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The Rt Hon the Lord Rooker
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08 July 2016

Dear Jeffrey,

INVESTIGATORY POWERS BILL: SECOND READING

I would like to extend my thanks to you and other members for the contributions to the thoughtful and measured debate on the Bill on 27 June.

As you are aware, the Bill was informed by three independent reviews of surveillance legislation including that conducted by a panel convened by the Royal United Services Institute (RUSI) on which you served alongside Lord Evans of Weardale, Lord Hennessy of Nympsfield, Baroness Lane Fox of Soho and Baroness O'Neill of Bengarve.

During the debate, you noted the RUSI panel's recommendation that the Bill should meet ten tests for new legislation. You asked whether the Bill met the ten tests set by RUSI and invited the Government to set out how it satisfied them.

Giving evidence to the Joint Committee on the Draft Investigatory Powers Bill, the former Director General of RUSI, Professor Michael Clarke, said:

> '*As Chair of the RUSI panel, I can say that the Bill met most of our expectations in terms of the recommendations that we made. Also, at the end of our report, we elucidated 10 principles and said any future legislation must meet those 10 tests. I would recommend you have a look at those tests. I think the legislation meets most of them.'*

Since then, the Bill has been improved and clarified, and its safeguards strengthened, through changes made in response to pre-legislative scrutiny and during its passage through the House of Commons.

I am confident that the Bill as introduced in the House of Lords meets each test. I have attached to this letter a short paper detailing the Bill's compliance with the tests.

I am copying this letter to all Members who spoke in last week's debate. I will place a copy of this letter and the paper in the House Library.

Yours sincerely,

THE LORD KEEN OF ELIE QC

THE INVESTIGATORY POWERS BILL AND THE RUSI TESTS

In July 2015, the Independent Surveillance Review Panel convened by the Royal United Services Institute (RUSI) published its report: A Democratic Licence to Operate. That report set out 10 tests that any new legislation governing investigatory powers should satisfy. This paper sets out how the Investigatory Powers Bill, as introduced to the House of Lords in June 2016, satisfies those tests.

1. ***Rule of law: All intrusion into privacy must be in accordance with law through processes that can be meaningfully assessed against clear and open legislation, and only for purposes laid down in law.***

The Bill consolidates and makes clear the powers available to the state to acquire communications and data about communications. It sets out the specific purposes for which these powers may be exercised on the face of legislation. It provides an overarching requirement to consider the impact on privacy of authorising any power under the Bill.

2. ***Necessity: all intrusion must be justified as necessary in relation to explicit tasks and missions assigned to government agencies in accordance with their duly democratic processes and there should be no other practical means of achieving the objective.***

The Bill makes clear that the powers may only be exercised when it is both necessary and proportionate to do so. They must only be used for specific purposes, and the most sensitive powers can only be exercised by the security and intelligence agencies.

The Government has published material alongside the Bill explaining the necessity of the powers it contains, including an operational case for internet connection records and an operational case for bulk powers.

The Joint Committee which considered the draft Bill reached the conclusion that the Government had made the case for retention of internet connections records, the only new power in the Bill.[1]

In its Privacy and Security report, its report on the draft Bill, and in speeches in Parliament, the Intelligence and Security Committee of Parliament explained why, in its view, the powers that the Bill makes available to the security and intelligence agencies are and remain necessary.[2]

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[1] Recommendation 12, Report by the Joint Committee on the draft Investigatory Powers Bill, page 8

[2] Report on the Draft Investigatory Powers Bill by the Intelligence and Security Committee of Parliament, page 1, paragraph 2; Investigatory Powers Bill Second Reading Debate, Rt Hon Dominic Grieve MP columns 836-838

During the course of the Bill's passage through the House of Commons, the Government committed to a review of the necessity of bulk powers. That review is currently being conducted by David Anderson QC, the Independent Reviewer of Terrorism Legislation, and will complete in time to inform consideration of the bulk powers in the Bill at Lords Committee stage.

3. ***Proportionality: Intrusion must be judged as proportionate to the advantages gained, not just in cost or resource terms but also through a judgment that the degree of intrusion is matched by the seriousness of the harm to be prevented.***

The Bill requires that the use of powers under the Bill must be both necessary and proportionate. Were the proposed conduct disproportionately intrusive, it would not be lawful. The Government introduced a new clause (the 'privacy' clause) during the passage of the Bill through the House of Commons, which requires that the person authorising conduct must have regard to: whether what is sought to be achieved by the warrant, authorisation or notice could reasonably be achieved by other less intrusive means; the public interest in the integrity and security of telecommunications systems and postal services; and any other aspect of the public interest in the protection of privacy. The Bill also introduces a new 'double-lock' for the authorisation of the most sensitive powers so that in future a senior judge must review and approve the decision of the person authorising the warrant as to necessity and proportionality.

4. ***Restraint: it should never become routine for the state to intrude into the lives of its citizens. It must be reluctant to do so, restrained in the powers it chooses to use, and properly authorised when it deems it necessary to intrude.***

It is a principle at the heart of the Bill, now enshrined in the privacy clause, that intrusive powers should only be used when it is necessary and proportionate to do so. The Bill contains strong privacy protections and extensive safeguards to prevent the misuse of powers. The most sensitive powers in the Bill are authorised by warrant, overseen by the Investigatory Powers Commissioner and restricted to a limited range of purposes. Only the security and intelligence agencies (GCHQ, MI5 and SIS) may apply for a warrant to use powers for the acquisition of data in bulk; the Bill applies new statutory safeguards to these powers to protect the privacy of innocent people, including a requirement that analysts may only search for and examine the content of a person in the British Islands if a targeted warrant has been authorised by a Secretary of State and approved by a Judicial Commissioner.

5. ***Effective oversight: an effective regime must be in place. Effectiveness should be judged by the capabilities of the regime to supervise and investigate governmental intrusion, the power it has to bring officials and ministers to account, and the transparency it embodies so the public can be confident it is working properly. There should also be means independently to investigate complaints.***

The Bill radically overhauls how the powers in the Bill are overseen. The new Investigatory Powers Commissioner will be a senior judge charged with supervising the exercise of all investigatory powers. The Commissioner will lead a visible, effective body, supported by a team of Judicial Commissioners and with access to technical and legal expertise. He or she will have unfettered access to systems, documentation and officials in order to conduct retrospective oversight. The Commissioner may, at any time, make a report to the Prime Minister which must then be published and laid before Parliament; the Commissioner must do this at least annually. The Bill provides the Commissioner with a new power to inform individuals who have suffered as a result of a significant error in the use of investigatory powers. And it introduces a new domestic right of appeal from the independent Investigatory Powers Tribunal.

6. ***Recognition of necessary secrecy: The 'secret parts of the state' must be acknowledged as necessary to the functioning and protection of the open society. It cannot be more than minimally transparent, but it must be fully democratically accountable.***

It is of course the case that the capabilities and operations of the security and intelligence agencies remain secret; it is right that the work they carry out to protect us is appropriately safeguarded against those who would do us harm. But the role of Ministers in authorising warrants is to ensure democratic accountability to Parliament, and the role of the Intelligence and Security Committee, in seeking evidence and undertaking inquiries ensures, that even the most sensitive of decisions can be held to account in Parliament.

7. ***Minimal secrecy: The 'secret parts of the state' must draw and observe clear boundaries between that which must remain secret (such as intelligence sources or the identity of its employees) and all other aspects of its work which should be openly acknowledged. Necessary secrecy, however, must not be a justification for a wider culture of secrecy on security and intelligence matters.***

The Bill goes further than ever before in making clear what the state may do, in what circumstances and for what purpose. The Bill places some of the most sensitive powers available to the security and intelligence agencies on a clear statutory footing, leaving no doubt about the powers available to those agencies or the safeguards that apply to them.

The Investigatory Powers Commissioner will report annually, providing statistics on the number of authorisations issued, errors, information about funding and staffing and other resources of the Commissioner, and may include any recommendations such as the Commissioner considers appropriate. This is enshrined on the face of the Bill.

The Government has also endeavoured to put as much information in the public domain as possible. That included the publication of an operational case for bulk powers on the Bill's introduction to the House of Commons.

8. ***Transparency: How the law applies to the citizen must be evident if the rule of law is to be upheld. Anything that does not need to be secret should be transparent to the public not just comprehensible to dedicated specialists but clearly stated in ways that any interested citizen understands.***

The Bill is designed to make the law clear and comprehensible. It does so by making explicit those powers available to law enforcement and the security and intelligence agencies, along with the safeguards that apply to those powers. Detailed Codes of Practice provide additional information as to how these powers will operate in practice. Those Codes of Practice will have statutory force and will be submitted for agreement by both Houses of Parliament following public consultation. The Government has published draft Codes of Practice alongside the Bill.

The Investigatory Powers Commissioner will be an outward facing body that works to enhance transparency and engages in public debate. The Bill requires the Investigatory Powers Commissioner to report annually on the details of public engagements that he or she has undertaken.

The Investigatory Powers Commissioner has a statutory requirement to publish reports on an annual basis on the exercise of these powers. By law, their reports must include statistics on the use of investigatory powers (including the number of warrants or authorisations considered and the number of warrants or authorisations approved). Their report must also contain information about the impact of the use of investigatory powers, including information about where a serious error has been committed

9. ***Legislative clarity: Relevant legislation is not likely to be simple but it must be clearly explained in Codes of Practice that have Parliamentary approval, are kept up-to-date and accessible to citizens, the private sector, foreign governments and practitioners alike***

The Government has published six draft Codes of Practice setting out how the powers in the Bill will operate in practice. The draft Codes will be revised over the coming months to reflect the outcome of Parliamentary scrutiny. Once the Bill is enacted, they will be subject to consultation before they are presented for consideration by Parliament. The Codes will then be subject to the agreement of Parliament under the affirmative procedure. The Government has also published explanatory notes, factsheets, memoranda and a Guide to the Bill, setting out the provisions in the Bill in a clear and accessible way.

10. ***Multilateral collaboration: Government policy on intrusion should be capable of being harmonised with that of like-minded open and democratic governments.***

The Bill provides world-leading safeguards and oversight. The Bill also provides for the Secretary of State to designate international agreements under which cross-border requests for information can be made. This will ensure in the future that our protections and

safeguards for requests for data under the legislation are capable of being harmonised with like-minded open and democratic governments.

As the Home Secretary made clear during the Bill's passage in the House of Commons, we are seeking to negotiate a bilateral agreement with the US to this end. Any such agreement would be based on the recognition that there are robust protections for privacy present in each country, and a transparent regime which governs the way in which the Agencies can access the communications of terrorists and criminals. It would illustrate that governments can work collaboratively with industry to overcome jurisdictional conflicts, and that practical steps to improve public safety can and should be carried out with due regard for transparency, freedoms and the rule of law.

Home Office
8 July 2016