



JUSTICE

***The Investigatory Powers Bill:
Building a Surveillance Framework for a Digital Age?***

**Public Bill Committee
Summary Briefing
23 March 2016**

In 2011, in *Freedom from Suspicion*, JUSTICE recommended that the Regulation of Investigatory Powers Act 2000 ('RIPA') be repealed and replaced by a modern legal framework for surveillance more suited to a digital age.¹

Reconciling the right to respect for privacy and the security interests of the wider community requires careful consideration, but the public interests in privacy and security are not mutually exclusive. Surveillance is a necessary activity in the fight against serious crime. When targeted, it can play a vital part in our national security.

Building a legal framework for surveillance in the digital age is now a priority. However, JUSTICE is concerned that the Investigatory Powers Bill, like the Draft Bill, and the Draft Communications Data Bill before it, yet includes broad provision for untargeted and bulk powers of surveillance, and makes limited provision for effective, world-leading oversight and accountability.

The Draft Investigatory Powers Bill was published on 4 November 2015 for consultation. A Joint Committee appointed to report on the Draft Bill published its report on 11 February 2016. The Investigatory Powers Bill was published on 4 March 2016 and had its Second Reading on 15 March 2016. The Government intends the Bill to become law before the end of 2016, before the sunset clause in the Data Retention and Investigatory Powers Act 2014 activates.

¹ JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age*, Nov 2011. In anticipation of the publication of the Draft Investigatory Powers Bill for consultation, we published an update to that report, JUSTICE, *Freedom from Suspicion: Building a Surveillance Framework for a Digital Age*, Nov 2015.

The Report of the Joint Committee on the Draft Investigatory Powers Bill reflects many of JUSTICE's concerns.² The Committee identified 86 separate areas for work and made significant criticism of the Government's proposals. This echoed the crucial conclusions of the Intelligence and Security Committee, chaired by former Attorney General, Dominic Grieve QC, that the Draft Bill is in parts "inconsistent and largely incomprehensible" and generally presents a "missed opportunity" to provide "the clarity and assurance which is badly needed".³ The House of Commons Science and Technology Committee agreed, criticising its "poorly defined" and "broad and ambiguous" provisions.⁴

Yet, the revised Bill had its first stage in the House of Commons less than a month after the pre-legislative process ended.

JUSTICE remains concerned about the compatibility of the powers proposed in the Bill with the provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. The conduct of more general or 'bulk' forms of data retention and surveillance are subject to pending challenges before the European Court of Human Rights in *10 Human Rights Organisations v UK*⁵ and *Big Brother Watch & Ors v UK*⁶ and the Court of Justice of the European Union in *Davis & Watson*.⁷

While others will be better placed to advise Parliament on the practical impact of these powers or the operational case to support them, JUSTICE considers that the legality of the measures in the Bill must now be subject to close scrutiny.

JUSTICE has a number of detailed concerns about the Bill's provisions.

Authorising Surveillance

(i) The Bill should be amended to provide for judicial authorisation of warrants throughout as a default, subject to a limited exception for certification by the Secretary of State in some cases involving defence and foreign policy matters. Certification should be subject to judicial review by Judicial Commissioners.

² Session 2015 – 16, *Report of the Joint Committee on the Draft Investigatory Powers Bill*, HL 93/HC 615

³ Session 2015 -16, Intelligence and Security Committee of Parliament, *Report on the draft Investigatory Powers Bill* HC 795

⁴ Third Report of Session 2015 – 16, Select Committee on Science and Technology, *The Investigatory Powers Bill*, HC 573

⁵ <https://privacyinternational.org/sites/default/files/HR%20Orgs%20v%20UK.pdf>

⁶ App No 58170/13

⁷ *R v Secretary of State for the Home Department ex p David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis* [2015] EWCA Civ 1185 (currently on reference to the CJEU, listed for April 2016).

(ii) If a review is conducted, it should be clear on the face of the Bill that Judicial Commissioners are required to conduct a full merits review of the necessity and proportionality of a Secretary of State's decision on surveillance.

(iii) The urgent procedure in the Bill should be amended to restrict the capacity for its arbitrary application.

(iv) All substantive modifications of warrants should be made by a Judicial Commissioner.

(v) Judicial Commissioners considering applications should have access to security vetted Special Advocates to help represent the interests of the subject and the wider public interest in protecting privacy.

The Investigatory Powers Commissioner

(vi) The Bill should be amended to provide a clear statutory basis for a new Investigatory Powers Commission. The independence of the Commission and its Judicial Commissioners will be paramount to its effectiveness.

(vii) The judicial functions of the Judicial Commissioners and the wider investigatory and audit functions of the Commission should remain operationally distinct. While it would be beneficial for the Commissioners to be able to draw upon the wider expertise provided by the staff of the Commission, there should be no doubt about their capacity to take independent decisions on individual warrants.

(viii) The Secretary of State should not have any involvement in the management of resources for the new Investigatory Powers Commissioner.

(ix) Any drain on the High Court when judges take up appointments as Judicial Commissioners should be offset by the Treasury.

(x) The Appointment of Judicial Commissioners by the Prime Minister should not be allowed to undermine their independence.

(xi) The Secretary of State should not be able to modify the functions of the Commissioners by secondary legislation.

(xii) The Bill's provision for the reporting of errors should be substantially amended. At a minimum, it should be accompanied by a mandatory disclosure requirement for individuals targeted for surveillance to be provided with information after-the-event.

(xiii) JUSTICE is concerned that the Bill does not yet provide a clear safe-route to the IPC, as it fails to make clear that communications from officials or Communications Service Providers will not be treated as a criminal offence for any purpose, including when making voluntary disclosures.

The Investigatory Powers Tribunal

(xiv) The new right of appeal from decisions of the Investigatory Powers Tribunal is welcome. Parliament may wish to consider whether the test for appeal is unduly restrictive. The Bill should make clear beyond doubt that an appeal at any stage of proceedings against any determination on the law by the IPT remains possible.

(xv) JUSTICE considers that the Bill should be amended to modernise the procedures of the IPT. This should include an amendment to provide for the IPT to be able to make declarations of incompatibility pursuant to Section 4, Human Rights Act 1998, for example.

Additional Issues

(xvi) JUSTICE is encouraged that Ministers accept that Legal Professional Privilege must be addressed on the face of the Bill and subject to debate in Parliament. However, we regret that the provision in the Bill provides for the authorisation of the interference with legally privileged materials in circumstances which are considered 'exceptional and compelling'. The safeguards proposed in the Bill are insubstantial and may pose a significant risk to individual confidence in the ability to secure confidential legal advice and assistance if implemented.

(xvii) The ban on the use of intercepted material in court proceedings should be removed.

(xviii) JUSTICE considers that the Bill should come with a true sunset clause. Given the breadth of the intrusive powers in the Bill, and the uncertainty over their legality, Parliament should bear regular responsibility for the scrutiny of the operational need for such measures and their renewal or amendment if necessary.

Like the Armed Forces Bill, the Investigatory Powers Bill should be renewed on a regular basis, prompting an automatic Parliamentary consideration of effectiveness and necessity of the existing powers, any new capacities, and any concerns about the lawfulness of the underlying framework.