



Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 2797 Email JCHR@parliament.uk Website www.parliament.uk



From Rt Hon Harriet Harman MP, Chair

Victoria Atkins MP
Parliamentary Under Secretary of State
(Minister for Safeguarding)
Home Office

By Email.

21 July 2021

Dear Victoria,

We are writing to you as our scrutiny of the Police, Crime, Sentencing and Courts Bill continues. This letter concerns Chapter 3 of Part 2 of the Bill, which introduces a new legislative scheme for the extraction of information from electronic devices.

We recognise that extracting information from complainants' and witnesses' electronic devices can be a crucial line of enquiry in criminal investigations, but it can also represent a significant intrusion into private life, which is protected by Article 8 of the ECHR. Our electronic devices are used to conduct much of our private lives and contain huge amounts of data which can be personally, financially and even legally sensitive. We received a number of submissions in response to our call for evidence on the Bill that raised concerns that the proposals regarding extraction of information from electronic devices would not adequately protect the right to respect for private life. In light of those submissions, we have the following questions:

Consent

1. The power introduced by the Bill is based on the agreement of the user of the electronic device. In their June 2020 report on the subject, the Information Commissioner's Office (ICO) found that a power to extract information from electronic devices needs to be based on strict necessity and proportionality, predicated on a definable investigation. Why have you taken a different approach in the Bill to the one the ICO recommended?

2. Under data protection law, which protects our private data, consent must be “freely given, specific, informed and unambiguous” and must be capable of being withdrawn.¹
 - a. We have heard concerns that the imbalance of power between the police and the user, together with the potential for an investigation to be discontinued if agreement is refused, may result in consent not being freely given. What protections will be in place to ensure that consent is freely given and unambiguous?
 - b. The Bill does not specify what information must be given to the user to ensure that their consent is properly informed, and does not make it clear whether a user will be able to withdraw consent once given. Why does the Bill not deal with these points? Will clarity be provided in the code of practice required under clause 40?

Children and adults without capacity

3. Clause 37 of the Bill permits “any responsible person who is aged over 18” to consent on behalf of a child if their parent or guardian is unavailable, and on behalf of an adult without capacity if a more appropriate adult (as set out in clause 37(8)(a)-(e)) is unavailable. How does this protect the Article 8 rights and best interests of the child or adult without capacity? How will the authorised person assess who is or is not a responsible adult?

The rights of others

4. Modern electronic devices such as mobile phones have the potential to contain private information relating to many people other than the user. As the ICO noted to us, a person cannot waive the Article 8 rights of other persons. How does securing the agreement of the user protect the Article 8 rights of others? Are there any other measures in the Bill or to come in the code of practice that would provide this protection?

Authorised persons

5. The Bill would provide the power to extract information from electronic devices to a range of authorised persons set out in schedule 3, including immigration officers. Why does this power need to be extended to such a wide group and why, in particular, is it being extended to immigration officers?

¹ UK GDPR, Article 4(11) and Article 7(3)

Limits on exercise of the power

6. The Bill provides that authorised persons may only exercise the power to extract information when they both “reasonably believe” that the electronic device contains relevant information and are “satisfied” that the exercise of the power is necessary and proportionate. Why does an objective standard apply only to the assessment of relevance and not to the assessment of necessity and proportionality, which is crucial to protecting Article 8 rights?

7. Where the authorised person carrying out the extraction thinks that there is a risk of obtaining information that is not necessary for the particular purpose of the extraction, they may still go ahead if they are satisfied that other means of obtaining the information are not ‘reasonably practicable’. How does this comply with the Article 8 requirement that any interference with privacy must be ‘necessary’ and with related data protection law, which requires the processing of sensitive personal data to be ‘strictly necessary’? Would you agree that where technology allowing for more focused extraction of information is available, the police should use it?

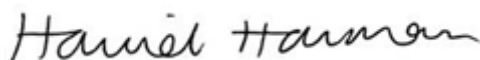
Retention of devices

8. The Bill contains no limit on how long an authorised person can keep an electronic device for the purposes of extracting information. Electronic devices can now be extremely important for the exercise of private and family life. Should the Bill or code of practice include a time limit on retaining possession of a device for the purposes of extraction?

Code of Practice

9. When it comes to ensuring that the extraction of information from electronic devices is compatible with Article 8 ECHR, it appears that a lot will depend on the content of the code of practice required under clause 40. We welcome the requirement for consultation with the Information Commissioner in the preparation of the code. Responses to our call for evidence have demonstrated that other organisations with expertise and experience in this area have substantial concerns – will there also be wider consultation with civil society on the content of the code of practice?

The Committee would be grateful if a response to this letter could be provided by Wednesday 1st September 2021.



Rt Hon Harriet Harman QC MP

Chair of the Joint Committee on Human Rights