



HOUSE OF COMMONS

LONDON SW1A 0AA

Ms Nadine Dorries MP & Albert Owen Esq., MP
Joint Chairmen
Investigatory Powers Bill, Public Bill Committee
House of Commons
London
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19th April 2016

A handwritten signature in blue ink that reads "Nadine and Albert".

I am sorry that prior commitments and the short notice given meant that I was unable to give evidence to the Bill Committee on the Investigatory Powers Bill on Maundy Thursday. I agreed to submit evidence in writing and hope that you will accept the following as my contribution.

I understand that there are calls for improved scrutiny associated with greater powers. However, we must take great care to avoid damaging the effectiveness of operational decision making which protects our citizens. The current system has saved significant numbers of innocent people from being killed or injured by terrorist violence. Effective operations rely on the capacity for operational agility in the face of ruthless and innovative opponents. After a decision has been made, I am firmly in favour of a more rigorous and rapid review process.

Firstly, I would like to say that I regarded signing warrants as a key responsibility when I took over as Secretary of State for Northern Ireland. Sadly there were elements in the republican community that would not accept the settlement that we had inherited from the previous Labour government and who were determined to pursue their aims by terrorism. We rapidly reequipped

various agencies at considerable public expense as there had been a deterioration in the security situation and a raised threat level. I was fully aware that our security services could only operate efficiently if decisions were made rapidly from the top. I made clear that I was always to be disturbed at any time if an urgent decision was required.

The vast majority of warrants were signed in an orderly manner, in regular slots built into my diary; these slots were a priority. I was occasionally woken up very early in the morning and asked to make an extremely urgent decision. I am deeply concerned that the proposal to have a dual lock, involving endorsement by a judge, will bring an element of delay and confusion to effective operational decisions.

Whilst I understand that there are calls for more accountability and scrutiny of these vital but necessarily confidential decisions, I believe very strongly that only a democratically elected Secretary of State, who is ultimately accountable to the House of Commons, should make such decisions. During my time, I had huge respect for the thoroughness with which warrants were prepared but I did on occasion refuse them. There was a very clear decision making procedure.

I was also acutely aware that my decisions would be subject to review after the event and I respected the review process. As Shadow Secretary of State for three years, I visited Northern Ireland every week and built up a level of local knowledge which was helpful.

Some decisions had to be made in imperfect conditions with imperfect information; that is the nature of working with intelligence to protect the public. The decisions sometimes required a personal judgement on what was in the public interest, not just a legal interpretation. I fully appreciate the public demand for more scrutiny but this should not interfere with operational agility, putting the public at risk.

The current system works and could, with amendments, offer greater scrutiny. I am in favour of a more rigorous and rapid review process. The proposal in the Bill is that in emergencies a warrant could be issued but would be reviewed within three days. This could be made applicable to all warrants.

There are other practical and operational issues that do not appear to have been considered in the Bill. The Bill as drafted is not clear what the procedure would be should a Commissioner refuse a Secretary of State's decision. There is potential for even further delay and confusion in Clause 21, Sub Clause 5, when the Secretary of State may go to the Investigatory Powers Commissioner.

Under the current arrangement it is quite clear who is responsible - the Secretary of State, accountable to Parliament. Under the proposed system, with possible delays and divided decision making, it is not clear who is responsible should something go horribly wrong with devastating consequences for the public. Should a terrorist operation be tragically successful because of delay and differences of opinion under the proposed dual lock, who will be legally responsible? Who will the relatives hold to account and potentially sue? Who will be accountable to the House of Commons?

The impossible position in which distinguished lawyers will be placed is highlighted in Clause 196 Sub Clauses 5&6. Lawyers and judges are trained to interpret the law meticulously but these Sub Clauses require very subjective political decisions.

(5) In exercising functions under this Act, a Judicial Commissioner must not act in a way which is contrary to the public interest or prejudicial to— (a) national security, (b) the prevention or detection of serious crime, or (c) the economic well-being of the United Kingdom.

(6) A Judicial Commissioner must, in particular, ensure that the Commissioner does not— (a) jeopardise the success of an intelligence or security operation or a law enforcement operation, (b) compromise the safety or security of those involved, or (c) unduly impede the operational effectiveness of an intelligence service, a police force, a government department or Her Majesty's forces.

In order for these criteria to be met the Secretary of State should clearly be accountable in guaranteeing our security services operational agility and swift reaction.

According to the principle of separation of powers, going back to Montesquieu, it is clear that lawyers should not make operational, executive decisions which may require some personal judgement. They should be brought in after the decision in order to review the process by which the decision was arrived at. The Bill effectively brings judges into the Executive, giving them a difficult role as both scrutineers and executive decision makers. These roles require very different skills; according to the separation of powers they should be kept separate for good reasons.

There is a further important deep flaw in the Bill as drafted which applies particularly to Northern Ireland. This is perfectly illustrated in the recent high profile case when members of the notorious Duffy family were accused of a number of terrorist offences arising out of a security services surveillance operation. The trial collapsed when the judge ordered disclosure of the tracking devices. The case has been made strongly that as a result of this trial collapsing, the public are at risk because of the judge's insistence on total transparency of procedure. In practical terms this is unworkable in the current circumstances in Northern Ireland. The demand for transparent disclosure of the technology used as required by this judge would have compromised the methodology which keeps the public safe; it would also have educated terrorists as to how to avoid detection in the future.

The case shows that in Northern Ireland there are now senior members of the judiciary who come from differing political backgrounds and who may not be at all sympathetic to agencies of the British State whatever the risk to life. It would be extraordinarily difficult to find local Judicial Commissioners representing the whole spectrum of society in Northern Ireland who could make the sorts of difficult decisions currently made by the Secretary of State which I have outlined above. These highly sensitive decisions cannot be made by local judges under these circumstances.

I am also concerned about Clause 194, Sub Clause 3e, which requires the Prime Minister to consult the First Minister and Deputy First Minister before appointing an Investigatory Powers Commissioner or a Judicial Commissioner.

I was the first Secretary of State to have responsibility following the devolution of justice and policing to local politicians. It was always clearly understood that the Secretary of State maintained responsibility for matters of national security; the PSNI and security services reported to him on these matters. The locally elected Minister of Justice, David Ford MLA did not handle matters concerned with national security.

Controversy surrounding the establishment of the National Crime Agency in Northern Ireland has shown the deep antipathy amongst many republicans to involvement of the UK police and security services at any level in Northern Ireland. Given that the current political arrangements are still delicate in Northern Ireland, I foresee extreme difficulties in a republican First or Deputy First Minister agreeing to the appointment of either an Investigatory Powers Commissioner or a Judicial Commissioner who would be required to sign warrants approving surveillance of citizens from strong republican backgrounds.

I suggest that the committee reflect on the wise words of the Joint Committee when they said in para 419 of their report "We are aware that particular sensitivities around these issues may apply in Northern Ireland. The Government will need to reflect on these sensitivities as this legislation progresses." I recommend, therefore, that Sub Clause 3e be removed in its entirety.

Law abiding British citizens are under threat from dangerous terrorists every day; I am acutely aware that deaths and injuries have been prevented not just thanks to the supreme professionalism of our security services but also thanks to the current swift decision making process which gives them critical operational agility. It would be tragic if this was lost because few Members of Parliament or the House of Lords understand the very real benefits of the current process. I am therefore opposed to the proposal of a dual lock.

I am clear that the signing of warrants should remain the exclusive responsibility of the Secretary of State, accountable to Parliament. The review process by distinguished members of the judiciary should be carried out sooner,

more frequently and more thoroughly after the executive operational decision has been made by an elected politician. This would satisfy public concerns on this issue.

Yours ever,

A handwritten signature in blue ink, appearing to read 'Owen Paterson'. The signature is fluid and cursive, with a large initial 'O' and a long, sweeping tail.

The Rt Hon Owen Paterson MP