

Written evidence from the Bingham Centre for the Rule of Law (DIP0021)

SUMMARY

The Bingham Centre for the Rule of Law welcomes the government's attempt to put certain investigatory powers on a clearer statutory footing and to increase the safeguards, accountability and transparency associated with the exercise of such powers. We also welcome the oversight changes that will see the establishment of a single commission and new rights of appeal from decisions of the Investigatory Powers Tribunal. The Bingham Centre's view is that the Draft Bill could be substantially improved to enhance fidelity to the rule of law and public confidence, while still ensuring that law enforcement, the intelligence agencies and Secretaries of State have appropriate and adequate powers to combat national security threats and serious crime. Our recommendations are made to that end. The submission has three parts.

PART 1: THE BINGHAM CENTRE AND ITS PRIOR WORK ON INVESTIGATORY POWERS [paras 1-6]

The Centre is a leading rule of law organisation. Its prior work on investigatory powers included a detailed submission to the review by David Anderson QC. In *A Question of Trust*, Mr Anderson referred to the Centre's submission on a number of occasions and, perhaps most significantly, took up the Bingham Centre's position in making his recommendation for judicial authorisation of warrants and the use of a Judicial Commissioner model (see para 14.47, *A Question of Trust*).

PART 2: THE RULE OF LAW, ANALYSIS OF DRAFT BILL, RECOMMENDATIONS [paras 7-55]

We outline what the rule of law is and how it applies in the context of the Draft Bill. We analyse the Bill, focusing mainly on oversights, warrants and authorisations, and make 12 recommendations:

- 1: Judicial authorisation is to be preferred to the proposed 'double-lock' (Parts 2, 3, 5, 6, 7). However, our remaining recommendations apply whether judicial authorisation is used or the 'double-lock' is retained.
- 2: Serious crime warrants should be on application by law enforcement and issued by judges.
- 3: Applications for warrants (eg, Cl 14(6), 84(6), 107(5), 122(4), 137(4), 153(2), 154(4)) and criteria for authorisations (eg, cl 46) and the giving of notices (eg, cl 72, 188) should be required to identify other, less intrusive options that have been considered and rejected.
- 4: In urgent circumstances, subsequent approval should be within 48 hours, not 5 days (cl 20, 91, 156, see also cl 119, 147, 160).
- 5: Journalistic sources (clause 61) – warrants should be made subject to additional safeguards.
- 6-7: Special advocates should be used where sensitive confidential communications are in issue and where novel or contentious applications are made.
- 8: National security notices (clause 188) – these should be subject to additional safeguards.
- 9: Judicial commissioners (clause 168) – appointments should be for non-renewable terms and 'inability or misbehaviour' removals should require parliamentary approval.
- 10: Notification of serious errors (clause 171) – presumption should be that there is notification and, in exceptional circumstances, notification should not be denied but should be deferred and reviewed every 5 years.
- 11: Annual reporting (clause 174) – sensitive communications should be included in statistical requirements.
- 12: Codes of Practice - Legal Professional Privilege (clause 179 / Sched 6) – should be in the body of the Act rather than a code of practice.

PART 3: CONSOLIDATED LIST OF RECOMMENDATIONS [pages 13-16]

For convenience, we provide a consolidated list of recommendations.

Written evidence from the Bingham Centre for the Rule of Law on the Draft Investigatory Powers Bill

PART 1: THE BINGHAM CENTRE AND ITS PRIOR WORK ON INVESTIGATORY POWERS

Introduction

1. The Bingham Centre for the Rule of Law welcomes this opportunity to submit evidence to the Joint Committee on the Draft Investigatory Powers Bill.
2. The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high-quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.
3. The Centre has engaged with investigatory powers issues for some time. Of particular note, in November 2014 **the Centre made a detailed submission to the review by David Anderson QC** (available at http://www.biicl.org/documents/399_bingham_centre_submission_to_investigatory_powers_review_final_2014-11-19.pdf). In *A Question of Trust*, Mr Anderson referred to the Centre's submission on a number of occasions and, perhaps most significantly, **Mr Anderson took up the Bingham Centre's position in making his recommendation for judicial authorisation of warrants and the use of a Judicial Commissioner model** (see para 14.47, *A Question of Trust*).
4. In this submission we avoid revisiting the detailed analysis contained in our November 2014 submission. Conscious of the volume of submissions the Committee will receive and in light of the breadth of the Draft Bill, we address only a limited range of issues in relation to which we have most expertise, attempt to present rationales concisely and make some specific recommendations. We would of course be happy to provide further written or oral evidence should it assist the Committee.
5. This submission has been written by Dr Lawrence McNamara (Acting Director & Senior Research Fellow, Bingham Centre for the Rule of Law) and Dr Eric Metcalfe (Barrister, Monckton Chambers, and Fellow of the Bingham Centre).
6. This submission is framed around the call for evidence by the **Joint Committee on the Draft Investigatory Powers Bill** and submitted to that Committee as written evidence. Following that, it has been sent on the same day to the **Joint Committee on Human Rights** as a response to the JCHR's call for evidence on the Draft Bill.

PART 2: THE RULE OF LAW, ANALYSIS OF DRAFT BILL, RECOMMENDATIONS

The Draft Bill on the whole

7. The Bingham Centre welcomes the government's attempt to put certain investigatory powers on a clearer statutory footing and to increase the safeguards, accountability and transparency associated with the exercise of such powers. It represents a substantial step forward in these respects. We also welcome the oversight changes that will see the establishment of a single commission and new rights of appeal from decisions of the Investigatory Powers Tribunal.
8. The Centre's view is that nevertheless the Draft Bill could be substantially improved to enhance fidelity to the rule of law and public confidence, while still ensuring that law enforcement, the intelligence agencies and Secretaries of State have appropriate and adequate powers to combat national security threats and serious crime. Our recommendations are made to that end.

A. Overarching / thematic questions: necessity and legality

Investigatory powers: challenges and fidelity to the rule of law

9. It is beyond question that the state has a particular responsibility to protect the public from serious crime, including acts of terrorism. It is essential that law enforcement and intelligence agencies have investigatory powers that enable the government to fulfil that responsibility. Such powers may require intrusive acts (including surveillance, data access and equipment interference) and they may require secrecy and the curtailment of rights to a fair hearing and effective remedy. It is equally beyond question that these powers cannot be unlimited; the extent and exercise of such powers are subject to the rule of law.
10. As Tom Bingham has observed in his landmark work, *The Rule of Law*, the rule of law is not a vague concept but contains concrete principles that can be identified and applied as standards against which laws can be made. The founding Director of the Bingham Centre, Professor Sir Jeffrey Jowell QC, has developed these arguments (eg, J Jowell, 'The Rule of Law: A Practical and Universal Concept' 2014). Several components of the rule of law are particularly relevant in our analysis of the Draft Bill. Among them:
 - The rule of law requires that laws are clear and certain.
 - The rule of law requires access to justice, and this demands that there are fair hearings, with equality of arms, before independent judiciaries.
 - The rule of law requires legality. This demands not only that the powers of the executive are exercised under law, but also that executive powers are not overly broad. Excessive discretion is at most a temptation to arbitrariness and at least can lead to a neglect or undermining of interests in privacy and access to information.

The rule of law is the cornerstone of democratic accountability and public trust in the state. Fidelity to the rule of law enhances public trust in the state, such that over the longer term it enables the government to effectively discharge its key responsibility of protecting the public.

11. In practical terms, the rule of law requires that there are meaningful and appropriate limits on the scope of investigatory powers, and there are meaningful and appropriate safeguards in place for the exercise of powers that parliament grants to the executive. The language and standards of necessity and proportionality should be the watchwords throughout.
12. The government's commitment to rule of law principles does not seem in doubt. For example, as the government observes in its impact assessments, 'It is essential for public confidence that there is no doubt over the role played by those authorising action, and safeguards are seen to be explicit and stringent.'
13. The challenge is to ensure that the legislation is compatible with rule of law principles. In the recommendations that follow we identify points at which the legislation, in our view, does not adequately and appropriately meet rule of law standards, and suggest ways in which it could be changed to do so, whilst in no way diluting the capabilities of the executive to discharge its protective responsibilities.

B. Overarching / thematic questions: are the powers sufficiently supervised?

Specific questions, including general, urgency and oversight

14. **Power to issue warrants/authorisations – Parts 2, 3, 5, 6, 7 – judicial authorisation rather than 'double lock' procedures:** While the 'double-lock' on the most intrusive warrants is an improvement on the previous position, we are concerned that this may not be the most appropriate method. It does not provide a suitable safeguard on the exercise of power by the Secretary of State because the balance of power to authorise weighs too heavily in favour of the executive. As well as being a Judicial Commissioner model where appointment is executive-driven (rather than authorisation by a judge *per se* who has judicial independence in the accepted sense), the standard of review is that of judicial review, and the judge must authorise in the absence of finding irrationality (in the *Wednesbury* unreasonable sense), albeit with the caveat that necessity and proportionality will be considered in the equation the more that an authorisation would result in an infringement of rights. Moreover, it is not necessary that the executive hold this degree of power. Authorisation should be by Judicial Commissioners, on the application of the Secretary of State.
15. A key point of contention has been just how substantial the powers and review will be in effect. As Lord Pannick QC noted in an early comment on the Draft Bill (*The Times*, 12 November 2015), and as we note above, judicial review principles may encompass more than just *Wednesbury*-unreasonableness. However, as Lord Pannick observes in his piece, there is an important and inherent margin of discretion accorded to the executive in national security matters and judges will be sensitive to the expertise and responsibility of ministers. Lord Pannick points to difference between the Draft Bill and the position in (for example) TPIMS and control orders, with the position in the Draft Bill being that the judicial commissioner will not hear representations by the adversely affected party. That difference is profoundly important and has significant implications: the fact that the judicial commissioners will not have the benefit of *inter partes* argument as to the appropriate intensity of review will, in our view, make it highly unlikely that a judicial commissioner will stray beyond conventional *Wednesbury* principles. In the absence of adversarial challenge or, at least, a special advocate to present the case for those affected by the warrant, it is the commissioner who will need to

both identify the arguments that might be put by those affected (were they represented) and also then judge the arguments himself or herself. In their current form, we consider that the proposals in the Bill do not adequately provide standards of access to justice or fairness that the rule of law requires.

16. We note and appreciate the ISC concern that democratic accountability rests with the Secretary of State, but a Judicial Commissioner authorisation still provides for this by virtue of the very fact that the the Secretary of State is *applying* for the warrant.
17. We appreciate also the concern that the Secretary of State has a wider picture of the relevance of any given exercise of power. However, this can be put to a Judicial Commissioner. As is well-established, judges defer greatly to the executive in security matters and a Judicial Commissioner would not refuse a warrant when confronted with a reasonable case put forward by the Secretary of State. The judicial authorisation model recommended by David Anderson QC in *A Question of Trust* provides a protection against the possible excessive exercise of power in two respects. First, it provides an independent assurance authorisation is in any given application is necessary and proportionate. Secondly, putting an application to an independent judicial commissioner will have a systemic effect, ensuring not merely scrutiny but also the independent demands that maintain over time the thresholds for authorisation, helping ensure that thresholds are not relaxed over time.
18. We differ from Mr Anderson with respect to his view that there were some categories of warrants which should have what is now the 'double-lock' approach, these being national security cases relating to foreign policy or defence and bulk warrants. In our view the rationale and practicality for judicial authorisation should apply to these categories as to others.
19. Public confidence in the state and its agencies will be improved by a judicial authorisation process where the judge decides an application on its merits and not merely reviews the reasonableness or rationality of the secretary of state's decision. The necessary and proportionate exercise of investigatory powers will not be diminished by a judicial process, and it will provide a check on the exercise by the executive of broad, discretionary power.
20. Recommendation 1: Where the 'double-lock' system proposed in the Bill (Parts 2, 3, 5, 6, 7), there should instead be a process in which there is:
 - An application by the Secretary of State to a Judicial Commissioner.
 - Authorisation should be by Judicial Commissioner, with the test being necessity and proportionality.In the event that that the 'double lock' is retained, the standard for judicial approval should expressly be necessity and proportionality.
21. It should be noted that all of the following recommendations all still apply even if the 'double-lock' is retained. That is, recommendations 2-12 are not dependent on a shift to judicial authorisation.
22. **Power to issue warrants – serious crime:** As the *Factsheet – Authorisation* indicates, 68% of the 2,795 interception warrants issued in 2014 related to serious crime. The same factsheet notes that both the RUSI report and the Anderson report recommended Judicial Commissioner authorisation for warrants in relation to serious crime. We are very strongly of the view that the RUSI and Anderson

views should be followed here. In particular, there would be a substantial benefit in that the Secretary of State's attention could be more focussed on applications related to other matters, especially where national security matters are in issue and the Secretary of State's views will be of particular importance and informed by wider strategic perspectives and intelligence.

23. Recommendation 2: Serious crime warrants should be on application from law enforcement and made by judicial authorisation.
24. **Power to issue warrants, authorisations and notices – content of an application**: The supervision of warrants, authorisations and notices would be enhanced if the Secretary of State, judicial commissioner or other relevant person considering the application was provided with detail which included an outline of the options for obtaining the relevant data and confirmation that other less intrusive options have been tried but failed or have not been tried because they were bound to fail. The Draft Bill is inadequate and inconsistent and not adequate in its approach to these concerns. As it stands:
- some provisions require consideration of whether information could reasonably have been obtained by other means (eg – those for warrants at cl 14(6), 84(6), 107(5), 122(4), 137(4))
 - some are silent on consideration of alternatives (eg – those for authorisations at cl 46 and those for notices at cl 72, 188)
 - some specify what applications must obtain (eg, those for warrants at cl 153(2), 154(4)), though do not require applications to address less intrusive options and are silent on consideration of alternatives
- Where intrusive powers are to be exercised it is appropriate that there is consideration of whether there are other, less intrusive alternatives. While this will presumably be a part of the consideration of whether information could have been reasonably obtained by other means, it seems essential that the decision-maker be provided with the information that will enable an informed judgment, and that this is expressly required by the law.
25. Accordingly, the legislation should include, for each of the powers, a requirement that an application for a warrant outline the options for obtaining the relevant data and confirmation that other less intrusive options have been tried but failed or have not been tried because they were bound to fail. For authorisations or notices not made on application, the same criteria should apply. An example of such a measure is found in PACE Schedule 1(2). That example relates to journalistic material, but in the Draft Bill where the scope of powers is so wide – not least in bulk collection – it would be appropriate to ensure that the material provided in an application so that it is possible to make a more informed judgment about whether the proposed measures are necessary and proportionate.
26. Recommendation 3: Applications for warrants (eg, Cl 14(6), 84(6), 107(5), 122(4), 137(4), 153(2), 154(4)) should be required to include:
- an outline of the options for obtaining the relevant data and
 - confirmation that other less intrusive options have been tried but failed or have not been tried because they were bound to fail

The same considerations should be required for authorisations (eg, cl 46) and notices (eg, cl 72, 188). In addition, the criteria for warrants, authorisations and notices should always include consideration of whether the information could be reasonably obtained by other means.

27. **Power to issue warrants – urgent circumstances:** Executive authorisation in urgent circumstances is appropriate and the Draft Bill rightly provides for that. However, judges are well acquainted with being available day and night for urgent matters, and one could reasonably expect that a duty roster for Judicial Commissioners would be a fairly standard expectation. Accordingly, the ‘fifth working day’ provision seems unnecessarily long period before authorisation could be made or approved. A more appropriate period would be 48 hours. If necessary, it could be that the statute should provide that, at the least, a provisional authorisation within 48 hours that is to be confirmed within a further 72 hours.
28. **Recommendation 4:** Where an executive warrant or authorisation has been issued in urgent circumstances, judicial authorisation (or approval) should be within 48 hours, rather than five working days (cf. clauses 20, 91, 156, see also cl 119, 147, 160).
29. **Power to issue warrants/authorisations – clause 61 – journalistic sources:** We welcome the inclusion in the Draft Bill of a clause recognising the public interest in the protection of journalistic sources and providing some safeguards in this area. It is right in our view that there should be no blanket exception to the powers relating to journalistic sources (though we are not sure that a blanket exception has been proposed by any stakeholders). Nevertheless, in light of the central role of journalism in maintaining a democratic society, and the importance of the protection of journalistic sources, as set out in *Mersey Care NHS Trust v. Robin Ackroyd* [2003] EWCA Civ 663 at [70]; *Financial Times v United Kingdom* (821/03) judgment 15 December 2010,¹ at [59-70] and *Goodwin v United Kingdom* (17488/90) judgment 27 March 1996,² at [39]ff,³ we are of the view that the safeguards should be stronger where an application for an authorisation relates to the identification or confirmation of journalistic sources. The need for strong protections is especially important given the breadth of purposes and interests covered in cl 46(7).
30. First, regarding clause 61(1)(a), it is not clear that there is a case for providing an exception for intelligence services from the safeguards. In the absence of a clear stated and compelling case, the better position is that the safeguards should apply to all applications, including those from the intelligence services.
31. Secondly, clause 61(1)(a) limits the safeguard to circumstances where an authorisation is sought ‘for the purpose’ of identifying or confirming a source. This is too narrow. It does not take into account the fact that collateral or incidental disclosures of journalistic sources cause the same damage to press

¹ <http://hudoc.echr.coe.int/eng?i=001-96157>

² <http://hudoc.echr.coe.int/eng?i=001-57974>

³ Ibid: [39]. ‘Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists’ Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.’

freedom and therefore raise the same public interest concerns. Accordingly, our view is that the safeguard needs to apply whenever authorisation is likely to result in the identification or confirmation of a source.

32. Thirdly, clause 61(4) is in our view inadequate in two important respects. First, 61(4) suggests that notification could be provided but does not have to be. Instead, conditions should be laid down providing for when notification is not required. As to 61(4)(b), it seems to us that in this key area, there should be a presumption in favour of notifying legal representatives, particularly as journalists are commonly working within large media organisations with in-house counsel. The lawyers in these organisations are officers of the court and fully understand their duties and obligations. They are thoroughly familiar with undertakings of confidentiality (eg, the numerous 'super-injunction' cases), including in security-related cases (eg, the *Incedal* case). Where a lawyer can be identified, it seems to us neither necessary nor appropriate for the intention to seek authorisation for identification or confirmation of the source not be notified to the lawyer, so as to enable submissions to be made to the judicial commissioner on the relevant issues.
33. Accordingly, the position in clause 61(4) needs to be reversed with respect to (2)(b) to meet the requirements of the case law as set out above and more generally. That is, notice should be given unless there are good reasons not to notify the person and their legal representatives, and criteria should be set down for such determinations.
34. Fourthly, clause 61(7) provides a very narrow definition of the 'source of journalistic information', one that is unnecessarily limited by reference to the knowledge and intent of the person *supplying* the information rather than the person *receiving* it. The need for a broad definition is especially important given that the European Court of Human Rights has repeatedly held that the protection of Article 10 ECHR applies not just to professional journalists but to all those engaged in the gathering of information in the public interest, including non-governmental organisations: see e.g. *Társaság a Szabadságjogokért v Hungary* (37374/05, 14 April 2009) at para 27; *Steel and Morris v United Kingdom* (68416/01, 15 February 2005) at para 89. We recommend, therefore, that the definition of "source" in clause 61(7) be "any person who provides information to a journalist" and "journalist" as "any natural or legal person who is engaged in the collection and dissemination of information to the public via any means of mass communication".⁴
35. Fifthly, we note that clause 61 applies only to the protection of journalistic sources but provides no protection in respect of requests to access communications data that may be used to identify various other categories of confidential information, e.g. a person's medical history, or their confidential communications with ministers of religion, Members of Parliament or lawyers. Given the obvious sensitivity of communications data, we consider that it is essential that similar protection should be afforded to these categories of confidential information as well.
36. Recommendation 5: Amendments should be made to clause 61:
 - (a) Cl 61(1)(a): there should be no exception for intelligence services.

⁴ These definitions are based on (but not identical to) those set out in Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000.

- (b) Cl 61(1)(a): the safeguards should not apply only when the authorisation is sought 'for the purpose' of identifying or confirming a source, but should apply when it is 'likely' that an authorisation will result in disclosure of a source.
- (c) Cl 61(4)(b): this should be reversed so that where there are pre-existing legal representatives for the person to whom the authorisation relates then those representatives must be notified unless there are reasons for not notifying, and criteria for deciding on notification should be set out. Where there is not notification, we recommend the use of Public Interest Special Advocates (see below and Recommendation 6).
- (d) Cl 61(7): The definition should be widened so that "source" in clause 61(7) is "any person who provides information to a journalist" and "journalist" is "any natural or legal person who is engaged in the collection and dissemination of information to the public via any means of mass communication".
- (e) We also draw attention to recommendation (3) above, which proposes that a part of the PACE model apply generally to the Draft Bill. At the very least, the recommendation (2) provisions should apply to clause 61.
- (f) We raise the question of whether protection of the confidentiality of journalistic sources in respect of requests for communications data should also be extended to other established categories of confidential information, i.e. legal professional privilege and communications with Members of Parliament, with doctor-patient confidentiality and communications with ministers of religion also arguably warranting enhanced safeguards.

37. **Power to issue warrants/authorisations – sensitive confidential communications – inter partes consideration and special advocates.** The Committee has rightly paid attention in oral evidence sessions to sensitive confidential communications, including those relating to journalistic sources and legal professional privilege, and recent parliamentary debates paid substantial attention to the position of MPs. We welcome the Committee's concerns and, in our view, there are needs for particular safeguards in these areas because they each relates to well-recognised public interests.
38. The Draft Bill proposes that applications for warrants and authorisations will be made in the absence of representations from the affected parties. However, there is no reason why this needs to be the case, and many compelling reasons why it should not be the case in all circumstances. In our view, the Committee should look closely at ways of restoring equality of arms in the authorisation process. This is especially important where there are significant public interests at stake, such as those that arise in relation to sensitive confidential communications in well-established categories.
39. We note the suggestion of Lord Pannick QC that the bill 'might make provision for counsel to the judiciary, or special advocates to ensure relevant points are addressed' (The Times, 12 November 2015). One problem that could arise, however, is the practicality of using special advocates in all circumstances, especially given the number of warrants and authorisations that may be sought, and so we give special consideration here to those established public interests (recommendation 6) and to novel or contentious applications (recommendation 7). We are also cautious in advocating what follows, as it risks a tendency to normalise secrecy and the inequality of arms in proceedings. However,

on balance, we feel that with an alternative of no representation at all, a special advocate structure is preferable.

40. Recommendation 6: We would propose that where a warrant, if issued, would authorise access to sensitive confidential communications (including at least those relating to journalistic sources, MPs communications, and legal professional privilege) then the Judicial Commissioner should be required to make a two-stage decision:
- (i) To consider whether an inter partes hearing is viable, including whether it may be viable to notify identifiable legal representatives of a person affected (with undertakings of confidentiality by those lawyers). If an inter partes hearing is viable then the application should proceed on that basis. If a special advocate need to be appointed for part of the hearing then that should occur.
 - (ii) If an interpartes hearing is not viable then the second stage is proceeded to: then a special advocate should be appointed so that a judicial authorisation is not made in the absence of submissions that would be made if the hearing were inter partes. In recognition of the public interest that underpins the well-established and long-accepted rationales for protections associated with these categories of sensitive communications, and of the importance of hearing submissions on both sides in arriving at a fully informed decision on such important matters, the use of special advocates in these circumstances is appropriate.
41. **Power to issue warrants – novel or especially contentious applications – Special Advocates and open judgments**: As David Anderson QC observed in *A Question of Trust*, applications for novel or contentious authorisations or warrants need to be treated with particular care (Anderson recommendations 70-71). Similarly, the resolution of novel or contentious questions needs to be conveyed to the public, especially where legal issues and interpretations of the law arise.
42. Recommendation 7: Where an application for a warrant or authorisation is novel or raises especially contentious issues (including the possible interpretation of a statute that would see an expansion of powers that differs from what is apparent on the face of the legislation) then:
- (a) a special advocate should be appointed, and
 - (b) a decision on the legal issues should be published.
43. **National security notices**: Clause 188 creates a power to issue national security notices. This is an exceptionally broad power that captures matters not expressly foreseen in Parts 1-7. To some extent, the same may be said of the technical capacity notices. However, the national security notices are particularly troubling because, being in effect a residual catch all, there is inherent uncertainty as to just what the scope and exercise of the power might capture. As events have shown, uncertainty should give rise to great concern. For example, it has only recently emerged that the existing power to issue notices under section 94 of the Telecommunications Act 1984 was used by the intelligence services to obtain communications data in bulk from telecommunications providers, and this is now the basis for the bulk acquisition warrants under chapter 2 of Part 6 of the Draft Bill. While it is important to ensure that new technical developments will not hamper the security and intelligence agencies, the use of notices and directions must never be allowed to be a substitute for primary

legislation. As the acquisition of bulk communications data by way of section 94 shows, uncertain powers may be used in very broad ways and with little or no transparency. Accordingly, it is appropriate that particular care is taken to put in place very stringent safeguards are in place that will ensure that certainty, clarity and adequate checks are in place for this power.

44. Recommendation 8: As an exceptionally broad and uncertain power that captures matters not expressly foreseen in Parts 1-7:
- (a) National security notices should be subject to judicial authorisation and, in the case of technical capacity notices, approval by the Technical Advisory Board.
 - (b) For the avoidance of doubt both national security notices and technical capacity notices should be expressly included in the statistical reporting requirements CI 174(2)(a)
 - (c) Interpretations of the law should be published unless there are exceptional circumstances that require secrecy, in which case publication should be deferred for a maximum period of five years.
45. **Judicial Commissioners – clause 168 – terms and conditions of appointment**: The Bill proposes the use of Judicial Commissioners, rather than judges per se (even though appointees must have previously held a high judicial office). However, if the Commissioners’ safeguarding role is to be effective, is to inspire public confidence and is to be informed by rule of law commitments and the judicial independence that the rule of law requires, then the terms and conditions of appointment should be as close as possible to those which characterise judicial appointments. Of particular concern are:
- the three-year appointment term under clause 168(2). The Draft Bill is silent on whether this term is renewable; and
 - the dismissal provisions in clause 168(6), with the associated limits in clause 168(4) that do not require parliamentary resolution in 168(6) circumstances.
46. With regard to terms under clause 168(2), it would be appropriate that these be non-renewable fixed terms. It 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. The fact that appointment lies in the hands of the Executive, whose decisions the Commissioner will be approving, means that fixed terms are preferable. With the likely office-holders being retired judges, we think it appropriate that an appointee be given an option of taking up a three, four or five year term.
47. With regard to dismissals under clause 168(6), there is insufficient certainty in criterion (a) of “inability or misbehaviour”. There is also no certainty in criterion (b) about what the terms and conditions of appointment are and, whatever they will be, we doubt that all terms and conditions should carry equal weight in decisions about removal from office. Again, there must be no possibility of perceptions of opportunities for the Executive of the Investigatory Powers Commissioner to interfere with independence of individuals or of process. That possibility is alive with such uncertainty, and with the fact that clause 168(4) permits removal from office for inability or misbehaviour without parliamentary resolution. The better path is to require that removal from office on the grounds of inability to carry out the functions of a Commissioner or misbehaviour requires a resolution of each of House of Parliament, except under subsection (5)

48. Recommendation 9: There should be amendments to the appointment and removal processes under clause 168:
- (a) Clause 168(2) should provide for fixed, non-renewable terms of 3, 4 or 5 years, at the election of the appointee.
 - (b) Clause 168(4) should remove the reference to subsection (6) and should state that a Judicial Commissioner may not, subject to subsection (5), be removed from office except on grounds of inability to carry out the functions of a Commissioner or misbehaviour, and only then not unless with a resolution approving the removal has been passed by each House of Parliament.
 - (c) Clause 168(6) should be deleted.
49. **Oversight – clause 171 - notification of serious errors**: The provisions relating to the notification of serious errors are of profound concern. We accept fully that there will be circumstances where a person has suffered significant prejudice or harm but that there will be good reasons (eg, national security) why they should not be notified, and it is right that the legislation provides for that. However, it is entirely inappropriate that the legislative presumption is *against* notification and that the legislation does not provide for notification at a future point when there are no longer reasons for secrecy. The rule of law requires access to justice, and this means that a person who is wronged should have an effective right to a remedy. This is especially so when that wrong has been at the hands of the state, and when the wrong has resulted in significant prejudice or harm.
50. The provision in clause 171(4) stating that the fact there has been a breach of Convention rights will not be sufficient of itself for an error to be a serious error is unnecessary. It is also at odds with the right to an effective remedy under Article 13 ECHR. The provision in clause 171(5)(a) – the Tribunal must consider the seriousness of the error and its effect on the person concerned – is adequate and is to be preferred.
51. Recommendation 10: The legislative provision that allows for non-notification of serious errors should be amended:
- (a) The present presumption in cl 171(2)(b) of non-notification should be reversed, so that where there has been a serious error (being one that has caused significant prejudice or harm) then the person(s) affected will be notified unless it is in the public interest that they are not notified, using the criteria in cl 171(5).
 - (b) A new sub-section should be inserted providing that, where a person has not been notified on the basis of cl 171(2)(b) then the non-notification is to be reviewed every five years and, if the public interest in non-notification is no longer satisfied then the person is to be notified of the relevant error and the provisions of information should follow cl 171(8).
 - (c) Clause 171(4) should be removed as it is unnecessary and inconsistent with Article 13 ECHR.
52. **Oversight – annual reporting – clause 174 – statistics on sensitive communications**: The extent to which sensitive confidential communications will be affected by the exercise of powers under the

legislation is obviously a matter of public interest. Accordingly, for the avoidance of doubt and with a view to transparency, the legislation should require that the statistical reporting in annual reports include information about those matters.

53. Recommendation 11: Clause 174(2)(a) should be amended to include a requirement that reports identify the number of warrants, etc, that capture or would have captured if issued sensitive communications categories of journalistic sources, legal professional privilege, MPs' communications and other sensitive categories such as medical records and communications with ministers of religion.
54. **Codes of practice – clause 179 / Schedule 6 - legal professional privilege**: Given the importance of legal professional privilege, its significance for ensuring access to justice and the ability to exercise and protect rights, and the recent admission by the government that its policy governing the use of privileged communications was unlawful, in our view it would be appropriate that privilege is dealt with substantially in the body of the statute rather than in the codes of practice.
55. Recommendation 12: The position regarding privileged material should be stated in the body of the statute, rather than being addressed only in the code of practice.

PART 3: CONSOLIDATED LIST OF RECOMMENDATIONS

Power to issue warrants – judicial authorisation rather than ‘double lock’ procedures

Recommendation 1: Where the ‘double-lock’ system proposed in the Bill (Parts 2, 3, 5, 6, 7), there should instead be a process in which there is:

- An application by the Secretary of State to a Judicial Commissioner.
- Authorisation should be by Judicial Commissioner, with the test being necessity and proportionality

In the event that the ‘double lock’ is retained, the standard for judicial approval should expressly be necessity and proportionality.

It should be noted that all of the following recommendations all still apply even if the ‘double-lock’ is retained. That is, recommendations 2 - 12 are not dependent on a shift to judicial authorisation

Power to issue warrants, etc – serious crime

Recommendation 2: Serious crime warrants should be on application from law enforcement and made by judicial authorisation.

Power to issue warrants , authorisations or notices – content of an application

Recommendation 3: Applications for warrants (eg, Cl 14(6), 84(6), 107(5), 122(4), 137(4), 153(2), 154(4)) should be required to include:

- an outline of the options for obtaining the relevant data and
- confirmation that other less intrusive options have been tried but failed or have not been tried because they were bound to fail

The same considerations should be required for authorisations (eg, cl 46) and notices (eg, cl 72, 188). In addition, the criteria for warrants, authorisations and notices should always include consideration of whether the information could be reasonably obtained by other means.

Power to issue warrants – urgent circumstances

Recommendation 4: Where an executive warrant or authorisation has been issued in urgent circumstances, judicial authorisation (or approval) should be within 48 hours, rather than five working days (cf. clauses 20, 91, 156, see also cl 119, 147, 160).

Power to issue warrants – clause 61 – journalistic sources

Recommendation 5: Amendments should be made to clause 61:

- (a) Cl 61(1)(a): there should be no exception for intelligence services.
- (b) Cl 61(1)(a): the safeguards should not apply only when the authorisation is sought ‘for the purpose’ of identifying or confirming a source, but should apply when it is ‘likely’ that an authorisation will result in disclosure of a source.

- (c) CI 61(4)(b): this should be reversed so that where there are pre-existing legal representatives for the person to whom the authorisation relates then those representatives must be notified unless there are reasons for not notifying, and criteria for deciding on notification should be set out. Where there is not notification, we recommend the use of Public Interest Special Advocates (see below and Recommendation 6).
- (d) CI 61(7): The definition should be widened so that "source" in clause 61(7) is "any person who provides information to a journalist" and "journalist" is "any natural or legal person who is engaged in the collection and dissemination of information to the public via any means of mass communication".
- (e) We also draw attention to recommendation (3) above, which proposes that a part of the PACE model apply generally to the Draft Bill. At the very least, the recommendation (2) provisions should apply to clause 61.
- (f) We raise the question of whether protection of the confidentiality of journalistic sources in respect of requests for communications data should also be extended to other established categories of confidential information, i.e. legal professional privilege and communications with Members of Parliament, with doctor-patient confidentiality and communications with ministers of religion also arguably warranting enhanced safeguards.

Power to issue warrants – sensitive confidential communications – inter partes consideration and special advocates

Recommendation 6: We would propose that where a warrant, if issued, would authorise access to sensitive confidential communications (including at least those relating to journalistic sources, MPs communications, and legal professional privilege) then the Judicial Commissioner should be required to make a two-stage decision:

- (i) To consider whether an inter partes hearing is viable, including whether it may be viable to notify identifiable legal representatives of a person affected (with undertakings of confidentiality by those lawyers). If an inter partes hearing is viable then the application should proceed on that basis. If a special advocate need to be appointed for part of the hearing then that should occur.
- (ii) If an inter partes hearing is not viable then the second stage is proceeded to: then a special advocate should be appointed so that a judicial authorisation is not made in the absence of submissions that would be made if the hearing were inter partes. In recognition of the public interest that underpins the well-established and long-accepted rationales for protections associated with these categories of sensitive communications, and of the importance of hearing submissions on both sides in arriving at a fully informed decision on such important matters, the use of special advocates in these circumstances is appropriate.

Power to issue warrants – novel or especially contentious applications – Special Advocates and open judgments

Recommendation 7: Where an application for a warrant or authorisation is novel or raises especially contentious issues (including the possible interpretation of a statute that would see an expansion of powers that differs from what is apparent on the face of the legislation) then:

- (a) a special advocate should be appointed, and
- (b) a decision on the legal issues should be published.

National security notices

Recommendation 8: As an exceptionally broad and uncertain power that captures matters not expressly foreseen in Parts 1-7:

- (a) National security notices should be subject to judicial authorisation and, in the case of technical capacity notices, approval by the Technical Advisory Board.
- (b) For the avoidance of doubt both national security notices and technical capacity notices should be expressly included in the statistical reporting requirements CI 174(2)(a)
- (c) Interpretations of the law should be published unless there are exceptional circumstances that require secrecy, in which case publication should be deferred for a maximum period of five years

Judicial Commissioners – clause 168 – terms and conditions of appointment

Recommendation 9: There should be amendments to the appointment and removal processes under clause 168:

- (a) Clause 168(2) should provide for fixed, non-renewable terms of 3, 4 or 5 years, at the election of the appointee
- (b) Clause 168(4) should remove the reference to subsection (6) and should state that a Judicial Commissioner may not, subject to subsection (5), be removed from office except on grounds of inability to carry out the functions of a Commissioner or misbehaviour, and only then not unless with a resolution approving the removal has been passed by each House of Parliament.
- (c) Clause 168(6) should be deleted.

Oversight – clause 171 - notification of relevant errors

Recommendation 10: The legislative provision that allows for non-notification should be amended:

- (a) The present presumption in cl 171(2)(b) of non-notification should be reversed, so that where there has been a serious error (being one that has caused significant prejudice or harm) then the person(s) affected will be notified unless it is in the public interest that they are not notified, using the criteria in cl 171(5).
- (b) A new subsection should be inserted providing that, where a person has not been notified on the basis of cl 171(2)(b) then the non-notification is to be reviewed every five years and, if the public interest in non-notification is no longer satisfied then the person is to be notified of the relevant error and the provisions of information should follow cl 171(8).
- (c) Clause 171(4) should be removed as it is unnecessary and inconsistent with Article 13 ECHR.

Oversight – annual reporting – clause 174 – statistics on sensitive communications

Recommendation 11: Clause 174(2)(a) should be amended to include a requirement that reports identify the number of warrants, etc, that capture or would have captured if issued sensitive communications categories of journalistic sources, legal professional privilege, MPs' communications, and other sensitive categories such as medical records and communications with ministers of religion.

Codes of practice – clause 179 / Schedule 6 - legal professional privilege

Recommendation 12: The position regarding privileged material should be stated in the body of the statute, rather than being addressed only in the code of practice

19 December 2015