



House of Lords

House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Investigatory Powers Bill

First Report of Session 2016–17



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Rights

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*Report, together with formal minutes
relating to the report*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Summary

This Report is intended to inform debate about some of the most significant human rights issues raised by the Investigatory Powers Bill when it has its Report Stage in the Commons. The Report focuses on the human rights issues most likely to be debated at that stage in the Bill's passage. (Further amendments may be proposed for later stages.)

We welcome the introduction of a Bill as a significant step forward in human rights terms towards the objective of providing a clear and transparent legal basis for the investigatory powers already being exercised by the security and intelligence agencies and law enforcement authorities and, in many respects, enhanced safeguards. Our Report focuses on areas in which the Bill could be improved to enhance further the compatibility of the legal framework with human rights and suggests some amendments to do so.

On the current state of the ECHR case-law, we do not consider the **bulk powers** in the Bill to be inherently incompatible with the right to respect for private life, but capable of being justified if they have a sufficiently clear legal basis, are shown to be necessary, and are proportionate in that they are accompanied by adequate safeguards against arbitrariness. We welcome the Government's publication of a detailed operational case for the bulk powers and recommend that it should be reviewed by the Independent Reviewer of Terrorism Legislation, who should report before the Bill completes its passage.

We recognise the value of **thematic warrants** but consider that the wording of the clauses concerning the subject matter of targeted interception and targeted equipment interference warrants is too broadly drafted. We recommend that the Bill be amended so as to ensure that the description in the warrant is sufficiently specific to enable any person unknown, but who is the subject of it, to be identified and to prevent the possibility of large numbers of people being potentially within the scope of a vaguely worded warrant.

We consider that the power to make **modifications** to warrants for targeted interception, without judicial approval, is so wide as to give rise to real concern that the requirement of judicial authorisation can be circumvented, thereby undermining that important safeguard against arbitrariness. We recommend that major modifications to warrants require approval by a Judicial Commissioner.

A key role of the legislature is to hold the executive to account. The Bill must provide sufficient safeguards to prevent the executive abusing its powers and undermining the ability of the legislature to hold it to account. Members of the public should also be able to communicate with members of Parliament with the expectation that those communications will remain confidential. We therefore welcome the Bill's recognition of the strong public interest in preserving the confidentiality of **communications of members of Parliament**, including the House of Lords, the devolved legislatures and the European Parliament. However we consider that the requirement that the Prime Minister be consulted before any interference with such communications is an inadequate safeguard. We recommend that, in addition, the Speaker or Presiding Officer should be given sufficient prior notification of the decision to issue an interception or

examination warrant affecting members' communications to enable the Speaker or Presiding Officer, if they so wished, to be represented at the hearing before the Judicial Commissioner, at which any representations could be made about matters such as the scope of the warrant, or the precision with which it specifies the matters subject to the warrant.

We welcome the express provision on the face of the Bill for **legal professional privilege**, but we query whether the safeguards for lawyer-client confidentiality in the Bill are sufficiently robust. The preservation of the "iniquity exception" to legal professional privilege, according to which communications concerned with furthering a criminal purpose are not legally privileged, makes it unnecessary for the Bill to provide for targeting confidential communications between lawyers and clients and we recommend that those provisions be removed from the Bill. We also recommend that the safeguard for legally privileged items which are likely to be included in intercepted communications be strengthened, by the insertion of a threshold test reflecting the strong presumption against interfering with such confidential communications.

We recognise the real difficulty of defining "journalism" in the digital age, but we are concerned that the safeguards for **journalists' sources** are inferior to similar safeguards in other contexts. We recommend that the Bill should provide the same level of protection for journalists' sources as currently exists in relation to search and seizure under the Police and Criminal Evidence Act 1984, including an on notice hearing before a Judicial Commissioner, unless that would prejudice the investigation.

We consider that the overall compatibility of the new legal framework with the requirements of Article 8 ECHR is likely to be enhanced if the new system of **oversight** provides for a clear separation of function between the prior judicial authorisation of warrants and *ex post* inspection and review. We recommend that the Investigatory Powers Commissioner be placed under a duty to ensure that the two distinct functions of authorisation and inspection are carried out by different Commissioners.

1 Introduction

Background

1.1 The Investigatory Powers Bill was introduced in the House of Commons on 1 March 2016. It had its Second Reading on 15 March¹ and completed its Committee stage on 3 May.² Report stage in the Commons is scheduled to take place on Monday 6 and Tuesday 7 June.

1.2 The Draft Investigatory Powers Bill³ was published by the Home Office on 4 November 2015. It sought to update and consolidate existing legislation governing the use of investigatory powers, including the Regulation of Investigatory Powers Act 2000 (RIPA).

1.3 The publication of the Bill followed the publication in 2015 of three significant reports on investigatory powers, by the Government's Independent Reviewer of Terrorism Legislation⁴; the Royal United Services Institute⁵; and the Intelligence and Security Committee⁶. All three reports concluded that the current framework was outdated, unworkable and in need of reform. They highlighted the need for greater transparency, more stringent safeguards and better oversight.

1.4 A Joint Committee was appointed by the House of Commons (on 5 November 2015) and House of Lords (on 25 November 2015) to undertake pre-legislative scrutiny of the draft Bill. The Committee was given a reporting deadline by both Houses of 11 February 2016.

1.5 The Joint Committee on the draft Bill received 148 submissions in response to its Call for Written Evidence (running to over 1500 pages) and heard evidence in person from 59 people. The written evidence is published with the Committee's report⁷ and the oral evidence (along with an electronic version of the written evidence) can be found on the Committee's website⁸.

1.6 The Committee made 86 conclusions and recommendations covering all aspects of the draft Bill. Some of these have been accepted by the Government and appear in the Bill. Others have been rejected. The draft Bill was also scrutinised by the Intelligence and Security Committee. The ISC reported on 9 February 2016⁹. The Science and Technology Select Committee reported on the technology issues on 19 January 2016¹⁰.

1.7 In view of the extensive pre-legislative scrutiny that the draft Bill received, and the importance of ensuring that a Report from this Committee is available to inform

1 HC Deb, 15 Mar 2016, [col 812](#)

2 There were 16 sittings of the Public Bill Committee between 24 March and 3 May.

3 Home Office, [Draft Investigatory Powers Bill](#), November 2015

4 David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust](#), June 2015

5 Royal United Services Institute, [A Democratic Licence to Operate](#), 2015

6 Intelligence and Security Committee of Parliament, [Privacy and Security: A modern and transparent legal framework](#), HC 1075

7 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651

8 www.parliament.uk/business/committees/committees-a-z/joint-select/draft-investigatory-powers-bill/

9 Intelligence and Security Committee of Parliament, [Report on the draft Investigatory Powers Bill](#), HC 795

10 Science and Technology Committee, Third Report of Session 2015–16, [Investigatory Powers Bill: technology issues](#), HC 573

debate about the human rights implications of the Bill before it leaves the House of Commons, we decided to prioritise our scrutiny on what we consider to be the most significant human rights issues raised by the Bill which we anticipate may be debated at Report stage in the Commons. Further amendments may be proposed for later stages.

1.8 On 27 April 2016 we heard oral evidence on those aspects of the Bill from Professor Iain Cameron, Professor in Public International Law at the University of Uppsala, Sweden and author of the 2015 Venice Commission Report on the Democratic Oversight of the Security Services and of Signals Intelligence Agencies; Michael Drury, a former Director of Legal Affairs at GCHQ; and Professor Martin Scheinin, Professor of International Law and Human Rights at the European University Institute in Florence, Italy and former UN Special Rapporteur on Human Rights and Counter-Terrorism.

1.9 Our call for evidence on Bills before Parliament in the last session included the draft Investigatory Powers Bill. In the event our other work meant that we were unable to scrutinise and report on the draft Bill. We are grateful to all those who responded to our call for evidence on the draft Bill:¹¹ their submissions have informed our scrutiny of the Bill itself. We are also grateful to the witnesses who gave oral evidence about the Bill. We are grateful to each of our witnesses for supplementing their evidence in follow up letters which are published on our website.

Information provided by the Government

1.10 The Government provided us with an ECHR Memorandum which we have found helpful in our scrutiny of the Bill's compatibility with the ECHR.

1.11 We have also taken into account the Government's Response to pre-Legislative Scrutiny, and other relevant documents published by the Government alongside the Bill and during its scrutiny in Public Bill Committee.

1.12 In view of the considerable scrutiny which has already been given to the draft Bill, the large amount of information which has helpfully been provided by the Government, and the need to publish a Report before the Bill reaches its Report Stage in the House of Commons, we have proceeded directly to a report on the Bill, without first engaging in correspondence with the Government.

The most relevant human rights engaged by the Bill

1.13 By far the most relevant right engaged by the Bill is the right to respect for private life, family life, home and correspondence in Article 8 ECHR. The right to privacy is also protected by Article 17 of the International Covenant on Civil and Political Rights and Article 7 of the EU Charter of Fundamental Rights (which applies within the field of application of EU law, including data protection).¹²

1.14 Any interferences with the right to respect for privacy must satisfy three requirements: they must be (1) in accordance with the law (which requires not only a clear legal basis but

¹¹ Joint Committee on Human Rights, 2015–16 [publications page](#)

¹² Internet Connection Records are qualitatively different from telephony. An individual's life can be mapped out by a simple search of their web history. For instance searches of medical/health websites can indicate their own condition and are particularly sensitive. This Report does not deal with Internet Connection Records but we may wish to address the human rights issues raised by that part of the Bill in any further report.

also sufficient specificity in the definition of the powers to provide effective guarantees against the risk of arbitrariness); (2) necessary in pursuit of a legitimate aim and (3) proportionate. The adequacy of safeguards against possible abuse is also relevant to any assessment of the proportionality of any interference with privacy.

1.15 Other ECHR rights are also relevant, in particular the right to freedom of expression in Article 10 ECHR, which is particularly relevant in relation to the safeguards for journalists' sources; and the right to a fair hearing in Article 6 ECHR, which is of particular relevance to the safeguards for communications between lawyer and client.

1.16 The EU Charter of Fundamental Rights also contains a distinct right to the protection of personal data (Article 8 EUCFR).¹³

1.17 Freedom of association, assembly, religion and movement are all rights which are also potentially affected by the provisions in the Bill.

1.18 Chapter 5 of the Investigatory Powers Review¹⁴, by the Independent Reviewer of Terrorism Legislation, contains an excellent and accessible account of the relevant legal framework within which the Bill must be assessed, including the relevant law of the ECHR and the EU.

1.19 We draw parliamentarians' attention to the Independent Reviewer's account of the legal framework as the starting point for their consideration of the human rights compatibility of the Bill.

Human rights enhancing aspects of the Bill

1.20 As the Government correctly points out in its ECHR Memorandum accompanying the Bill, the new legislation will enhance the UK's compliance with the relevant human rights law standards in a number of significant ways, for example by:

Providing a clear legal basis for the use of investigatory powers by law enforcement, the security and intelligence agencies and other public authorities;

Establishing new or enhanced safeguards against the arbitrary or unlawful use of such investigatory powers, such as the judicial approval of warrants;

Providing for independent oversight;

Providing new legal remedies by introducing a right of appeal from decisions of the Investigatory Powers Tribunal.¹⁵

1.21 We welcome the introduction of a Bill as representing a significant step forward in human rights terms towards the objective of providing a clear and transparent legal basis for the investigatory powers being exercised by the security and intelligence agencies and law enforcement authorities and, in many respects, enhanced safeguards.

¹³ Incompatibility with a right in the Charter can result in the legislation being invalidated by domestic courts if the legislation is in the field of application of EU law, e.g. because it is implementing EU law or derogating from it.

¹⁴ David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust](#), June 2015

¹⁵ Home Office, Investigatory Powers Bill, [European Convention on Human Rights Memorandum](#), March 2016

In this Report we focus on areas in which in our view the opportunity could be taken to amend the Bill to improve further the compatibility of the legal framework with the requirements of human rights law.

The scope of our Report

1.22 Although the Bill raises a number of very significant human rights issues, our priority is to inform the debate which takes place at the Bill's Report Stage in the House of Commons. In this Report we therefore focus on those human rights issues which are most likely to be debated at that stage in the Bill's passage, and we suggest some amendments for debate at Commons Report Stage.¹⁶ We may decide to report again on the Bill before its Report Stage in the House of Lords, in the light of all the debates which will by then have taken place.

¹⁶ The amendments suggested in this Report are to the version published as HC Bill 2 of the current session.

2 Bulk powers

2.1 The Independent Reviewer of Terrorism Legislation, David Anderson QC, told us in evidence that in his view the most significant human rights issue raised by the Bill is the compatibility of the bulk powers with the right to respect for privacy in Article 8 of the ECHR and its equivalent under the EU Charter.

I think there is a human rights issue in relation to this Bill that dwarfs all the others, and it is the question of the compatibility of bulk collection and retention of data with Article 8 of the European convention and its equivalents under the Charter of Fundamental Rights of the European Union.¹⁷

2.2 The significant human rights issue raised by these bulk powers is that their exercise will result in the acquisition of large volumes of untargeted data about a large number of people, most of whom will not be of intelligence interest. The Government acknowledges this fact, and that the collection of data in relation to such people constitutes an interference with their privacy, but argues that the mere collection of such data involves merely “a degree of interference” with their privacy, and the greater interference comes at the later stage when information is selected from examination.

2.3 The Independent Reviewer himself is quite clear that the case-law of the European Court of Human Rights suggests that bulk data collection and analysis, in the absence of suspicion, is not in itself a disproportionate interference with the right to respect for private life.¹⁸ As he told us in evidence:

Those who have looked at the security case in this country have generally speaking been pretty comfortable about these powers; I include myself in relation to the powers that I have been able to look at, as well as the Commissioners and the Intelligence and Security Committee and, indeed, the Investigatory Powers Tribunal. You might have seen only this morning the report of the UN’s privacy rapporteur, which said that these practices should be outlawed and suggested that they are incompatible with judgments of both the Court of Justice of the EU and the European Court of Human Rights in Strasbourg. I do not go that far. I do not think that those courts have yet come to a final position on these issues, but I think we are right to be concerned that there are differences in the way our judges look at these issues. On the retention of DNA in the Marper case, for example, all our judges in three courts in a row—10 judges—said that it was fine to retain indefinitely the data of people who had been arrested but not charged. Seventeen judges in Strasbourg to nil took the opposite view, and there are judges from Germany and countries of eastern Europe who had a rather different experience in the 20th century and who are more privacy-minded and less inclined to tolerate these powers than people are here. I hope we are not heading for a bust-up on that, but from the lawyers’ point of view that remains a major issue.

[...]

¹⁷ Oral evidence taken on Wednesday 9 March 2016, [HC \(2015–16\) 647](#), Q13 [Mr David Anderson QC]

¹⁸ David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust](#), June 2015, para 5.34

My view is that you can detect a difference in approach with the ECHR, which has traditionally been more tolerant. The Venice commission and the Strasbourg court have been more tolerant to bulk collection. The Court of Justice of the European Union, which comes relatively fresh to all this with its new charter of fundamental rights, has been saying things, in cases such as Digital Rights Ireland and the Schrems case, which on the face of it are more hostile to the idea on principle. A case brought by David Davis and Tom Watson, which I think will be heard in that court on 12 April this year, may give us a fairly early indication of what it will say about the bulk collection of even some fairly unremarkable types of data: traditional call logs, the details of when an email was sent and so on. I would guess from the fact that that hearing has been expedited that the court may want to have its say before the Bill has completed its parliamentary passage.¹⁹

2.4 However, opinion, including legal opinion, is very divided on whether the bulk powers in the Bill are inherently incompatible with the right to respect for private life. As the Joint Committee on the Draft Bill reports, many witnesses to its inquiry were of the view that the bulk powers were necessarily incompatible with Article 8 ECHR because their indiscriminate nature made it impossible for them to be proportionate.

2.5 Professor Martin Scheinin told us in his oral evidence:

Professor Scheinin: One would need to define the proportionality assessment required from the Secretary of State, or anybody else issuing the warrant, and from the Judicial Commissioner who reviews the decision to issue a warrant. Both of them should include a proper proportionality assessment and, on that basis, determine the necessity of the measure in a democratic society, once it has already been assessed that the intrusion into human rights is deemed proportionate compared with the benefit obtained.

[...] Unfortunately, that test would be very demanding for bulk powers. It is probably impossible to do a proper proportionality assessment when we deal with a warrant that relates to the authorisation of bulk powers, because the information is not granular enough to allow for an assessment of the impact on human rights, hence you would not have the data. That is where the bulk powers would be in deep trouble, and that is why it is legitimate to say that the European courts are very wary of any mass surveillance or bulk powers. When you are dealing with big groups of individuals situated in different situations in different scenarios, and using different technical methods for surveillance, you lose the required granularity of the information to conduct a proper proportionality assessment. This becomes a fundamental problem. It is very hard to fix simply by writing a proper proportionality clause in the bulk powers, but that would be the best we could try.

The Chair: You do not think that that can be addressed by safeguards further down the line, when it comes to the use of the material obtained under the bulk powers?

¹⁹ Oral evidence taken on Wednesday 9 March 2016, [HC \(2015–16\) 647](#), Q13 [Mr David Anderson QC]

Professor Scheinin: I do not think so, because the law has to be necessary and proportionate, and then the decisions concerning warrants, which are the first step in implementation, also have to be necessary and proportionate in order to allow for actual implementation that remains within the limits of what is proportionate and necessary.

Lord Woolf: Does that mean that there should be no ability to exercise the bulk powers?

Professor Scheinin: I have great hopes concerning so-called targeted powers and their development towards addressing scenario-based situations where a particular method of surveillance is applied. Then it becomes controllable. We could still deal with a large group of individuals, but they would be so-called thematic or targeted powers instead of what are now named in the Bill as bulk powers.

Lord Woolf: I think that that means your answer to me is that there should not be any bulk power as such.

Professor Scheinin: The short answer is: correct.²⁰

2.6 The Council of Europe Commissioner for Human Rights has also expressed:

[...] serious concerns as to whether generic interception of external communications is an inherently disproportionate interference with the private lives of a great number of persons.²¹

2.7 Michael Drury, on the other hand, disagreed. He said:

Weber and Saravia [...] sets a standard in Strasbourg jurisprudence that interception in bulk [...] should meet: specificity about what is being intercepted, the class of people being intercepted, time limits, reviews and so on. There is a standard. While the Bill is far from perfect and clearly there are things to change [...] on any sensible view it meets the standards set out in Weber and Saravia. [...] A tribunal consisting of High Court judges and very eminent lawyers [the Investigatory Powers Tribunal] has carried out the most methodical and thorough investigation into bulk powers and has found that they are consistent with the Strasbourg and Human Rights Act requirements. [...] as a matter of fact they are in law both proportionate and necessary, and are exercised in that way.²²

2.8 Professor Iain Cameron also disagreed with the view that bulk powers are inherently incompatible with the ECHR:

The European Court of Human Rights has accepted bulk interception in Weber and Saravia, but, as Martin points out, the European Court of Justice may not

²⁰ Q1 [Professor Scheinin]. See also (IPB0001), Professor Scheinin's follow-up letter dated 2 May 2016 explaining by reference to case-law of the Court of Justice of the European Union and the European Court of Human Rights why in his view the exercise of the bulk powers proposed in the Bill would constitute an interference with the right to privacy and in many cases also with other human rights: the letter can be viewed on the Committee's website.

²¹ Council of Report, [Memorandum on surveillance and oversight mechanisms in the United Kingdom](#), (17 May 2016), para. 37

²² Q1 [Michael Drury]

have accepted it. It is important to stress that. The European Court of Human Rights has accepted bulk interception under certain very tight conditions. The issue is: are we fulfilling these conditions in the present Bill?²³

2.9 We note that the issue of whether bulk powers are inherently incompatible with the right to respect for private life is the subject of ongoing litigation in cases which are pending before both the European Court of Human Rights in Strasbourg²⁴ and the Court of Justice of the European Union in Luxembourg.²⁵ This is one of the aspects of the Bill, or Act if it has received Royal Assent by then, which will require careful review in the light of those judgments when they are handed down.

2.10 In our view, however, on the current state of the ECHR case-law, as at the date of our Report, the bulk powers in the Bill are not inherently incompatible with the right to respect for private life, but are capable of being justified if they have a sufficiently clear legal basis, are shown to be necessary, and are proportionate in that they are accompanied by adequate safeguards against arbitrariness. Whether the powers have a sufficiently clear legal basis and the adequacy of the safeguards are closely intertwined questions on which the courts will rule in due course, and we do not express a view pending the determination of those legal challenges.

2.11 On the question of necessity, however, there is an important question which Parliament may be better placed than the courts to decide in the first instance. The Government says that the use of the bulk powers in the Bill is “vital” to the work of the intelligence and security services: the powers are necessary for them to be able to counter effectively threats to national security. The Joint Committee on the Draft Bill recommended that the Government should publish a fuller justification for each of the bulk powers alongside the Bill.²⁶ The Government responded positively to that recommendation by publishing *The Operational Case for the Bulk Powers* alongside the Bill.

2.12 We welcome the Government’s publication of a detailed operational case for the bulk powers in the Bill, providing more detail than ever before about why these powers are needed. This makes it possible for Parliament to scrutinise more carefully the Government’s case as to why such powers are necessary. However, for such scrutiny to be meaningful and effective, Parliament needs expert assistance.

2.13 The Joint Committee on the Draft Bill recommended that the Government’s operational case for the bulk powers should be assessed by an independent body, such as the Intelligence and Security Committee (ISC) or the Interception of Communications Commissioner. The Government invoked the statement of the Chair of the Intelligence and Security Committee, Rt Hon Dominic Grieve QC MP, during the Second Reading debate, that:

[...] the present Committee and its predecessor are satisfied that the Government are justified in coming to Parliament to seek in broad terms the powers that the Bill contains. None of the categories of powers in the Bill -

23 Q2 [Professor Iain Cameron]

24 *Liberty v UK*

25 *Davis and Watson*

26 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, para 319

including the principle of having powers of bulk collection of data, which has given rise to controversy in recent years - is unnecessary or disproportionate to what we need to protect ourselves.²⁷

2.14 However, it is not clear whether the ISC has assessed the Government's Operational Case for the bulk powers in the way envisaged by the Joint Committee on the Draft Bill, and, if it has, it has not yet reported to Parliament in detail on the result of that assessment.

2.15 **In our view, the Government's operational case for the bulk powers should be assessed by the Independent Reviewer of Terrorism Legislation, who also has access to any supplementary sensitive information which the Government may wish to rely on in making the case for the necessity of the powers. The Independent Reviewer has already undertaken a comprehensive and well respected review of investigatory powers, but he has not had an opportunity to assess the operational case for the bulk powers. We note from media reports and comments made by the Shadow Home Secretary²⁸ that the Government intends to ask him to do so, but at the date of finalising our Report the precise terms of the review had not been made public.**

2.16 *We recommend that the Government's Operational Case for the Bulk Powers in the Bill should be reviewed by the Independent Reviewer of Terrorism Legislation. We further recommend that the result of the review should be reported to Parliament before the Bill completes its passage, so that both Houses have an opportunity to take the results of the assessment into account before the Bill becomes law.*

2.17 *If the Government does not agree to our recommendation, we recommend that the Bill be amended to require the Secretary of State to appoint the Independent Reviewer to carry out such a review and to report to Parliament before the end of the year. There is also a case for periodic review of the continuing necessity for the bulk powers, as recommended by the former Director of Legal Affairs at GCHQ. The following suggested amendment (adapted from section 7 of the Data Retention and Investigatory Powers Act 2014 which required the Secretary of State to appoint the Independent Reviewer to review the operation and regulation of investigatory powers) would give effect to this recommendation:*

New clause

Page 172, line 9, before section 222 (Review of operation of Act) insert new clause:

NC () Review of operational case for bulk powers

(1) The Secretary of State must appoint the independent reviewer of terrorism legislation to review the operational case for the bulk powers contained in Parts 6 and 7 of this Act.

(2) The independent reviewer must, in particular, consider the justification for the powers in the Act relating to—

(a) bulk interception,

27 HC Deb, 15 March 2016, [col 836](#)

28 HC Deb, 24 May 2016, [col 502](#)

(b) bulk acquisition,

(c) bulk equipment interference, and

(d) bulk personal datasets.

(3) The independent reviewer must, so far as reasonably practicable, complete the review before 30 November 2016.

(4) The independent reviewer must send to the Prime Minister a report on the outcome of the review as soon as reasonably practicable after completing the review.

(5) On receiving a report under subsection (4), the Prime Minister must lay a copy of it before Parliament together with a statement as to whether any matter has been excluded from that copy under subsection (6).

(6) If it appears to the Prime Minister that the publication of any matter in a report under subsection (4) would be contrary to the public interest or prejudicial to national security, the Prime Minister may exclude the matter from the copy of the report laid before Parliament.

(7) The Secretary of State may pay to the independent reviewer—

(a) expenses incurred in carrying out the functions of the independent reviewer under this section, and

(b) such allowances as the Secretary of State determines.

(8) The independent reviewer shall complete further reviews on a five-yearly basis and the provisions of this section other than subsection (3) shall apply

(9) In this section “the independent reviewer of terrorism legislation” means the person appointed under section 36(1) of the Terrorism Act 2006 (and “independent reviewer” is to be read accordingly).’

This amendment provides for an independent review of the operational case for the bulk powers in the Bill, and further periodic reviews, to be undertaken by the independent reviewer of terrorism legislation.

3 Thematic warrants

3.1 Although the Bill does not use the language of “thematic warrants”, it provides for the possibility of such warrants for interception and equipment interference, in clauses 15 and 90 of the Bill, because of the generality of the definition of the subject-matter to which such warrants may apply.

3.2 In addition to a particular person or organisation or a single set of premises, such “targeted warrants” may also relate to, for example, “a group of persons who share a common purpose or who carry on, or may carry on, a particular activity”, and “more than one person or organisation, or more than one set of premises, where the conduct authorised or required by the warrant is for the purposes of a single investigation or operation.”

3.3 The Independent Reviewer, in his Report, *A Question of Trust*, recommended that the use of “thematic warrants” should be continued into the new legislative regime, but he envisaged their utility as being “*against a defined group or network whose characteristics are such that the extent of the interference can reasonably be foreseen, and assessed as necessary or proportionate, in advance*”²⁹—for example, a specific organised crime group.

3.4 The Intelligence and Security Committee expressed similar concerns about the breadth of the equipment interference power.³⁰

3.5 The Joint Committee on the Draft Bill concluded that “the current wording of the provisions for targeted interception and targeted equipment interference warrants is too broad.” It recommended that the Bill be amended so that targeted interception and targeted equipment interference warrants cannot be used as a way to issue thematic warrants concerning a very large number of people.³¹

3.6 The Government says that thematic warrants are not intended to be used against very large groups of people. It says that such warrants are used for fast moving and urgent events: for example, when a person has been kidnapped and his life is in imminent danger. “Being able to have a single targeted warrant against the group of kidnappers, without needing to seek separate authorisations for each of the kidnappers as their identities become known, has significant operational benefits.”³² They might also be useful in non-urgent situations:

[...] If, for example, a law enforcement agency wished to intercept the users of a paedophile file sharing website, they would be likely to use a thematic warrant because it would not be possible to identify each individual user beforehand. It would be permissible to use a thematic warrant in such a case because there

29 David Anderson QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust*, June 2015, para 14.61

30 Intelligence and Security Committee of Parliament, *Privacy and Security: A modern and transparent legal framework*, HC 1075

31 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, *Draft Investigatory Powers Bill*, HL Paper 93, HC 651, paras 461–468, recommendation 38

32 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, *Draft Investigatory Powers Bill: Government Response*, Cm 9219, p 59

would be a clear link between the group and the necessity and proportionality considerations for the interception of each suspected paedophile could be properly considered by the Secretary of State.³³

3.7 However, the Independent Reviewer of Terrorism Legislation remained concerned about the scope of the Bill's provision for so-called "thematic" use of the targeted powers in the Bill. He told the Public Bill Committee:

The bulk powers, of course, are extraordinarily broad in scope, although the practical effect of that breadth is greatly limited by what happens after the line has been tapped or the device has been accessed. That is really the stage that makes it proportionate. My concern, particularly in relation to equipment interference, is that, if one looks at the so-called targeted power and, in particular, at its potential thematic use, it is quite extraordinarily broad. We are looking, I think, at clause 90 of the Bill. A so-called targeted equipment interference can be performed—devices may be subject to equipment interference if they are concerned in an operation or an investigation, or if they are in a location not defined.

The code of practice indicates that that power is very broad indeed—so broad that the ISC said: "The so-called targeted power appears to be very broad. We are not quite sure what, in addition, you would get from the bulk power."³⁴

3.8 The Independent Reviewer went on to explain why, if the thematic targeted powers are too broadly drawn, this gives rise to concern that they provide an alternative to the bulk powers, without the same safeguards:

I think that matters because the safeguards on the targeted power are less than the safeguards on bulk. For a start, you do not need to be aiming only at somebody outside the UK or people outside the UK. You can quite properly target it inside the UK. Secondly, you do not have the safeguard that you have with a bulk power that, if you are going to look in detail at one individual within the UK, you need a full individual warrant as well.

The commissioners have been very cautious in the past in allowing thematic powers to be too broad. One could say, "Let's put it all on the commissioners. Let's rely on them to make sure that the thematic power is not too broadly used." I would feel a little more comfortable if there were more constriction in the statute.³⁵

3.9 We recognise the value of thematic warrants but we consider the Bill's provisions concerning the possible subject matter of targeted interception and targeted equipment interference warrants to be too broadly drafted.

3.10 We recommend that the Bill be amended so as to circumscribe the possible subject-matter of warrants in the way recommended by the Independent Reviewer: so as to ensure that the description in the warrant is sufficiently specific to enable the person

33 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, *Draft Investigatory Powers Bill: Government Response*, Cm 9219, p 54

34 Public Bill Committee debate on the Investigatory Powers Bill, [24 March 2016](#)

35 Public Bill Committee debate on the Investigatory Powers Bill, [24 March 2016](#)

unknown, but who is the subject of it, to be identified and to prevent the possibility of large numbers of people being potentially within the scope of a vaguely worded warrant. The following amendments are intended to give effect to this recommendation:

Clause 15

Page 12, line 8, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 12, line 11, after ‘operation’ insert ‘where each person is named or otherwise identified’

Clause 90

Page 68, line 26, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 68, line 29, after ‘operation’ insert ‘where each person is named or otherwise identified’

Page 68, line 45, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 68, line 47, after ‘operation’ insert ‘where each person is named or otherwise identified’

These amendments seek to make more specific the currently very broadly worded thematic warrants in the Bill, to make it more likely that such thematic warrants will be compatible with the requirements of Article 8 ECHR as interpreted by the European Court of Human Rights.

4 Modifications

4.1 The Bill currently provides a very broad power to modify warrants for targeted interception after they have been obtained, without requiring the modification to be approved by a Judicial Commissioner.³⁶

4.2 Adding or varying a name or description of a person, organisation or set of premises to which the warrant relates is a major modification, which must be authorised by a minister or a senior official.

4.3 Removing any such name or description, or adding, varying or removing any factor specified in the warrant for identifying the communications (such as addresses, numbers or apparatus) is a minor modification. Minor modifications can be made by the person to whom the warrant is addressed, or another senior person in that public authority.

4.4 This feature of the Bill has attracted considerable criticism because it has the potential to detract from the important safeguard of Judicial Commissioner supervision of interferences with privacy.

4.5 The Joint Committee on the Draft Bill concluded that, on the wording of the draft Bill, a major modification might include adding a whole new set of people or premises to an existing warrant, which would amount to a substantial change without judicial oversight.³⁷ It recommended that major modifications for targeted interception warrants should also be authorised by a Judicial Commissioner.³⁸

4.6 The Government did not accept this recommendation, arguing that to require authorisation by a Judicial Commissioner for each major modification to a targeted interception warrant “would drastically reduce the operational agility of the agencies.”³⁹ It says that the current law Regulation of Investigatory Powers Act 2000 (RIPA) allows for major modifications to be made to thematic targeted interception warrants, and that this ability is a key feature in the effective operation of the warrant system.

4.7 The Bill therefore preserves this “essential” ability for major modifications to be made, but only where they are necessary and proportionate and within the boundaries of the original Secretary of State/Judicial Commissioner approved warrant. The safeguard, in the case of major modifications, is that they have to be notified to the Secretary of State, and all modifications will also be subject to retrospective oversight by the Investigatory Powers Commissioner.

4.8 However, the Independent Reviewer remained concerned about this in his evidence to the Public Bill Committee. In his written evidence supplementing the oral evidence he gave to the Public Bill Committee on 24 March 2016 he said:

I [...] recommended that the addition of new persons or premises to the warrant should normally require the approval of a Judicial Commissioner,

³⁶ [Investigatory Powers Bill](#), Clause 30 [Bill 56 (2016–17)]

³⁷ Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, para 438

³⁸ Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, recommendation 32

³⁹ Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, *Draft Investigatory Powers Bill: Government Response*, [Cm 9219](#), p 55

so that the use of a thematic warrant did not dilute the strict authorisation procedure that would otherwise accompany the issue of a warrant targeted on a particular individual or premises. [...] the Bill is considerably more permissive than I had envisaged. [...] New persons, premises or devices (without statutory limitation as to extent) may be added on the say-so of a senior official, without troubling either the Secretary of State (though she needs to be notified) or the Judicial Commissioner (who, curiously, does not): clause 30(5)(c). I adhere to my opinion that any such additions should be approved by the Judicial Commissioner.⁴⁰

4.9 In our view, the power to make major modifications to warrants for targeted interception, without judicial approval, is so wide as to give rise to real concern that the requirement of judicial authorisation can be circumvented, thereby undermining that important safeguard against arbitrariness.

4.10 *We recommend that major modifications to warrants require approval by a Judicial Commissioner. The following amendment would give effect to this recommendation:*

Clause 30

Page 24, line 46, insert new subsection:

‘(10A) Section 21 (Approval of warrants by Judicial Commissioners) applies in relation to a decision to make a major modification of a warrant by adding a name or description as mentioned in subsection (2)(a) as it applies in relation to a decision to issue a warrant; and accordingly where section 21 applies a Judicial Commissioner must approve the modification.’

This amendment seeks to ensure that major modifications of warrants require judicial approval.

⁴⁰ Written evidence from David Anderson QC, Independent Reviewer of Terrorism Legislation, to the Public Bill Committee, [March 2016](#)

5 Communications of Members of Parliament

5.1 A key role of the legislature is to hold the executive to account. The Bill must provide sufficient safeguards to prevent the executive abusing its powers and undermining the ability of the legislature to hold it to account. Members of the public should also be able to communicate with members of Parliament with the expectation that those communications will remain confidential.

5.2 To put this in some historical context, the Wilson Doctrine is the name given to the convention that MPs' communications should not be intercepted by the police or the security services. It derives from the statement made by the then Prime Minister Harold Wilson to the House of Commons on 17 November 1966:

With my right hon. Friends I reviewed the practice when we came to office and decided on balance—and the arguments were very fine—that the balance should be tipped the other way and that I should give this instruction that there was to be no tapping of the telephones of Members of Parliament. That was our decision and that is our policy. But if there was any development of a kind which required a change of policy, I would, at such a moment as seemed compatible with the security of the country, on my own initiative make a statement in the House about it.⁴¹

5.3 During the course of recent litigation before the Investigatory Powers Tribunal it emerged that the protection for MPs' communications afforded by the so-called “Wilson Doctrine” was of a weaker, presumptive nature than had been widely assumed.⁴² The Tribunal concluded that the Wilson Doctrine applies to targeted, but not incidental, interception of parliamentarians' communications; that it was never absolute; and that it has no legal effect.

5.4 The Bill addresses this issue and provides a single safeguard (in addition to the requirement of Judicial Commissioner approval): consultation of the Prime Minister before the communications of any parliamentarian (in the devolved legislatures as well as the Westminster and European Parliaments) are interfered with.⁴³

5.5 The Joint Committee on the Draft Bill considered that the approach taken in the draft Bill to surveillance of parliamentarians struck an effective balance between the need for parliamentarians to be able to communicate fully and frankly with their constituents and other relevant third parties and the needs of the security and intelligence agencies and law enforcement agencies.⁴⁴

5.6 However, some MPs have argued that the requirement that the Prime Minister be consulted is an inadequate safeguard and that a stronger safeguard is required, such as a role for the Speaker. At Second Reading, for example, Sir Edward Leigh MP asked:

41 HC Deb, 17 November 1966, [col 639](#)

42 Caroline Lucas MP, Baroness Jones of Moulsecoomb AM and George Galloway v the Security Service and others [2015] UKIPTrib 14 79-CH. See *The Wilson Doctrine*, Standard Note [SN4258](#), House of Commons Library, February 2016.

43 [Investigatory Powers Bill](#), Clause 24

44 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, para 564

Of course Members of Parliament should not be above the law, and the Procedure Committee has ensured that a Member of Parliament who is arrested is treated exactly like a member of the public. We all recognise that, but in some of the most dodgy regimes—ours is not, of course, one of them—Governments do intercept the communications of Members of Parliament. Surely, just so that we can be absolutely reassured, we need the extra safeguard of having you, Mr Speaker, look at such an interception as well. Why not?⁴⁵

5.7 We welcome the Bill’s recognition that there is a strong public interest in preserving the confidentiality of the communications of the members of legislative bodies. We also welcome the extension of protections to members of legislatures other than the Westminster Parliament.

5.8 However, the requirement that the Prime Minister be consulted before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members’ communications is not, in our view, a safeguard commensurate with the importance of the public interest at stake.

5.9 Consulting the Prime Minister provides something of a safeguard by elevating the political accountability for the decision, but it does not eliminate the risk of a partisan motivation, whether real or apparent. **We consider that the safeguard should reflect the particular nature of the important public interest at stake, which is providing a degree of protection for communications with members in their capacity as members of the legislature.**

5.10 The office holder best placed to understand the nature of that public interest is the Speaker, or Presiding Officer, of the relevant legislature. Indeed, we note that as a result of the Damian Green case, in which the police searched the office of Damian Green MP without first obtaining a warrant authorising the search, there is now a Speaker’s Protocol on the Execution of a Search Warrant in the Precincts of the House of Commons, and that under that Protocol any decision relating to the execution of a warrant in future must be referred to the Speaker, who will consider matters such as the precision with which it specifies the material being sought.

5.11 We consider that the Speaker or Presiding Officer should be given sufficient prior notification of the decision to issue an interception or examination warrant, to enable the Speaker or Presiding Officer, if they so wished, to be represented at the hearing before the Judicial Commissioner, at which any representations could be made about matters such as the scope of the warrant, or the precision with which it specifies the matters subject to the warrant. Unlike the Wilson doctrine, this suggested amendment would give legal protection to communications with members of Parliament.

5.12 We recommend the additional safeguard that the Speaker or Presiding Officer of the relevant legislature be given sufficient notice before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members’ communications, to enable the Speaker or Presiding Officer to be represented at the hearing before the Judicial Commissioner. The following suggested amendment would give effect to this recommendation:

45 HC Deb, 15 March 2016, [col 819](#)

Clause 24

Page 19, line 8, after ‘consult the Prime Minister’ insert ‘and give sufficient notice to the relevant Presiding Officer of the relevant legislature to enable the relevant Presiding Officer to be heard at the hearing before the Judicial Commissioner’

Page 19, line 15, insert:

‘(4) In this section “the relevant Presiding Officer” means
the Speaker of the House of Commons
the Lord Speaker of the House of Lords
the Presiding Officer of the Scottish Parliament
the Presiding Officer of the National Assembly for Wales
the Speaker of the Northern Ireland Assembly
the President of the European Parliament.’

This amendment adds the safeguard of giving the Speaker, or other Presiding Officer, of the relevant legislature, sufficient notice before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members’ communications, to enable the Speaker or Presiding Officer to be heard at the hearing before the Judicial Commissioner.

6 Legal professional privilege

6.1 Communications between lawyers and their clients are another category of confidential communications recognised as deserving special legal protection. In UK law this public interest in the confidentiality of such communications finds expression in the doctrine of legal professional privilege.

6.2 The confidentiality of communications between lawyers and their clients is recognised by human rights law not only as a part of the right to respect for private life and correspondence in Article 8 ECHR,⁴⁶ but as an aspect of the fundamental rights of access to court and to a fair hearing before such a court.⁴⁷ The privilege is that of the client but attaches to communications to and from both client and lawyer. In order for those rights to be practical and effective, a client has a right to private communications with their lawyer.

6.3 The need for special safeguards against unwarranted breaches of professional confidence between lawyers and their clients has been recognised in the case-law of the European Court of Human Rights. The tapping of a law firm's telephones by the Swiss authorities, for example, was held not to be "in accordance with the law" because the Swiss law failed to distinguish between communications that would attract privilege and those that would not.⁴⁸ In another case, the provision in the French law imposing a duty to respect the confidentiality of relations between an accused or suspect was regarded by the Court as valuable safeguard.⁴⁹ In 2009 the House of Lords held that it was lawful in some circumstances, and where authorised expressly by statute, to listen in to confidential consultations held at a police station between lawyers and their clients, but that the safeguards set out in RIPA and the Code of Practice for Surveillance provided insufficient protection in a case where privileged communications would be intercepted.⁵⁰

6.4 The Joint Committee on the Draft Bill was concerned by the lack of provision about legal professional privilege on the face of the Bill, rather than in Codes of Practice, and recommended that the Bill should contain provision for the protection of legal professional privilege in relation to all categories of acquisition and interference addressed in the Bill.⁵¹ The Government responded to this recommendation by including additional safeguards for items subject to legal privilege on the face of the Bill.⁵²

6.5 Michael Drury, in his supplementary written evidence, welcomed these protections on the face of the Bill, while regarding safeguards in the Codes of Practice as being equally effective, but advocated a consistent approach for all categories of sensitive information throughout the Bill and across all the different categories. He suggested that the principles of sensitivity be included in the Bill itself and the detail of the safeguards in the Codes.⁵³

46 See for example, *Niemietz v Germany* in which the European Court of Human Rights held that special procedural safeguards are necessary where a search warrant is executed at a lawyer's office.

47 European Convention on Human Rights, [Article 6\(1\)](#)

48 *Kopp v Switzerland*, ECHR 25 Mar 1998

49 *Kruslin v France*, ECHR 24 Apr 1990

50 *McE v Prison Service of Northern Ireland* [2009] UKHL 15

51 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, paras 534-537 and recommendation 46

52 See for example, [Investigatory Powers Bill](#), Clauses 25 and 100

53 Michael Drury ([IPB0004](#))

6.6 We welcome the Government's positive response to pre-legislative scrutiny of the draft Bill by including specific provision about legal professional privilege on the face of the Bill. We accept that, for the purposes of human rights law, the protection of legal professional privilege is not an absolute, but can be overridden by sufficiently weighty public interest considerations, provided there are adequate safeguards against abuse. However, we query whether the safeguards for lawyer-client confidentiality in the Bill are as robust as they should be.

6.7 In particular, we do not see the need for a power to target lawyer-client communications when communications which further a criminal purpose are not covered by legal privilege (the so-called "iniquity exception").⁵⁴

6.8 Nor do we consider that the Bill contains a sufficiently strong safeguard for legally privileged items which are likely to be included in intercepted communications, as it does not contain a threshold test which must be satisfied before a warrant for such interception can be issued. In our view, the "exceptional and compelling circumstances" test should apply to such a decision, reflecting the strong presumption against interfering with confidential communications between lawyer and client.

6.9 *We recommend that the power to target confidential communications between lawyers and clients be removed from the Bill because it is unnecessary in light of the iniquity exception: communications between lawyer and client which further a criminal purpose are not legally privileged.*

6.10 *We further recommend that a warrant to intercept or examine communications which are likely to include items subject to legal professional privilege should only be issued if the person to whom the application for the warrant is made considers that there are exceptional and compelling circumstances that make it necessary to authorise the interception or examination. The following suggested amendments would give effect to these Recommendations:*

Clause 25

Page 19, line 16, leave out subsections (1) to (3)

This amendment removes the power to apply for a warrant the purpose of which is to authorise the interception, or selection for examination, of items subject to legal privilege.

Page 19, line 44, leave out subsection (4)(c)

Page 20, line 7, in subsection (6) after 'considers' insert

'(a) that there are exceptional and compelling circumstances that make it necessary to authorise the interception, or (in the case of a targeted examination warrant) the selection for examination, of items subject to legal privilege, and (b)'

⁵⁴ The definition section in the Bill (s. 225) preserves the so-called "iniquity exception" by adopting the provision in PACE 1984 s.10 according to which 'items held with the intention of furthering a criminal purpose are not items subject to legal privilege.'

These amendments introduce a threshold test for the interception or examination of communications likely to include items subject to legal privilege, reflecting the strong presumption against interference with lawyer-client confidentiality.

6.11 Equivalent amendments should also be made to clause 100.

7 Journalists' sources

7.1 Communications between journalists and their sources is another category of confidential information for which human rights law requires special protection. The important role of the media in a democratic society, including in holding the Government to account, is recognised by the European Court of Human Rights, and the confidentiality of journalists' sources is therefore an important aspect of the right to freedom of expression in article 10 ECHR.⁵⁵

7.2 Interferences with the confidentiality of journalists' sources can have a "chilling effect" on the willingness of sources to talk to the media, which may limit the media's access to whistleblowers who are prepared to expose wrongdoing to the media but in the expectation of anonymity. Such interferences with the communications between journalists and their sources therefore require the most careful scrutiny. There is no immunity from disclosure, but the Court has held that only "an overriding requirement in the public interest" is capable of justifying such interferences.⁵⁶

7.3 Special safeguards are therefore required in order to protect the confidentiality of journalists' sources. The most significant such safeguard is the requirement that there be "review by a judge or other independent and impartial decision-making body".⁵⁷ In December 2015 the Investigatory Powers Tribunal held that the previous legal regime under RIPA was incompatible with the right to freedom of expression in Article 10 ECHR because it did not contain effective safeguards in a case in which the authorisations had the purpose of obtaining disclosure of the identity of a journalist's source.⁵⁸ However, it also held that the incompatibility had been remedied by the amended Code of Practice issued in March 2015 which requires law enforcement to obtain independent authorisation through the use of PACE in such cases.

7.4 The adequacy of the current protections provided for journalists' sources in UK law in the context of investigatory powers is currently under consideration by the European Court of Human Rights in a pending case brought by the Bureau of Investigative Journalism and a Guardian journalist, Alice Ross.⁵⁹

7.5 The Joint Committee on the draft Bill considered that protection for journalists' sources should be fully addressed by way of substantive provisions on the face of the Bill.⁶⁰ The Joint Committee was particularly concerned about the possibility that the relevant provision in the draft Bill provided less protection for journalists' sources than the current law in the Police and Criminal Evidence Act 1984 ("PACE") and the Terrorism Act 2000, which require applications to be made to a court for a production order, on notice to the relevant journalist or media organisation which therefore has an opportunity to appear at the hearing before the judge to make arguments about the need to protect the confidentiality of communications with their source.

55 See David Anderson QC, Independent Reviewer of Terrorism in Legislation, [A Question of Trust](#), June 2015, paras 5.49-5.51

56 *Goodwin v UK* (App. No. 17488, judgment of 27 March 1996)

57 See, for example, *Sanoma Uitgevers BV v The Netherlands* (App. No. 38224/03, judgment of 14 September 2010)

58 *News Group Newspapers v Metropolitan Police Service*

59 Bureau of Investigative Journalism and Alice Ross v UK (App. No. 62322/14)

60 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, paras 539-556

7.6 The Joint Committee recommended that the Government should reconsider the level of protection which the Bill affords to journalistic material and sources, which should be at least equivalent to the protection which already exists under the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000. It recommended that the Bill should make it clear that nothing in the Bill enables the investigatory authorities to circumvent the protections for journalists' sources contained in PACE and the Terrorism Act, which enable the media to know about an application for communications data and make representations about the proposed interference.⁶¹

7.7 The Government's response to pre-legislative scrutiny of the draft Bill made some welcome changes from the draft Bill in relation to this issue. The clause in the Bill which requires Judicial Commissioner approval for authorisations to identify or confirm journalistic sources, for example, now applies to the security and intelligence agencies (which were exempt in the previous version in the draft Bill).⁶² The relevant Schedule of the Bill also now makes clear that all the Codes of Practice accompanying the Bill "must include provision designed to protect the public interest in the confidentiality of sources of journalistic information",⁶³ and the draft Codes of Practice make relevant provision.

7.8 However, the Government has not accepted the main recommendation of the Joint Committee on the draft Bill that the safeguards for journalists' sources in the Bill should be equivalent to those provided by PACE and the Terrorism Act. Most significantly, the Bill provides for Commissioner approval for authorisations to identify or confirm journalistic sources, but the applicant for authorisation is not required to give notice of the application to the media,⁶⁴ and the test to be applied by the Judicial Commissioner is whether they consider that there are "reasonable grounds" for considering that the requirements in the Act are satisfied in relation to the authorisation.⁶⁵

7.9 The Government considers that both the clause in the Bill, and the overall approach to the protection of journalists' sources, are compatible with the right to freedom of expression in Article 10 ECHR. In the Government's view, PACE and the Terrorism Act 2000 provide appropriate mechanisms for law enforcement bodies to obtain journalistic material from journalists themselves, but RIPA and, in future, the new Investigatory Powers Act, is the appropriate mechanism for acquisition of communications data from Communications Service Providers. The Government is opposed to advance notification of requests for communications data on the basis that "in many cases such notification would alert the subject under investigation to the ongoing investigation, to the detriment of the case. In addition no other applications for communications data require prior notification, nor do applications made to a court by the police for comparable data, for example banking records, or for other police powers such as application for covert surveillance."⁶⁶

61 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, recommendations 48-49

62 [Investigatory Powers Bill](#), Clause 68

63 [Investigatory Powers Bill](#), Schedule 7, para. 2(1)(a)

64 *Ibid.*, Clause 68(4)

65 *Ibid.*, Clause 68(5)

66 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill: Government Response](#), [Cm 9219](#), p65

7.10 The Government's preference for putting the additional protections for journalists' sources in the Codes of Practice rather than the Bill "reflects the fact that it is much harder to define in law what constitutes a journalist (as opposed to legally privileged material), as seen during the Joint Committee's evidence sessions on this issue."⁶⁷

7.11 We welcome the changes made by the Government to the Bill in relation to the protection of journalists' sources and the inclusion of safeguards in all of the draft Codes of Practice. We also recognise that there is a real difficulty about how to define "journalism" in the digital age. However, we share the concern of the Joint Committee on the draft Bill that the safeguard of independent review by a Judicial Commissioner provided in the Bill is inferior to the equivalent safeguard in PACE and the Terrorism Act 2000 because the hearing before the Commissioner will not be on notice. In our view, this gives rise to a risk of incompatibility with Article 10 ECHR. We accept that notification should not prejudice the investigation but consider that this can be dealt with by the wording of the clause.

7.12 We recommend that the Bill should provide the same level of protection for journalists' sources as currently exists in relation to search and seizure under the Police and Criminal Evidence Act 1984, including an on notice hearing before a Judicial Commissioner, unless that would prejudice the investigation. The following amendment would give effect to this recommendation:

Clause 68

Page 54, line 14, in subsection (4), before 'required to give notice' leave out 'not'

Page 54, line 16, at end of subsection (4) insert 'unless an application without such notice is required in order to avoid prejudice to the investigation.'

Page 54, line 16, after subsection (4) insert new subsection

'() Schedule 1 to the Police and Criminal Evidence Act 1984 shall apply to an application for an order under this section as if it were an application for an order under that Schedule.'

This amendment seeks to ensure that the same level of protection is provided for journalists' sources under the Bill as is currently provided in PACE.

67 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, *Draft Investigatory Powers Bill: Government Response*, [Cm 9219](#), p 65

8 Oversight

8.1 The Bill makes extensive changes to the system of oversight of investigatory powers.⁶⁸ The current offices of the Interception of Communications Commissioner, Chief Surveillance Commissioner, Intelligence Services Commission and Investigatory Powers Commissioner for Northern Ireland are replaced by an Investigatory Powers Commissioner. The Investigatory Powers Commissioner will be supported by other Judicial Commissioners. The Commissioners will be judges who hold or have held high judicial office (they will therefore be at least as senior as a High Court Judge). The Commissioners will scrutinise the use of all the investigatory powers in the Bill, including retrospectively, through audit and inspection and investigations.

8.2 Human rights law does not lay down a simple standard of oversight against which arrangements such as these can be measured. The approach of the European Court of Human Rights is to take the strength of the oversight regime into account in its overall assessment of the adequacy of the safeguards which inform its judgment as to whether the framework as a whole is a necessary and proportionate interference with the right to respect for private life.⁶⁹ Whether current oversight arrangements are compatible with the requirements of Article 8 is one of the issues pending before the Strasbourg Court.

8.3 The Government describes the new arrangements in the Bill as introducing strong, “world-leading oversight”. The Joint Committee on the Draft Bill welcomed the creation of the Judicial Commissioners as a single oversight body which will improve transparency, public confidence and effective oversight of the use of the powers in the Bill.⁷⁰ The new arrangements go a long way towards implementing the recommendations of the Independent Reviewer in his Report on Investigatory Powers. Michael Drury in his supplementary written evidence argued that ‘as a scheme of oversight the proposals in the IPB taken together with those parts of RIPA which will remain in force [...] provide a thoroughgoing and effective system of control and oversight which, based on the Strasbourg jurisprudence to date appears to meet the requirements taken overall [...] albeit one that can be improved and in certain areas does require improvement.’⁷¹

8.4 However, in our view there is one significant respect in which the provision for oversight in the Bill fails to go far enough: the Bill provides for both prior authorisation and *ex post* inspection to be carried out by the Judicial Commissioners.

8.5 Professor Iain Cameron suggested to us in evidence that human rights law requires that these functions should be separated:

Professor Cameron: [...] There are three points at which rights are infringed by bulk interception: first, issuing the selectors; secondly, the point of processing; and, thirdly, the point of destruction.

In other countries the first two issues are separated. In Sweden, the issuing of selectors is decided by a court or a quasi-judicial organ. The processing and

68 [Investigatory Powers Bill](#), Part 8

69 See, for example, *Kennedy v UK* in which the Court considered in detail the oversight arrangements in the UK when reaching its decision that the system was compatible with the right to respect for private life in Article 8 ECHR.

70 Joint Committee on the Draft Investigatory Powers Bill, Session 2015–16, [Draft Investigatory Powers Bill](#), HL Paper 93, HC 651, para 579

71 Michael Drury ([IPB0004](#))

oversight is monitored by another quasi-judicial organ, and then there is a complaints procedure at the point of destruction. In the British Bill there is a problem, because the same body engages in the first two functions. It is a classic accountability problem, in that the oversight body is overseeing itself to some extent, and that is problematic. To be fair to Britain, it is also problematic in the German system. I think you need to separate the two issues; you need separate bodies.

The Chair: Do you have in mind which separate body it would be, or do you want another body established?

Professor Cameron: The proposed British system is that the Judicial Commissioners are part of the authorisation process, but the second point—processing—is very important. Who monitors how the warrant has ended up, if I can put it that way, and the information you have obtained from the warrant? Who monitors that part of the interference? Who is looking at what information the human analysts in GCHQ wish to retain, and why? GCHQ will probably be behaving with a lot of professionalism in that regard, but the issue is: who is doing the monitoring of that?

The Chair: What is the answer to my question? Who do you think should be doing it?

Professor Cameron: [...] You need a body that is separate from the authorisation body, which follows up on what happened with the authorisation body's warrant [...]

The Chair: [...] The point is that two separate functions should have two separate people doing them, because the second part is to some extent a check on the first part.

Professor Cameron: Yes.⁷²

8.6 The issue was also raised by the Council of Europe Commissioner for Human Rights in his recent memorandum on surveillance of oversight mechanisms in the UK, following his visit to the UK in January 2016 during which he met with a number of NGOs and lawyers specialising in the area of surveillance:

Another issue raised by the surveillance experts was the fact that authorizing warrants and ex-post facto oversight of surveillance will be the task of the same institution. It may be preferable that these two functions should be performed by separate bodies within an Investigatory Powers Commission as recommendation 9 of the 2015 Issue Paper on Democratic Oversight suggests.⁷³

8.7 The Commissioner's Recommendation 9 in the 2015 Issue Paper calls on member states of the Council of Europe to:

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73 Council of Europe, [Memorandum on surveillance and oversight mechanisms in the United Kingdom](#), (17 May 2016), para 24

Consider how surveillance authorisation processes can be kept under *ex post facto* review by an independent body that is empowered to examine decisions taken by the authorising body.⁷⁴

8.8 In our view, bearing in mind that the adequacy of the oversight arrangements in the Bill will be an important part of the overall assessment of whether the safeguards satisfy the requirements of Article 8 ECHR, it would be highly desirable for there to be a clear functional separation between prior judicial authorisation and *ex post* inspection and review. We agree with the Independent Reviewer that this does not necessarily have to be carried out by entirely separate bodies.⁷⁵ In our view, however, it should be carried out by different personnel.

8.9 We recommend that, in the absence of an Investigatory Powers Commission, the necessary functional separation can be achieved by placing the Investigatory Powers Commissioner under a duty to ensure that the two distinct functions of authorisation and *ex post* inspection are carried out by different Commissioners. The following suggested amendment would give effect to this recommendation:

Clause 194

Page 149, line 36, after subsection (7) insert new subsection:

‘(7A) The Investigatory Powers Commissioner shall ensure that all judicial authorisation functions under this Act are carried out by different Commissioners from those who carry out the audit and inspection functions set out in this Part.’

*This amendment requires the Investigatory Powers Commissioner to ensure the separation of the judicial authorisation function from the *ex post* audit and inspection function.*

⁷⁴ Council of Europe, [Democratic and effective oversight of national security services](#), May 2015

⁷⁵ Report of the Investigatory Powers Review, para. 14.98, citing the precedent of the Office of the Surveillance Commissioner, and the benefit of dialogue between commissioners carrying out the distinct functions of authorisation and inspection.

9 Conclusions and recommendations

Introduction

1. In view of the extensive pre-legislative scrutiny that the draft Bill received, and the importance of ensuring that a Report from this Committee is available to inform debate about the human rights implications of the Bill before it leaves the House of Commons, we decided to prioritise our scrutiny on what we consider to be the most significant human rights issues raised by the Bill which we anticipate may be debated at Report stage in the Commons. Further amendments may be proposed for later stages. (Paragraph 1.7)
2. We draw parliamentarians' attention to the Independent Reviewer's account of the legal framework as the starting point for their consideration of the human rights compatibility of the Bill. (Paragraph 1.19)
3. We welcome the introduction of a Bill as representing a significant step forward in human rights terms towards the objective of providing a clear and transparent legal basis for the investigatory powers being exercised by the security and intelligence agencies and law enforcement authorities and, in many respects, enhanced safeguards. In this Report we focus on areas in which in our view the opportunity could be taken to amend the Bill to improve further the compatibility of the legal framework with the requirements of human rights law. (Paragraph 1.21)

Bulk powers

4. In our view, however, on the current state of the ECHR case-law, as at the date of our Report, the bulk powers in the Bill are not inherently incompatible with the right to respect for private life, but are capable of being justified if they have a sufficiently clear legal basis, are shown to be necessary, and are proportionate in that they are accompanied by adequate safeguards against arbitrariness. Whether the powers have a sufficiently clear legal basis and the adequacy of the safeguards are closely intertwined questions on which the courts will rule in due course, and we do not express a view pending the determination of those legal challenges. (Paragraph 2.10)
5. We welcome the Government's publication of a detailed operational case for the bulk powers in the Bill, providing more detail than ever before about why these powers are needed. This makes it possible for Parliament to scrutinise more carefully the Government's case as to why such powers are necessary. However, for such scrutiny to be meaningful and effective, Parliament needs expert assistance. (Paragraph 2.12)
6. In our view, the Government's operational case for the bulk powers should be assessed by the Independent Reviewer of Terrorism Legislation, who also has access to any supplementary sensitive information which the Government may wish to rely on in making the case for the necessity of the powers. The Independent Reviewer has already undertaken a comprehensive and well respected review of investigatory powers, but he has not had an opportunity to assess the operational case for the bulk powers. We note from media reports and comments made by the Shadow

Home Secretary that the Government intends to ask him to do so, but at the date of finalising our Report the precise terms of the review had not been made public. (Paragraph 2.15)

7. We recommend that the Government's Operational Case for the Bulk Powers in the Bill should be reviewed by the Independent Reviewer of Terrorism Legislation. We further recommend that the result of the review should be reported to Parliament before the Bill completes its passage, so that both Houses have an opportunity to take the results of the assessment into account before the Bill becomes law. (Paragraph 2.16)
8. If the Government does not agree to our recommendation, we recommend that the Bill be amended to require the Secretary of State to appoint the Independent Reviewer to carry out such a review and to report to Parliament before the end of the year. There is also a case for periodic review of the continuing necessity for the bulk powers, as recommended by the former Director of Legal Affairs at GCHQ. The following suggested amendment (adapted from section 7 of the Data Retention and Investigatory Powers Act 2014 which required the Secretary of State to appoint the Independent Reviewer to review the operation and regulation of investigatory powers) would give effect to this recommendation:

New clause

Page 172, line 9, before section 222 (Review of operation of Act) insert new clause:

NC () Review of operational case for bulk powers

(1) The Secretary of State must appoint the independent reviewer of terrorism legislation to review the operational case for the bulk powers contained in Parts 6 and 7 of this Act.

(2) The independent reviewer must, in particular, consider the justification for the powers in the Act relating to—

- (a) bulk interception,
- (b) bulk acquisition,
- (c) bulk equipment interference, and
- (d) bulk personal datasets.

(3) The independent reviewer must, so far as reasonably practicable, complete the review before 30 November 2016.

(4) The independent reviewer must send to the Prime Minister a report on the outcome of the review as soon as reasonably practicable after completing the review.

(5) On receiving a report under subsection (4), the Prime Minister must lay a copy of it before Parliament together with a statement as to whether any matter has been excluded from that copy under subsection (6).

(6) If it appears to the Prime Minister that the publication of any matter in a report under subsection (4) would be contrary to the public interest or prejudicial to national security, the Prime Minister may exclude the matter from the copy of the report laid before Parliament.

(7) The Secretary of State may pay to the independent reviewer—

(a) expenses incurred in carrying out the functions of the independent reviewer under this section, and

(b) such allowances as the Secretary of State determines.

(8) The independent reviewer shall complete further reviews on a five-yearly basis and the provisions of this section other than subsection (3) shall apply

(9) In this section “the independent reviewer of terrorism legislation” means the person appointed under section 36(1) of the Terrorism Act 2006 (and “independent reviewer” is to be read accordingly).’

This amendment provides for an independent review of the operational case for the bulk powers in the Bill, and further periodic reviews, to be undertaken by the independent reviewer of terrorism legislation. (Paragraph 2.17)

Thematic warrants

9. We recognise the value of thematic warrants but we consider the Bill’s provisions concerning the possible subject matter of targeted interception and targeted equipment interference warrants to be too broadly drafted. (Paragraph 3.9)
10. We recommend that the Bill be amended so as to circumscribe the possible subject-matter of warrants in the way recommended by the Independent Reviewer: so as to ensure that the description in the warrant is sufficiently specific to enable the person unknown, but who is the subject of it, to be identified and to prevent the possibility of large numbers of people being potentially within the scope of a vaguely worded warrant. The following amendments are intended to give effect to this recommendation:

Clause 15

Page 12, line 8, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 12, line 11, after ‘operation’ insert ‘where each person is named or otherwise identified’

Clause 90

Page 68, line 26, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 68, line 29, after ‘operation’ insert ‘where each person is named or otherwise identified’

Page 68, line 45, after ‘activity’ insert ‘where each person is named or otherwise identified’

Page 68, line 47, after ‘operation’ insert ‘where each person is named or otherwise identified’

These amendments seek to make more specific the currently very broadly worded thematic warrants in the Bill, to make it more likely that such thematic warrants will be compatible with the requirements of Article 8 ECHR as interpreted by the European Court of Human Rights.(Paragraph 3.10)

Modifications

11. In our view, the power to make major modifications to warrants for targeted interception, without judicial approval, is so wide as to give rise to real concern that the requirement of judicial authorisation can be circumvented, thereby undermining that important safeguard against arbitrariness. (Paragraph 4.9)
12. We recommend that major modifications to warrants require approval by a Judicial Commissioner. The following amendment would give effect to this recommendation:

Clause 30

Page 24, line 46, insert new subsection:

‘(10A) Section 21 (Approval of warrants by Judicial Commissioners) applies in relation to a decision to make a major modification of a warrant by adding a name or description as mentioned in subsection (2)(a) as it applies in relation to a decision to issue a warrant; and accordingly where section 21 applies a Judicial Commissioner must approve the modification.’

This amendment seeks to ensure that major modifications of warrants require judicial approval.(Paragraph 4.10)

Communications of members of Parliament

13. We welcome the Bill’s recognition that there is a strong public interest in preserving the confidentiality of the communications of the members of legislative bodies. We also welcome the extension of protections to members of legislatures other than the Westminster Parliament. (Paragraph 5.7)
14. However, the requirement that the Prime Minister be consulted before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members’ communications is not, in our view, a safeguard commensurate with the importance of the public interest at stake. (Paragraph 5.8)
15. We consider that the safeguard should reflect the particular nature of the important public interest at stake, which is providing a degree of protection for communications with members in their capacity as members of the legislature. (Paragraph 5.9)

16. We consider that the Speaker or Presiding Officer should be given sufficient prior notification of the decision to issue an interception or examination warrant, to enable the Speaker or Presiding Officer, if they so wished, to be represented at the hearing before the Judicial Commissioner, at which any representations could be made about matters such as the scope of the warrant, or the precision with which it specifies the matters subject to the warrant. Unlike the Wilson doctrine, this suggested amendment would give legal protection to communications with members of Parliament. (Paragraph 5.11)
17. We recommend the additional safeguard that the Speaker or Presiding Officer of the relevant legislature be given sufficient notice before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members' communications, to enable the Speaker or Presiding Officer to be represented at the hearing before the Judicial Commissioner. The following suggested amendment would give effect to this recommendation:

Clause 24

Page 19, line 8, after 'consult the Prime Minister' insert 'and give sufficient notice to the relevant Presiding Officer of the relevant legislature to enable the relevant Presiding Officer to be heard at the hearing before the Judicial Commissioner'

Page 19, line 15, insert:

'(4) In this section "the relevant Presiding Officer" means

the Speaker of the House of Commons

the Lord Speaker of the House of Lords

the Presiding Officer of the Scottish Parliament

the Presiding Officer of the National Assembly for Wales

the Speaker of the Northern Ireland Assembly

the President of the European Parliament.'

This amendment adds the safeguard of giving the Speaker, or other Presiding Officer, of the relevant legislature, sufficient notice before the Secretary of State decides whether to issue a warrant for targeted interception or examination of members' communications, to enable the Speaker or Presiding Officer to be heard at the hearing before the Judicial Commissioner. (Paragraph 5.12)

Legal professional privilege

18. We welcome the Government's positive response to pre-legislative scrutiny of the draft Bill by including specific provision about legal professional privilege on the face of the Bill. We accept that, for the purposes of human rights law, the protection of legal professional privilege is not an absolute, but can be overridden

by sufficiently weighty public interest considerations, provided there are adequate safeguards against abuse. However, we query whether the safeguards for lawyer-client confidentiality in the Bill are as robust as they should be. (Paragraph 6.6)

19. In particular, we do not see the need for a power to target lawyer-client communications when communications which further a criminal purpose are not covered by legal privilege (the so-called “iniquity exception”). (Paragraph 6.7)
20. Nor do we consider that the Bill contains a sufficiently strong safeguard for legally privileged items which are likely to be included in intercepted communications, as it does not contain a threshold test which must be satisfied before a warrant for such interception can be issued. In our view, the “exceptional and compelling circumstances” test should apply to such a decision, reflecting the strong presumption against interfering with confidential communications between lawyer and client. (Paragraph 6.8)
21. We recommend that the power to target confidential communications between lawyers and clients be removed from the Bill because it is unnecessary in light of the iniquity exception: communications between lawyer and client which further a criminal purpose are not legally privileged. (Paragraph 6.9)
22. We further recommend that a warrant to intercept or examine communications which are likely to include items subject to legal professional privilege should only be issued if the person to whom the application for the warrant is made considers that there are exceptional and compelling circumstances that make it necessary to authorise the interception or examination. The following suggested amendments would give effect to these Recommendations:

Clause 25

Page 19, line 16, leave out subsections (1) to (3)

This amendment removes the power to apply for a warrant the purpose of which is to authorise the interception, or selection for examination, of items subject to legal privilege.

Page 19, line 44, leave out subsection (4)(c)

Page 20, line 7, in subsection (6) after ‘considers’ insert

‘(a) that there are exceptional and compelling circumstances that make it necessary to authorise the interception, or (in the case of a targeted examination warrant) the selection for examination, of items subject to legal privilege, and (b)’

These amendments introduce a threshold test for the interception or examination of communications likely to include items subject to legal privilege, reflecting the strong presumption against interference with lawyer-client confidentiality. (Paragraph 6.10)

Journalists' sources

23. We welcome the changes made by the Government to the Bill in relation to the protection of journalists' sources and the inclusion of safeguards in all of the draft Codes of Practice. We also recognise that there is a real difficulty about how to define "journalism" in the digital age. However, we share the concern of the Joint Committee on the draft Bill that the safeguard of independent review by a Judicial Commissioner provided in the Bill is inferior to the equivalent safeguard in PACE and the Terrorism Act 2000 because the hearing before the Commissioner will not be on notice. In our view, this gives rise to a risk of incompatibility with Article 10 ECHR. We accept that notification should not prejudice the investigation but consider that this can be dealt with by the wording of the clause. (Paragraph 7.11)
24. We recommend that the Bill should provide the same level of protection for journalists' sources as currently exists in relation to search and seizure under the Police and Criminal Evidence Act 1984, including an on notice hearing before a Judicial Commissioner, unless that would prejudice the investigation. The following amendment would give effect to this recommendation:

Clause 68

Page 54, line 14, in subsection (4), before 'required to give notice' leave out 'not'

Page 54, line 16, at end of subsection (4) insert 'unless an application without such notice is required in order to avoid prejudice to the investigation.'

Page 54, line 16, after subsection (4) insert new subsection

'() Schedule 1 to the Police and Criminal Evidence Act 1984 shall apply to an application for an order under this section as if it were an application for an order under that Schedule.'

This amendment seeks to ensure that the same level of protection is provided for journalists' sources under the Bill as is currently provided in PACE.
(Paragraph 7.12)

Oversight

25. In our view, bearing in mind that the adequacy of the oversight arrangements in the Bill will be an important part of the overall assessment of whether the safeguards satisfy the requirements of Article 8 ECHR, it would be highly desirable for there to be a clear functional separation between prior judicial authorisation and ex post inspection and review. We agree with the Independent Reviewer that this does not necessarily have to be carried out by entirely separate bodies. In our view, however, it should be carried out by different personnel. (Paragraph 8.8)
26. We recommend that, in the absence of an Investigatory Powers Commission, the necessary functional separation can be achieved by placing the Investigatory Powers Commissioner under a duty to ensure that the two distinct functions of authorisation and ex post inspection are carried out by different Commissioners. The following suggested amendment would give effect to this recommendation:

Clause 194

Page 149, line 36, after subsection (7) insert new subsection:

‘(7A) The Investigatory Powers Commissioner shall ensure that all judicial authorisation functions under this Act are carried out by different Commissioners from those who carry out the audit and inspection functions set out in this Part.’

This amendment requires the Investigatory Powers Commissioner to ensure the separation of the judicial authorisation function from the ex post audit and inspection function. (Paragraph 8.9)

Declaration of Lords' interests

Baroness Hamwee

Board member for Safer London

A full list of members' interests can be found in the [Register of Lords' Interests](#)

Formal Minutes

Wednesday 25 May 2016

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Lord Henley
Jeremy Lefroy MP	Baroness Lawrence of Clarendon
Mark Pritchard MP	Baroness Prosser
Amanda Solloway MP	Lord Trimble
	Lord Woolf

Draft Report (*Legislative Scrutiny: Investigatory Powers Bill*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 8.9 read and agreed to.

Summary agreed to.

Resolved, That the Report be the First Report of the Committee to the Houses.

Ordered, That the Chair make the Report to the House of Commons and the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134 of the House of Commons.

[Adjourned to Wednesday 8 June at 3.00p.m.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 27 April 2016

Question number

Professor Iain Cameron, Faculty of Law, University of Uppsala, **Professor Martin Scheinin**, International Law and Human Rights, European University Institute, and **Michael Drury CMG**, Partner, BCL Burton Copeland

[Q1-7](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

IPB numbers are generated by the evidence processing system and so may not be complete.

- 1 Iain Cameron ([IPB0003](#))
- 2 Martin Scheinin ([IPB0001](#))
- 3 Martin Scheinin ([IPB0002](#))
- 4 Michael Drury ([IPB0004](#))