IOCCO Points to Consider on the Investigatory Powers Bill (IP Bill)
(updated post introduction of the IP Bill into Parliament on 1st March 2016)

On 21st December 2015 we submitted written evidence to the IP Bill Joint Committee[1] highlighting the elements needed to create a world-leading oversight body, along with a number of additional concerns and inadequacies relating to the clauses in the IP Bill.

We summarized our evidence into 8 key areas and we were very pleased to note that the Joint Committee and the Intelligence and Security Committee (ISC) made over 20 recommendations in the areas we highlighted. On 11th February 2016 we produced a one page summary[2] linking the Committees' recommendations to our evidence.

On 1st March 2016 the Government introduced the revised Bill into Parliament and also published a substantial amount of additional documents to accompany the Bill. One of these entitled the *Government's Response to Pre-legislative Scrutiny*[3] includes a table of the Committees recommendations and the Government's response to each. It would have been helpful if the table had included a column setting out explicitly whether the various recommendations had been achieved or not (i.e. Yes, No or Partly). Without this indicator it is difficult to review which of the Committees' recommendations have been achieved, which are still under review or which are not going to be implemented. Further practical difficulties arise when reviewing the revised Bill as a consequence of the fact that amendments to draft Bills result in Clauses being renumbered.

This document seeks to review the 8 key areas that we highlighted in our original written evidence to the IP Bill Joint Committee[4] against the revised IP Bill that was introduced into Parliament on 1st March 2016 and should be read alongside that written evidence.

1. We have concerns with the aggressive timeline for the IP Bill. There should be a review provision included in the IP Bill to enable the legislation to be re-visited regularly by the Government and revisions to take place in light of experience, especially given the fact that communications technology is ever changing.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? Yes - **Joint Committee Recommendation 86 (Para 710).**

Update as of 1st March 2016: Clause 222 of the revised Bill contains a provision for the Secretary of State to prepare a report within six years on the operation of the Act. Clause 222(3) signifies that the Secretary of State's review anticipates a Select Committee of either House of Parliament (acting alone or jointly) undertaking a review of the powers. This is in line with the Joint Committee's recommendation. However we do still have concerns with the aggressive timeline for this extensive piece of legislation.

[1] http://www.iocco-uk.info/docs/IOCCO%20Evidence%20for%20the%20IP%20Bill%20Joint%20Committee.pdf
[2] http://www.iocco-uk.info/docs/Summary%20of%20Points%20to%20Consider%20on%20IP%20Bill%20and%20recommendations.pdf
[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504174/54575_Cm_9219_WEB.PDF
[4] http://www.iocco-uk.info/docs/IOCCO%20Evidence%20for%20the%20IP%20Bill%20Joint%20Committee.pdf

2. The oversight provisions in Part 8 of the IP Bill require significant enhancement in order to prescribe properly the legal mandate and functions of the "world-leading oversight body" which the Government is seeking to create. 3 of the 6 elements of our oversight wish-list[5] have been partly addressed and the remaining 3 have not been addressed by the clauses.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? Yes - **Joint Committee Recommendations 51 (Para 574), 52 (Para 575), 53 (Para 588), 54 (Para 593), 55 (Para 597), 56 (Para 604), 59 (Para 626), 60 (Para 629), 61 (Para 630), 63 (Para 637), 64 (Para 638), 76 (Para 670).**

Update as of 1st March 2016: We are disappointed that the Government has still not created or made any reference to the oversight "Commission" in the IP Bill. The clauses only create the Investigatory Powers Commissioner and the Judicial Commissioners. The Commissioners will be responsible for approving approximately 2% of the applications falling within the remit of the oversight body. The remaining 98% will only be subject to post-facto oversight. The post-facto oversight will be carried out predominantly by specialist inspectors and technical staff within the Commission. Creating an oversight "Commission" would help to form a distinction between the approval and post facto audit elements of the oversight body, addressing a concern raised by a number of witnesses to the Joint Committee that the Judicial Commissioners' are not perceived to be "marking their own homework". We again urge the Government to implement this recommendation which was also made by the Royal United Services Institute (RUSI) Independent Surveillance Review, David Anderson QC's Investigatory Powers Review and the IP Bill Joint Committee.

The Secretary of State is still responsible for providing the Commissioner with the funding, staff and facilities that *the Secretary of State considers necessary* for the carrying out of the Commissioners' functions (Clause 204(2)), despite the Joint Committee suggesting rightly that it was inappropriate for the Secretary of State alone to determine the budget of the body which is responsible for reviewing the Secretary of State's performance.

There are however some enhanced safeguards in the revised IP Bill concerning the oversight provisions. First, we welcome the amendment which makes explicit that the Judicial Commissioners are to have power to carry out such investigations, audits and inspections as the Investigatory Powers Commissioner considers appropriate for the purpose of his or her functions (Clause 202(1)). Secondly, we are pleased to see a further amendment which makes explicit that assistance to a Judicial Commissioner includes such access to apparatus, systems or other facilities or services as required (Clause 202(4)). Thirdly, amendments have been made to the powers to appointment of the Commissioners (Clause 194 requires the Lord Chief Justice and others to be consulted). The Government has also committed to consulting with the current Commissioners', the Judicial Appointments Commission and other relevant parties to ensure the appointments procedure and terms are fair and transparent. Fourthly, the revised Bill provides a route for Communication Service Providers (CSPs) and other bodies or individuals to refer to the Commissioners' any complaints or concerns with the conduct proposed or undertaken, or any matter on which they require clarification (Clause 203). Fifthly, the draft Code of Practice for the Interception of Communications makes a good start on prescribing provisions for error reporting and includes statistical requirements which will aid transparency.

3. Clause 171 (now Clause 198) is a paradox which requires substantial re-drafting and clarification to ensure that a) the delineation of responsibility between the Investigatory Powers Commissioner and the Investigatory Powers Tribunal (hereafter "the IPT") is clear and, b) individuals are able to seek effective remedy.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? Yes - **Joint Committee Recommendations 57 (Para 621), 58 (Para 622), 65 (Para 640).**

[5] http://www.iocco-uk.info/docs/Kings%20College%20Round%20Table.pdf

Update as of 1st March 2016: Clause 198 has been amended to allow the Investigatory Powers Commissioner to inform individuals of any serious errors which have caused significant prejudice or harm to the person concerned *without* having to seek agreement from the Investigatory Powers Tribunal (IPT). Clause 199 now makes clear that the Judicial Commissioners can communicate with the IPT without consulting the Secretary of State.

However we still have a number of concerns with Clause 198 which covers error reporting. First, the description of a "serious error" is still dependent on the consequence of the conduct, rather than an assessment of the seriousness of the nature of the conduct itself. Secondly, there is still no complete definition of "relevant error" in Clause 198(9) which appears to still be confined to public authority conduct (even though around 38% interception errors and 14.3% of communications data errors are caused by Communication Service Providers (CSPs)). The Codes of Practice should provide clarity and further detail on these points but at present they do not. Thirdly, we have concerns that the threshold is set artificially high which will prevent individuals from being able to seek effective remedy. We note that Government has committed to review the threshold for error reporting (response to IP Bill Joint Committee recommendation 58) but we have not seen any evidence of this review as yet.

4. Clause 8 (offence of unlawfully obtaining communications data) (now Clause 9) could have the unintended consequence of undermining the open and co-operative self-reporting of errors and contraventions currently undertaken. There is a real danger that this provision will reduce accountability and individuals' and public authorities' co-operation with our investigations into errors and contraventions.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? No.

Update as of 1st March 2016: We welcome the fact that the Government has made it clearer when this offence will apply and that the revised Bill contains a defence whereby a person in a public authority believed they had the appropriate authorisation in place to limit the risk that genuine mistakes become a criminal offence - Clause 9(3).

5. Is it desirable to have the same body responsible for authorising investigatory powers and undertaking the post facto oversight of the exercise of those powers? If so, the judicial authorisation and oversight elements of that body must be operationally distinct.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? No – **however the Joint Committee's Report (Para 612) emphasises need for these two functions to have clear delineation.**

Update as of 1st March 2016: There are no Clauses to address this important point. We have already set out how we believe that the creation of an oversight "Commission" would help to form the required distinction between the approval and post facto audit elements of the oversight body, a point of detail raised by a number of witnesses to the Joint Committee which is crucial to ensure the Judicial Commissioners are not perceived to be "marking their own homework".

6. There appear to be a number of clauses which provide exceptions for national security or which exempt the intelligence agencies from key safeguards (e.g. clauses 47(2), 47(3), 60(2), 60(3) and 61). Are these exceptions, especially the combined effect, justified?

Did any of the Committees' scrutinising the IP Bill make a recommendation on this point? Yes – **Joint Committee Recommendation 50 (Para 556). Intelligence and Security Committee (ISC) Recommendations B and J (viii).**

Update as of 1st March 2016: Clause 61 (now Clause 68) has been amended to remove the exemption for the security and intelligence agencies relating to applications to determine journalistic sources.

The Joint Committee's recommendation to remove the national security exemption relating to the requirement for Designated Persons to be independent of investigations or operations when approving communications data has *not* been implemented. Clause 47 (now Clause 54) still includes a broad exemption for national security purposes. The Government's response sets out that the exemption only applies in exceptional cases and particular cases and that it is not a blanket exemption. However, in our view that is not reflected in the drafting of Clause 54.

Clause 60 (now Clause 67) has not been amended and still disapplies the requirement for a public authority to consult with a Single Point of Contact (SPoC) when acquiring communications data *in the interests of national security*. The SPoC is a key safeguard in the process and the justification for deeming the interests of national security always to be an exceptional circumstance is unclear.

7. The Government has not taken the opportunity to bring all of the investigatory powers used by public authorities into the IP Bill. The result is a lack of clarity and inconsistency in application and approval procedures.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? Yes – **Intelligence and Security Committee Recommendation C. The Joint Committee did not make a specific recommendation on this point, but there are a number of references to inconsistencies in the application and approval procedures in their report.**

Update as of 1st March 2016: It is disappointing that the Government has missed the opportunity to bring all of the investigatory powers used by public authorities into the IP Bill, particularly because the Judicial Commissioners created under the IP Bill will be responsible for overseeing those powers. The result is a lack of clarity and inconsistency in the authorisation processes.

8. The IP Bill also curiously prescribes different authorisation and modification procedures for targeted equipment interference warrants made on behalf of the intelligence services (or Chief of Defence intelligence) to those made on behalf of law enforcement. The different procedures are confusing and it is not clear on what basis they are justified.

Did any of the Committees scrutinising the IP Bill make a recommendation on this point? Yes – **Joint Committee Recommendation 35 (Para 450).**

Update as of 1st March 2016: The Government has not made any amendments in this respect. It is still unclear on what basis the different equipment interference authorisation and modification procedures for intelligence services and law enforcement are justified.

Conclusion

Due to the time constraints our evidence to date has concentrated mainly on the oversight elements of the Bill. However we also recognised in our evidence to the Joint Committee that a number of experts and key stakeholders raised concerns about other Clauses which are worthy of serious consideration, such as the broad definition for targeted interception warrants and targeted examination warrants in Clause 15(2); the provisions to modify such warrants in Clause 30(5); and the principle of judicial review (Clause 21(2)).

The reviews carried out by the three Committees' (especially that of the Joint Committee) were particularly comprehensive considering the short timeframe they had to carry out their work. The Government has shown in their response to those reviews that they are willing to make amendments to the Bill in order to provide more clarity and to enhance the privacy protections and safeguards.

A number of the concerns we raised with the November 2015 draft have been addressed by amendments. However this document shows that further amendments are still required in order to address properly all of the concerns and inadequacies that we have raised. Furthermore the *Government's Response to Pre-*

legislative Scrutiny[6] document sets out that there are still a number of areas that the Government has committed to review which we have yet to hear on and it is important that those elements do not get lost in the scrutiny process.

Finally, although we were pleased that the draft Codes of Practice were published when the amended Bill was introduced into Parliament, it is clear that the Codes require a substantial amount of work to align them properly to the Bill and to ensure the safeguards and protections contained within them are adequate. It is vital for the Government and Parliament to ensure that the Codes of Practice are scrutinised thoroughly as they contain the all important detail about the operation of the powers.

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504174/54575_Cm_9219_WEB.PDF