



## **1. About ISPA**

1. The Internet Services Providers' Association (ISPA) is the trade association for companies involved in the provision of Internet Services in the UK with around 200 members from across the sector. ISPA represents a diverse set of companies, including those that provide access to the internet, host websites and data of individuals and business and other cloud-based or over-the-top services. Our members are affected by the proposals in different ways, be it retention, targeted requests for data, and the potential for equipment interference to impact on how our members run their business.

## **2. Introduction**

2. ISPA has long been supportive of the creation of a new legal framework to underpin investigatory powers. The existing laws are too complex for legal experts let alone the public or policy-makers to understand, oversight arrangements have not kept pace with the application of the law and various courts and tribunals have found issues with the current arrangements.
3. The Investigatory Powers Bill is a step in the right direction and has the potential to be a significant improvement on the status quo. However, in order to fulfil this potential, ISPA believes that the current draft requires a number of amendments to ensure that the final Bill is both comprehensive and comprehensible, provides effective powers and oversight, and maintains the ability of the UK to grow its digital economy.
4. We will be making detailed amendments in a follow-up briefing paper but, given the amount of time available since the publication of the Bill, would like to provide the Committee with an overview of our concerns with the current draft. There is currently a real danger that a Bill will be passed that will negatively impact on the UK's vibrant technology sector. By working with the Committee on our areas of concern we hope to improve the proposals resulting in a Bill that minimises the impact on business while giving effective powers to public authorities.

## **3. Government's clear intentions must be reflected on the face of the Bill**

5. The Investigatory Powers Bill deals with highly complex technical matters, however, our members do not believe that complexity should lead to a Bill lacking in clarity. The primary legislation must be the starting point for a clear and comprehensive framework that reflects Government's full intentions. There have been numerous occasions where there has been a disconnect between what can be found on the face of the Bill

and what the Home Office says the Bill will be used for, e.g. while the Home Secretary has provided a limited use case for ICRs, the Bill effectively allows a far wider application of this provision though the use of language such as “data generated and processed”. Given that the Bill will carry significant costs and is highly intrusive, the Government must put all of its intentions for how it plans to use the powers on the face of the Bill. Reliance on speeches and non-legislative documents to make clear what the Bill explicitly intends, puts our members, the public at large and indeed Parliament in an unsatisfactory position. To be clear, we do not expect that the exact use of powers should be described in detail on the face of the Bill, but we do believe it is necessary to clearly define the powers in the Bill. We want to ensure that the Bill cannot be interpreted in such a way that the stated intentions become meaningless.

#### **4. Key terms and concepts remain unclear**

6. The successful implementation of the Bill will depend, to a large degree, on the ability of communications service providers to comply with the provisions of the Bill. However, despite the publication of a significant volume of additional documents and direct conversation between our members and the Home Office, our members are still uncertain about how key terms and concepts of the Bill will be interpreted. Of key concern in this area are Internet Connection Records (an entirely new concept), encryption powers, extra-territorial application, the impact of network interference but also the various definitions of data in the Bill, and who the powers will ultimately fall on. A full assessment of the impact of the Bill can only take place if clarity in these areas is provided. We look towards the Committee to fully clarify these key terms and concepts in the Bill.

#### **5. Cost implications remain unclear**

7. Our members have consistently argued that the cost estimates that have been provided by the Home Office do not accurately reflect the implementation costs that CSPs would face to ensure that they comply with the Bill’s provisions. A service provider that is currently under a notice to retain communications data told the Joint Committee that it expects that the *“the lion’s share of that £174 million would be for us alone”* while another small provider that is currently not subject to a notice suggested that *“you are looking in the order of £20 million to £30 million if I have to replace so much hardware on my network because it is not designed to do that; it does not have logging capability.”*<sup>1</sup> Accordingly, it is clear that the cost of implementing the Bill will be significantly higher than estimated. As the Home Office outlines, how we

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<sup>1</sup> <http://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/oral-evidence-draft-investigatory-powers-committee.pdf>

communicate is changing and constantly evolving with more and more data being generated leading to the creation of a new and updated framework. The one certainty we have is that there will be significantly more data generated and retained, leading to higher costs. As the Committee may be aware, Denmark recently shelved plans to reintroduce a similar programme of ICR retention, partially due to the significant costs involved.

8. The fact that the cost estimates have not been accurate seems to have been accepted by the Home Office in its *"Response to Pre-Legislative Scrutiny"*. While we accept that it may not be possible for the Home Office to *"publish final costs during the passage of the Bill"*<sup>2</sup> (Page 93), we believe that it is of vital importance that Government provide a more accurate estimate of costs. A more accurate estimate of costs – both capital expenditure and operational costs – would help the Committee assess the effectiveness and proportionality of the powers. As we outline below, implementation costs provide for a clear safeguard for the Bill and the Committee should demand a clear indication of costs before clearing the Bill.

## **6. Cost recovery**

9. Cost recovery is one of the strongest checks and safeguards as it provides a clear link between public expenditure and the exercise of investigatory powers. Despite a recommendation by the Science and Technology Committee, there is no explicit commitment from the Home Office to pay the full costs incurred. While we recognise that there has been an informal commitment to pay the costs that communication services providers incur when they comply with certain provisions of the Bill, there is uncertainty among our members about what form this cost recovery will take. For example, at second reading, the Home Secretary referred to reimbursing "in full the reasonable operational costs" but also stated that "100% of the compliance costs will be met by the Government". These statements do not provide for the same coverage of costs and we would welcome a clearer commitment from the Government to reimburse costs.
10. Our members do not benefit from investigatory powers and will be required to put additional measures in place to secure ICR data, so it is important that UK companies are not put a competitive disadvantage and receive full cost recovery. The Government makes clear spending commitments in other areas, so we therefore do not understand the Home Office's insistence that "it would not be appropriate to commit future Governments to pay the full cost of compliance, as it would limit their discretion on this issue."<sup>3</sup> As

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<sup>2</sup> Page 93, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504174/54575\\_Cm\\_9219\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504174/54575_Cm_9219_WEB.PDF)

<sup>3</sup> Page 93, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504174/54575\\_Cm\\_9219\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504174/54575_Cm_9219_WEB.PDF)

things stand too much discretion is given to the current (and future) Home Secretary, leaving our members in a state of uncertainty, an uncertainty that could discourage investment.

## **7. What should happen next**

11. We will provide the Committee with a more detailed briefing paper and suggested amendments as soon as we are in a position to do so. In the meantime, we urge the Committee to:
  1. Clearly define all the powers contained in the Bill – this is not an argument against the powers in the Bill, but an argument that the Bill should not leave the use of powers open to interpretation. A Bill that provides for a wider use of powers than outlined by the Government in supporting documents and speeches potentially allows for an extension of powers without further involvement of Parliament.
  2. Ensure key definitions and concepts included in the Bill are clearly defined – The Home Secretary has emphasised many times that the Bill has been drawn up in close cooperation with industry, yet our members have expressed concerns that provisions that are dependent on action from them remain unclear.
  3. Clearly define the cost implication of the Bill – The Home Secretary has accepted that current cost estimates are not accurate. We fully appreciate that certain costs are hard to fully determine as they are based on technologies and networks that are constantly developing. However, in order to allow Parliament to adequately assess the proportionality of the legislation and its cost value effectiveness, an updated cost impact assessment must be provided to Parliament. If a more accurate figure is hard to come by, a costs range should be provided.
  4. Ensure that UK companies are not put at a competitive disadvantage with a presumption against impacting on smaller companies – CSPs and other technology companies have a track-record of complying with the investigatory powers regime in the UK and are committed to working constructively with the Home Office and public authorities. However, given the importance of the digital economy to the UK, the impact of the Investigatory Powers Bill on the sector should be considered by the Committee.