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Investigatory Powers Bill

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Investigatory Powers Bill

INTRODUCTION

1. A Draft Investigatory Powers Bill was published in November 2015.[1] The Bill itself was introduced in the House of Commons on 1 March 2016. It received its first reading in the House of Lords on 8 June 2016 and its second reading on 27 June. The Committee stage will commence on Monday 11 July.

2. Parts 6 and 7 of the Bill—which are concerned with the interception and collection of "bulk" data—have attracted particular interest and, in some quarters, criticism. In the light of that, David Anderson QC, the Independent Reviewer of Terrorism Legislation, has been asked by the Government to review the operational case for bulk powers.[2] Mr Anderson's report is expected to inform the House's consideration in committee of Parts 6 and 7 of the Bill. As those Parts of the Bill are expected to be debated after the summer recess, we will scrutinie them separately later in the year.

3. The Bill and the draft Bill have already been subject to considerable scrutiny by committees, including the Joint Committee on the Draft Investigatory Powers Bill ('JCDIPB'),[3] the Joint Committee on Human Rights ('JCHR'),[4] the Intelligence and Security Committee[5] and the House of Commons Science and Technology Committee.[6] Many of the contentious issues in relation to the Bill concern whether it strikes an appropriate balance between considerations of privacy and security, and whether the Bill is compatible with relevant rights under the European Convention on Human Rights—the most obviously germane of which is the Article 8 right to respect of private and family life, home and correspondence. The JCHR have reported on the Bill's compatibility with Convention rights. Our report focuses on specifically the constitutional, as distinct from human rights, issues raised by the Bill.

Judicial Commissioners

4. Under the provisions of this Bill, the 'Judicial Commissioners'—a term that refers collectively to the 'Investigatory Powers Commissioner' and the other (regular) 'Judicial Commissioners'—would be appointed by the Prime

1 Home Office, *Draft Investigatory Powers Bill*, Cm 9152, November 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf [accessed 7 July 2016]

2 Home Office, Independent review of the operational case for bulk powers: Terms of Reference (2016): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527764/TOR_for_Bulk_Review.pdf [accessed 7 July 2016]

3 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill* (Report, Session 2015–16, HC 561, HL Paper 83).

4 Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill* (First Report, Session 2016–17, HC 104, HL Paper 6).

5 Intelligence and Security Committee, *Report on the draft Investigatory Powers Bill* (9 February 2016, HC 795).

6 House of Commons Science and Technology Committee, *Investigatory Powers Bill: Technology Issues* (Third Report, Session 2015–16; HC 573).

Minister and be required to hold or have held high judicial office.[7] The Judicial Commissioners would have two principal functions under the Bill. First, warrants would be issued subject to a 'double lock' process, meaning that the authorisation of both the Secretary of State[8] and a Judicial Commissioner would be required.[9] Second, the Investigatory Powers Commissioner—who would be able to delegate his functions to other Judicial Commissioners—would be charged with extensive duties in respect of the oversight of the investigatory powers regime.

5. The Judicial Commissioners' role might fairly be regarded as judicial—not only because of the use of the term 'judicial' in describing it, but because the role of Judicial Commissioners in respect of authorisations would entail (among other things) reviewing the Secretary of State's decision by reference to the principles applicable in judicial review proceedings. It would be sophistry to contend that serving or former judges styled as 'Judicial Commissioners' and charged with examining executive decisions by reference to judicial review principles involved anything other than the discharge of a judicial function. The constitutional question is therefore whether the Bill treats Judicial Commissioners in a way that is consonant with the judicial nature of that role.

General matters concerning judicial independence

Appointment, reappointment and dismissal

6. The Draft Bill permitted the Prime Minister to appoint Judicial Commissioners, subject to duties to consult devolved Ministers and (in the case of Judicial Commissioners other than the Investigatory Powers Commissioner) the Investigatory Powers Commissioner. The JCDIPB proposed vesting the appointment power in the Lord Chief Justice, subject to consultation with his counterparts in Scotland and Northern Ireland and with the Prime Minister and his counterparts in the devolved administrations.[10]

7. In arriving at their view, the JCDIPB indicated that it did not think that appointment by the Prime Minister would "in reality"[11] have any impact on the independence of the Judicial Commissioners, but that securing "public confidence" in their "independence and impartiality" required a judicial appointments model.[12] The JCDIPB's analysis as to the *actual* independence of Judicial Commissioners is bolstered by the fact that the Prime Minister would be choosing from a limited pool of candidates consisting exclusively of serving and former senior judges, whose independence would be vouchsafed by their membership of that pool. However, the point concerning the *appearance* of independence, and hence public confidence, is clearly an important one.

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7 Investigatory Powers Bill, clause 203, Bill 40 (2016—17). The term 'high judicial office', which carries the same meaning as in the Constitutional Reform Act 2005, Part 3, extends to Justices of the Supreme Court and to judges of the Court of Appeal in England and Wales, the High Court in England and Wales, the Court of Session, the Court of Appeal in Northern Ireland, and the High Court in Northern Ireland.

8 Or, in relation to certain matters, the Scottish Ministers.

9 In urgent cases, it would be possible for the Secretary of State alone to issue a warrant, subject to ex post authorisation by a Judicial Commissioner by the end of the third working day after the day on which the warrant was issued.

10 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill*, para 588.

11 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill*, para 587.

12 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill*, para 588.

8. There has been limited movement on this issue since the JCDIPB reported on the draft Bill. As presently drafted, the Bill continues to make appointment a matter for the Prime Minister, but requires that he consult with his counterparts in the devolved administrations and with the Lord Chief Justice and his counterparts in Scotland and Northern Ireland.[13]

9. **Given the judicial nature of the role of Judicial Commissioner, the House may wish to consider whether it is appropriate for the Prime Minister—subject only to the consultation duty set out in clause 203—to appoint Judicial Commissioners. In particular, the House may wish to consider whether such an arrangement is consistent with the separation of powers principle and with the constitutional interest in securing public confidence in the independence and impartiality of those who are appointed to judicial roles.**

10. **If the Prime Minister is to have a role in the appointment of Judicial Commissioners, it should be a strictly limited one of formally making an appointment decided through another means. We endorse the recommendation of the Joint Committee on the draft Bill: that Judicial Commissioners should be appointed by the Lord Chief Justice, subject to consultation with his counterparts in Scotland and Northern Ireland and with the Prime Minister and his counterparts in the devolved administrations.**

11. In addition, the Bill provides that Judicial Commissioners are to be appointed for three-year renewable terms.[14] As presently drafted, it would be for the Prime Minister to decide whether a Judicial Commissioner who had reached the end of his or her term should be appointed for a further term. This would arguably create risks in terms of actual or perceived independence. In evidence to the JCDIPB, the Bingham Centre for the Rule of Law argued that "[i]t is important that there be absolutely no possibility of perception that a Commissioner's decisions could be influenced by a desire to have a term renewed".[15] The JCDIPB concluded that renewable terms could have "negative consequences for public confidence in the independence of Judicial Commissioners" and considered that, taken in combination, renewable terms and prime ministerial appointment were particularly problematic.[16]

12. **We are concerned that the three-year renewable model of appointment, when combined with the Prime Minister's role in appointing and reappointing Commissioners as set out in the Bill, is not compatible with the constitutional interest in securing public confidence in the independence and impartiality of those who are appointed to judicial roles. If, as recommended above, the appointment of Judicial Commissioners is to be undertaken without input from the Prime Minister, other than potentially in a strictly limited role, we would expect the same to apply to reappointments, in which case this concern would not arise.**

13. Concerns were raised by the JCDIPB concerning dismissal, but those arrangements have been tightened up in the Bill itself. In particular, a sub-clause in the draft Bill enabling Judicial Commissioners to be dismissed by the

13 Investigatory Powers Bill, clause 203.
14 Investigatory Powers Bill, clause 204.
15 Joint Committee on the Draft Investigatory Powers Bill, Draft Investigatory Powers Bill, para 590.
16 Joint Committee on the Draft Investigatory Powers Bill, Draft Investigatory Powers Bill, para 592.

Investigatory Powers Commissioner on grounds of inability, misbehaviour or breach of a ground specified in the Judicial Commissioner's terms and conditions of appointment has been dropped from the Bill. It would remain possible under the Bill for Judicial Commissioners to be removed from office following resolutions passed by both Houses of Parliament.[17] It would also be possible for Judicial Commissioners to be removed from office by the Prime Minister in very limited circumstances, such as following the making of a bankruptcy order or the imposition of a sentence of imprisonment upon conviction of a criminal offence.

14. **As in the case of the appointment and reappointment of Judicial Commissioners, the requirement of judicial independence and the need for public confidence in that independence make it inappropriate for the Prime Minister to play any substantive role in the dismissal of Commissioners. The House may therefore wish to consider whether the dismissal power vested by the Bill as it presently stands in the Prime Minister should instead be vested in the Lord Chief Justice.**

15. In addition, we are concerned that the process of obtaining a resolution of both Houses to dismiss a Commissioner may be overly time-consuming, meaning that it could take an unreasonably long time to remove a Commissioner who was no longer able properly to perform their role. This is of particular concern given the sensitivity and importance of the Judicial Commissioners' roles established under this Bill. **We do not think that a dismissal system modelled on that which applies to senior judges, involving dismissal following resolutions of both Houses, is necessarily appropriate in the present context. We therefore recommend that the provision for dismissal following a resolution passed by both Houses should be removed from the Bill and replaced in line with our other recommendations on appointments and dismissals.**

16. **We recommend that that provision be replaced by one that vests in the Lord Chief Justice a power to dismiss Judicial Commissioners on the ground of inability or misbehaviour. Taken together with our suggestion in paragraph 14, this would mean that the Lord Chief Justice would have the power to dismiss Judicial Commissioners in the circumstances presently set out in clause 204(5) and on the ground of inability or misbehaviour.**

Oversight and authorisation functions: Henry VIII powers

17. In previous reports, we have criticised the framing of Henry VIII clauses in Bills presented to the House.[18] We note that there are several Henry VIII powers in this Bill; however, while some are significant—for instance those in clauses 67 and 69 which have the capacity to expand the operational scope of the regime for the collection of communications data under Part 3 of the Bill—we feel that the majority of uses of Henry VIII powers in this Bill raise no constitutional concerns. It is for the Delegated Powers and Regulatory Reform Committee to assess more broadly whether such delegations of power are appropriate.

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17 Investigatory Powers Bill, clause 204(4)

18 For example, see our reports: *Childcare Bill [HL]* (3rd Report, Session 2015–16, HL Paper 16) and *Cities and Local Government Devolution, Psychoactive Substances and Charities (Protection and Social Investment) Bills* (2nd Report, Session 2015–16, HL Paper 9)

18. The provision about which we do have concerns is clause 214—a Henry VIII power enabling the modification of the functions of the Commissioners. The draft Bill conferred a power to modify the functions of the Investigatory Powers Commissioner and other Judicial Commissioners. In the draft Bill, the power was a very broad one; among other things, it would have allowed modification of the tests to be applied by the Judicial Commissioners when deciding whether to authorise warrants. The power conferred by the Bill itself is narrower, in that it could not be exercised so as to modify the Judicial Commissioners' functions in respect of approving, quashing or cancelling warrants.[19] However, it remains the case that the power—which is subject to the affirmative procedure—could be used to modify the Commissioners' other functions, including in relation to oversight of the investigatory powers regime.

19. The position adopted in relation to this matter in the Bill appears to concede that it would be inappropriate for the Government to be able to interfere, by way of Henry VIII powers, with the Judicial Commissioners' authorisation function. However, the implication of the Bill is that such interference would not be inappropriate in respect of the Judicial Commissioners' oversight function. The defensibility of that distinction is debatable. It might be argued that the authorisation function lies at the core of the Commissioners' judicial function, given that it involves, in effect, adjudicating—by reference to the judicial review principles—upon the lawfulness of Ministerial decisions to issue warrants. It might further be argued that the Commissioners' oversight functions are less classically judicial and more regulatory in nature.

20. On this analysis, the distinction drawn by the Bill in respect of the adjustment of Commissioners' functions through the use of a Henry VIII power might be considered defensible. However, for two reasons, we are not satisfied that the Henry VIII power as presently framed in the Bill is constitutionally acceptable. First, notwithstanding the possibility of distinguishing between the Judicial Commissioners' various functions, it remains the case that the office of Judicial Commissioner is a judicial office. An executive power to diminish the legal role and responsibility of holders of such an office would be inappropriate on separation of powers grounds. Second, when exercising oversight functions, Judicial Commissioners would be carrying out oversight of an interception of communications regime operated by the Government (albeit with judicial involvement via the double lock process) and Government agencies. The availability of a Henry VIII power to adjust, and particularly to reduce, the Commissioners' oversight functions might give cause for concern, since such a power would enable the Government to weaken an oversight regime of which it was the subject.

21. **The House may wish to consider whether it is appropriate for a Henry VIII power, albeit one that is subject to the affirmative procedure, to be available for the modification of certain of the Judicial Commissioners' functions.**

22. **We recommend that the power be confined to the ability to extend and augment the oversight functions of the Commissioners, in order that those functions are able to keep up with technological or other developments. Thus circumscribed, this could be an appropriate use of a Henry VIII power, allowing flexibility without risking any**

19 Investigatory Powers Bill, clause 214.

potential or perceived interference by the executive in the existing functions of the Commissioners.

Funding

23. As far as the funding of the Judicial Commissioners is concerned, the Bill provides that:

> The Secretary of State must, after consultation with the Investigatory Powers Commissioner and subject to the approval of the Treasury as to numbers of staff, provide the Judicial Commissioners with—(a) such staff, and (b) such accommodation, equipment and other facilities, as the Secretary of State considers necessary for the carrying out of the Commissioners' functions.[20]

24. The JCDIPB concluded that it was "inappropriate for the Home Secretary alone to determine the budget of the public body which is monitoring the exercise of her surveillance powers".[21] **The House may wish to consider whether it would be appropriate for the Secretary of State alone to determine the budget of the Judicial Commissioners. In combination with the ability to modify certain functions of the Commissioners by statutory instrument (see paragraphs 18-22), the Secretary of State would have the power to determine both the funding and oversight functions of the Judicial Commissioners. The House may wish to consider whether this would be consonant with the requirements of judicial independence and the need for public trust and confidence in the system.**

25. **One measure that might mitigate the risk of executive interference in the functions of the Judicial Commissioners would be conferring on the Investigatory Powers Commissioner the right to make written representations to Parliament, akin to the right conferred on the Lord Chief Justice by section 5 of the Constitutional Reform Act 2005.**[22]

Judicial Commissioners' powers in respect of authorisation

26. As well as raising the independence-related questions addressed above, the Bill raises questions about the nature of the role of Judicial Commissioners. If serving and former judges, styled 'Judicial Commissioners', were assigned a role under the Bill that amounted to requiring them to rubber-stamp executive decisions concerning such matters as the issuing of warrants, an obvious constitutional objection would arise. The objection would be that drafting in judges in such a way, so as to lend their imprimatur to executive decisions that they were unable meaningfully to scrutinise, would be to assign to judges a role that was incompatible with the place of the judiciary under the separation of powers and that risked compromising public confidence in the independence of the judiciary.

27. The question therefore arises whether the role assigned to judges by the Bill is consistent with the broader, constitutional role of the judiciary. Concerns were expressed to the JCDIPB that limiting the Judicial Commissioners' role

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20 Investigatory Powers Bill, clause 213(2).

21 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill*, para 604.

22 Clause 210 of the Bill already requires the Investigatory Powers Commissioner to make an annual report to the Prime Minister. The Prime Minister is required to publish the report but has a power to order redactions.

to an application of the judicial review principles would, in circumstances inevitably raising sensitive questions concerning national security and analogous matters, largely empty the Commissioners' oversight of meaningful content. Following suggestions from the Intelligence and Security Committee and opposition parties, the Government introduced a new clause at report stage in the Commons setting out 'General duties in relation to privacy', with which Commissioners must comply when considering warrants as well as applying judicial review principles.[23]

28. **We are content that, under the provisions of this Bill, particularly those setting out general duties in relation to privacy, the Judicial Commissioners will not merely be called upon to rubber-stamp executive decision, and that the role assigned to judges by the Bill, in spite of concerns raised over the draft Bill, is not incompatible with judges' broader role under the separation of powers.**

Parliamentarians' communications

29. Traditionally, the interception of communications of Members of Parliament has been subject to the 'Wilson doctrine', as set out in 1966 by the then Prime Minister Harold Wilson:

> "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."[24]

30. The constitutional significance of the Wilson Doctrine is clear: among other things, it buttresses the capacity of parliamentarians to hold the executive government to account by facilitating communication by parliamentarians that is uninhibited by concerns as to interception by the executive or other governmental agencies. However, in a case decided in 2015, the Investigatory Powers Tribunal held that the Wilson Doctrine provided fewer safeguards for parliamentarians' communications than had commonly been supposed.[25] In particular, the Tribunal concluded that the doctrine applies only to targeted—and not incidental—interception of parliamentarians' communications and that it allows for changes in policy so as to permit interception provided that such changes are announced at some point in the future.

31. Against that background, the Bill addresses the question of parliamentarians' communications by stipulating that relevant warrants could be issued only with the Prime Minister's approval (as well as the approval of a Judicial Commissioner).[26] This is subtly different from the draft Bill, which required only that the Prime Minister be consulted. Whether the two approaches differ in any meaningful sense is questionable, however, and turns upon the extent to which a Secretary of State would be likely to press ahead with the

23 Investigatory Powers Bill, clauses 2 and 23
24 HC Deb, 17 November 1966, col 639.
25 *Lucas v Security Service* [2015] UKIPTrib 14 79-CH.
26 Investigatory Powers Bill, clauses 26 and 105.

issuing of a warrant following a negative response from a consulted Prime Minister. The JCDIPB considered that involving the Prime Minister 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."[27]

32. In contrast, the JCHR concluded that while involving the Prime Minister may have the effect of "elevating political accountability" for decisions of this nature, it "does not eliminate the risk of a partisan motivation, whether real or apparent",[28] and fails to supply "a safeguard commensurate with the importance of the public interest at stake".[29] The JCHR concluded that the Speaker or Presiding Officer of the relevant legislature should have the opportunity to be represented at the hearing before the Judicial Commissioner.[30]

33. **We note that the surveillance of parliamentarians is a significant constitutional issue and would welcome clarification from the Government of its current understanding of the Wilson Doctrine.**

The Investigatory Powers Tribunal

34. The Investigatory Powers Tribunal ('IPT') decides complaints concerning unlawful intrusion upon privacy—including through the use of interception of communication and acquisition of communications data powers—by public bodies, including the security and intelligence agencies and the police. The IPT is established by section 65 of the Regulation of Investigatory Powers Act 2000. At present, there is no right of appeal against the IPT's decisions. However, clause 208 of the Bill creates a right of appeal to the Court of Appeal.

35. Following this change, it is clear that the IPT would no longer be merely a complaints body, but an independent tribunal and part of the justice system.[31] This change leads to two major concerns. First, we note that at present the IPT's rules are made by the Secretary of State,[32] in contrast to the rules pertaining to the First-tier Tribunal and the Upper Tribunal, which are made by the independent statutory Tribunal Procedure Committee.[33]

36. **The capacity of the Secretary of State to determine the Investigatory Powers Tribunal's rules could call into question the Tribunal's actual and perceived independence. The introduction of a right of appeal would clearly elevate the IPT from a complaints body to an independent tribunal within the justice system. In the light of that, the House may wish to consider whether the Tribunal Procedure Committee, rather than the Secretary of State, should make the IPT's rules.**[34]

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27 Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill*, para 564
28 Joint Committee on Human Rights, *Legislative Scrutiny: Investigatory Powers Bill*, para 5.9
29 *Legislative Scrutiny: Investigatory Powers Bill*, para 5.8
30 *Legislative Scrutiny: Investigatory Powers Bill*, para 5.11
31 See evidence from Dr Tom Hickman to Public Bill Committee on the Investigatory Powers Bill (IPB66).
32 Regulation of Investigatory Powers Act 2000, section 69(1).
33 Tribunals, Courts and Enforcement Act 2007, section 22.
34 Such a change may require amendments altering section 69(1) of the Regulation of Investigatory Powers Act 2000.

37. Second, under the IPT's Rules, the Tribunal cannot disclose (including to the complainant) any material supplied to it by the intelligence services or the police unless the relevant body consents.[35] The Court of Appeal would inherit this restriction on its ability to disclose material submitted to it.[36] **The House may wish to consider whether it would be appropriate for an independent court to be prevented from disclosing information if it considers it necessary in the interests of justice.**

35 Investigatory Powers Tribunal Rules (SI 2000/2665), rule 6.

36 Section 15(3) of the Senior Courts Act 1981 provides that when it hears appeals, the civil division of the Court of Appeal "shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought".