tribunal already benefit from the appointment of counsel to the tribunal, who can and do act in the interest of all parties to a claim to ensure that justice is done. I am worried that adding more counsel and more lawyers to the process will only slow down matters and, perhaps more importantly, would be a duplication that I do not think any of us would want to see.

May I deal with the question of declarations of incompatibility? The hon. and learned Gentleman has outlined the powers under the Human Rights Act 1998 that enable a judge to issue a declaration that they consider either secondary or primary legislation incompatible with this country's obligations under that Act, which incorporates the European convention on human rights into domestic law. That ability to make a declaration is properly reserved to a small number of specified courts: the Supreme Court; the Judicial Committee of the Privy Council; the Court Martial Appeals Court; the Court of Protection; the High Court and Court of Appeal in England, Wales and Northern Ireland; and in Scotland, the High Court and the Court of Session. No tribunals, either upper or lower, are able to issue declarations of incompatibility, and frankly, I cannot see any good reason for departing from that position.

As we discussed while debating the previous group of amendments, the fact that the Bill introduces a right of appeal against the decisions of the IPT means that such a change is simply unnecessary. Where the Government is a party to a proceeding and there is a challenge, it is more appropriately dealt with at the appellate level than by departing from the current structure and allowing this tribunal, uniquely among all tribunals, to have that power. In any case where a complainant considered that a declaration of incompatibility was required, they could seek to appeal on that basis. To me, it seems likely that an appeal on such a point would meet the criteria provided for in the Bill.

We are also thinking about what it means for complainants in terms of full and proper redress. Although declarations of incompatibility are important and I do not seek to minimise them, they will not in practice prevent the tribunal from offering full and proper remedy to those who have been wronged as a result of an error or something worse.

Keir Starmer: I am not sure that the Solicitor General is right about that. The declaration of incompatibility arises only where the primary legislation requires an outcome that is incompatible with the convention right. By definition, the legislation in place overrides the convention right, which is what bounces it back to Parliament. Technically, he is probably wrong about that. There cannot be a remedy; that is why the amendment is needed.

The Solicitor General: I am interested in that argument, although I am not entirely persuaded by it. I am afraid that the amendment would be a problem across the piece. If courts of lower record could issue declarations, obviously I would not be arguing the point. It would be unusual for us to single out the Investigatory Powers Tribunal as sui generis in this instance.

To return to the point that I was developing, under section 68(5) of the Regulation of Investigatory Powers Act 2000, the IPT is required to make a report to the Prime Minister in the event that it makes a determination in favour of a person that arises from any act or omission made by or on behalf of the Secretary of State. In such circumstances—this may be a helpful and practical point—the Government would of course be required to consider whether legislative change was needed. De facto, our position would be very similar to the result of the declaration of incompatibility.

For example, the IPT recently decided in the Belhaj and Saadi cases, both public judgments, that the regime for certain intrusive surveillance of legally privileged material contravened article 8. I know that this is a slightly different point from declarations of incompatibility pursuant to section 80, I think—I am sure *Hansard* will help me—of the Human Rights Act 1998. The tribunal is already making findings on the compatibility with rights under the convention.

Finally, I will deal with the question of review of the tribunal. As Committee members will know, the use of investigatory powers has been the subject of extensive reviews, to which we have referred repeatedly in this Committee's deliberations. None of those reports recommended the wholesale change to how the IPT operates that the amendment suggests. Bearing in mind that we have ongoing and detailed scrutiny and important and recent reviews, I do not believe that we will get added value from a further review. The new clause would also require that any independent review must consider two issues.

The IPT can of course make clear any concerns that it might have about the operation of the tribunal. The tribunal published a report only recently, and it did not express any concerns about its effective operation, so I do not think that a further review will add anything. I believe that the key concerns identified in the amended clause have been and are being addressed. On reasons of lack of necessity, I therefore submit that the new clause would not take us any further. On that basis, I invite the hon. and learned Gentleman to withdraw the amendments and new clauses.

Keir Starmer: I will not press new clauses 20 and 21, but I will press amendment 842 to a vote on the open justice principle.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 120]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

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

Question accordingly negatived.
Clause 208 ordered to stand part of the Bill.
Clauses 209 and 210 ordered to stand part of the Bill.

Clause 211

TECHNICAL ADVISORY BOARD

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

The Committee divided: Ayes 10, Noes 2.

Division No. 121]

AYES

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

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 211 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Simon Kirby.)*

3.43 pm

Adjourned till Tuesday 3 May at half-past Four o'clock.

Written evidence reported to the House

IPB 70 Letter from the Security Minister further submission
IPB 71 Sir David Pepper KCMG