



IOCCO Update on the Investigatory Powers Bill (IP Bill)

Here's a recap on what we have been saying recently about the IP Bill...

On **3 November 2015** we published our "wish list" of the six elements we would like to see in the IP Bill to strengthen the current oversight of surveillance powers:

- 1 A single independent public facing oversight body.** We support fully a single unified body with responsibility for surveillance oversight. This will be an opportunity to streamline the oversight landscape, to put all of the oversight responsibilities on a statutory footing, to bridge some of the identified gaps and remove overlaps. The body must be independent, have an appropriate legal mandate and be public facing to promote greater public trust and confidence.
- 2 Full access to technical systems.** RIPA contains outdated language (a requirement to provide to the Commissioner with "all such documents and information") and is in need of updating. The query based searches we have developed on the communications data side of our business enable us at scale to identify trends, patterns and compliance issues across large volumes of applications. We need to develop our technical audits on the interception side of the business, particularly where the collection of material and data is at scale.
- 3 Provision to launch investigations and sufficient resource to conduct thematic inquiries.** The oversight body should have a clear mandate to launch inquiries into matters of public interest or areas of concern. Detailed thematic investigations should take place in addition to ongoing reviews. It is difficult presently for us to produce detailed thematic reports without undermining our core review functions - both are key to ensuring robust oversight and one should not compromise the other.
- 4 Relaxation on secrecy provisions to aid transparency.** We are constrained by the current statutory provisions in section 19 of RIPA forbidding disclosure, as are the public authorities and the CSPs. The culture of secrecy must continue to be challenged and transparency should be encouraged where it leads to greater accountability without prejudicing national security or the ongoing prevention or detection of crime.
- 5 Full provision for reporting errors / breaches and power to refer matters to the IPT.** It is crucial to ensure that the error reporting provisions are clear and comprehensible and that individuals adversely affected are able to seek effective remedy. On the latter point a number of areas would benefit from review here including; the threshold of "wilful or reckless" and whether the Commissioner should be able to refer matters directly to the IPT.
- 6 Expert resource to complement the Commissioner.** To complement the Commissioner's expertise a breadth of skills are required, for example, staff with technical skills (such as computer scientists, engineers), analytical expertise, investigative experience, privacy and public interest advocates, media and communications expertise. A broad and in-depth range of skills will ensure that the public authorities are robustly held to account and that all critical views are represented.

Since the IP Bill was introduced in Parliament on 4th November 2015 it has gone through various iterations, has been reviewed by a number of Parliamentary Committees', and has undergone scrutiny in the House of Commons and, latterly the House of Lords. We have published a number of documents to assist the various reviews, committees, parliamentarians and other key stakeholders. Our aim has been to help interested individuals to understand the safeguards to protect privacy, the case for amending or replacing legislation, the statistical and transparency requirements that should apply to the powers, and how the oversight provisions can be developed and strengthened to improve the effectiveness of the current oversight arrangements. For example on:

- **2 December 2015** - we gave oral evidence to the IP Bill Joint Committee¹.
- **21 December 2015** - we submitted written evidence to the IP Bill Joint Committee highlighting the elements needed to create a world-leading oversight body, along with a number of additional concerns and inadequacies relating to the IP Bill clauses².
- **25 February 2016** - we published a one page summary linking the various Committees recommendations to our evidence. The Joint Committee and the Intelligence and Security Committee (ISC) made over 20 recommendations in the areas we highlighted³.
- **23 March 2016** - we published a document that sought to review the 8 key areas we had highlighted in our original written evidence to the Joint Committee against the revised IP Bill that was introduced to Parliament on 1 March 2016. We did so in order to assist the Public Bill Committee which was at that time carrying out a detailed line by line examination of the Bill⁴.
- **24 March 2016** - we gave oral evidence to the Public Bill Committee⁵.

IOCCO update for House of Lords

On 8 June 2016 the IP Bill was introduced to the House of Lords⁶. The House of Lords is due to continue its line by line check of the IP Bill (committee stage day 5) on 5 September 2016 and this update has been produced to assist with the debate.

The iteration of the IP Bill introduced to the House of Lords contained some enhanced safeguards, however we still have concerns that a number of the elements on our original "wish-list" are not explicitly provided for. This is a missed opportunity to enhance safeguards and strengthen further the oversight provisions. For example:

- We are disappointed that the Government has still not created or made any reference to an oversight Commission in the IP Bill, despite repeatedly giving a commitment to creating "world leading oversight". The oversight provisions in the IP Bill need to prescribe properly the legal mandate of the "Commission" in order to set the standard for a modern, independent oversight body.

At present clause 203 of the IP Bill only creates a Chief Judicial Commissioner and a small number of Judicial Commissioners. The commissioners will only be responsible for approving approximately 2% of the applications falling within the remit of the oversight

¹ <http://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/oral-evidence-draft-investigatory-powers-committee.pdf>

² <http://www.iocco-uk.info/docs/IOCCO%20Evidence%20for%20the%20IP%20Bill%20Joint%20Committee.pdf>

³ <http://www.iocco-uk.info/docs/Summary%20of%20Points%20to%20Consider%20on%20IP%20Bill%20and%20recommendations.pdf>

⁴ <http://www.iocco-uk.info/docs/Points%20to%20Consider%20on%20IP%20Bill%20and%20recommendations%20-%20updated%20post%201st%20March%20amended%20Bill.pdf>

⁵ <http://www.publications.parliament.uk/pa/cm201516/cmpublic/policingandcrime/160324/pm/160324s01.pdf>

⁶ <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0040/17040.pdf>

body. The remaining 98% will only be subject to post-facto oversight. The post-facto oversight will be carried out predominantly by specialist inspectors, investigators, analysts and technical staff within the Commission and it is important for those individuals to have a delegated power to require information or access to technical systems. The creation of a Commission is crucial to achieve a modern, inquisitive oversight body that has the expertise to carry out investigations and inquiries to the breadth and depth required and the intellectual curiosity to probe and challenge the conduct of the public authorities. Putting the oversight Commission on a statutory footing will be a huge step towards guaranteeing independence, capability and diversity within the organisation which will inspire public trust and confidence.

Creating an oversight Commission would also help make a distinction between the approval and post-facto audit elements of the oversight body, addressing a concern raised by a number of witnesses to the Joint Committee that the Judicial Commissioners should not be perceived to be “marking their own homework”.

We urge the Government to implement this recommendation which was also made by the RUSI Independent Surveillance Review, David Anderson QC and the IP Bill Joint Committee.

- The secretary of state remains responsible for providing the Commissioner with the funding, staff and facilities that *the secretary of state considers necessary* for the carrying out of the Commissioners’ functions (clause 213(2) of the IP Bill), despite the Joint Committee suggesting rightly that it was inappropriate for the secretary of state alone to determine the budget of the body which is responsible for reviewing the secretary of state’s performance.
- Clause 207 makes provision for the Investigatory Powers Commissioner to inform individuals of any serious errors, but an error cannot be deemed to be serious unless it has caused significant prejudice or harm to the person concerned. We still have a number of concerns with this clause.

First, the description of a “serious error” appears to be dependent on the consequence of the conduct, rather than on an assessment of the seriousness of the conduct itself. Currently our determination of whether an error is considered to be “serious” or not is not purely based on the consequence of the conduct.

Secondly, there is still no complete definition of “relevant error” in clause 207(9) which appears to still be confined to public authority conduct, even though around 21% of interception errors and 13% of communications data errors are caused by CSPs. The draft IP Bill Codes of Practice should provide clarity and further detail on these points but at present they do not. Thirdly, we have concerns that the threshold is set artificially high, which will prevent individuals from being able to seek effective remedy. We note that Government has committed to review the threshold for error reporting (see the Government’s response to IP Bill Joint Committee recommendation 58), but we have not seen any evidence of this review as yet.

- The Joint Committee’s recommendation to remove the national security exemption relating to the requirement for DPs to be independent of investigations or operations when approving communications data has *not* been implemented. Clause 59 still includes a broad exemption for national security purposes which dilutes considerably the strengthened process introduced in the March 2015 Acquisition and Disclosure of Communications Data Code of Practice as a result of the Digital Rights Ireland Judgment by the European Court of Justice (ECJ). The Government’s response sets out that the exemption only applies in exceptional and particular cases and that it is not a blanket exemption. However, in our view that is not reflected in the drafting of clause 59.

- Clause 72 has not been amended and still disapplies the requirement for a public authority to consult with a SPoC when acquiring communications data *in the interests of national security*. The SPoC is a key safeguard in the process and the justification for considering the interests of national security always to be an exceptional circumstance is unclear.
- The Government has not taken the opportunity to bring all of the investigatory powers used by public authorities into the IP Bill (e.g. Part 2 of RIPA which covers directed and intrusive surveillance authorisations for law enforcement) and curiously it prescribes different authorisation and modification procedures for targeted equipment interference warrants made on behalf of the intelligence services to those on behalf of law enforcement. The different application and approval procedures are confusing, lack clarity, and it is not clear on what basis they are justified. We agree with others that this is a missed opportunity.
- In our 2015 report the former Commissioner made clear that it would be preferable if our prison oversight was formalised as a statutory function. Our understanding is that the Government intended to do this in the IP Bill. However, although clause 47 of the IP Bill provides that the interception of communications in a prison is authorised if it is conduct in exercise of any power conferred by or under Prison Rules, there is no provision for oversight of these powers. Clause 205 of the IP Bill sets out the main oversight functions of the Investigatory Powers Commissioner and includes the exercise of functions by virtue of section 80 of the Serious Crime Act 2015 (prevention or restriction of use of communication devices by prisoners etc.) and the exercise of functions by virtue of sections 1 to 4 of the Prisons (Interference with Wireless Telegraphy) Act 2012. Both of these functions are new areas of oversight which we have so far informally been asked by the Home Office and Ministry of Justice to oversee. It seems odd that these two new areas of oversight are included in the IP Bill, but there is no explicit provision for our current oversight of interception of communications in prisons. To remedy this, clause 206 of the IP Bill requires amending to include oversight of conduct taking place under Chapter 2 of Part 2 of the IP Bill.

To summarise, although we welcome a number of the amendments which have already been made by the Government to the IP Bill, in our view there is still room for further amendments to enhance safeguards and to increase accountability and transparency.