



KEEPING THE INTERNET
OPEN • INNOVATIVE • FREE

www.cdt.org

CENTER FOR DEMOCRACY
& TECHNOLOGY

1634 I Street, NW
Suite 1100
Washington, DC 20006

P +1-202-637-9800
F +1-202-637-0968
E info@cdt.org

RESPONSE TO HOME OFFICE CONSULTATION ON ESTABLISHING A UK PRIVACY AND CIVIL LIBERTIES BOARD

30 JANUARY 2015

The Center for Democracy & Technology¹ respectfully submits the following comments to the Home Office in response its request for views regarding the creation of a Privacy and Civil Liberties Board ('PCLB') to provide advice and assistance to the Independent Reviewer of Terrorism Legislation as he carries out his statutory role.² Based on our extensive experience with the Privacy and Civil Liberties Oversight Board ('PCLOB') in the United States, we believe a board of this nature could potentially be effective, but only if it 1) is fully independent of the entities whose activities it reviews, 2) is a complementary piece of a thorough and robust oversight system, 3) is fully empowered to obtain all necessary information, 4) is transparent in its activities and findings, 5) has a broad mandate that complements and supports the Independent Reviewer's, 6) is adequately funded and staffed, and 7) consists of members with credibility and expertise.

1) To what extent do you agree or disagree that independent oversight enhances the fairness and effectiveness of counter-terrorism legislation and powers?

We wish to note at the outset that independent and effective oversight of the exercise of counter-terrorism powers is critical to ensuring compliance with the UK's binding obligations under the European Convention on Human Rights.³ Further, we strongly believe that

¹ The Center for Democracy & Technology is a charity dedicated to keeping the Internet open, innovative and free. Among our priorities is preserving the balance between security and freedom.

² Home Office, *Consultation on establishing a UK Privacy and Civil Liberties Board* (December 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389902/PCLB_Consultation_Paper_Final_Revised_19_12_2014.pdf.

³ See, e.g., *Rotaru v. Romania* (Grand Chamber, 2000), ¶ 59 (citing *Klass and others v. Germany* (Plenary, 1978), ¶ 55) ('In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure...')

independent oversight of all counter-terrorism legislation and powers not only enhances the fairness and effectiveness of the relevant activities, but is also a critical check on the abuses of power to which clandestine operations are inherently susceptible.⁴ Independent oversight provides accountability against both misconduct and error.

To be successful, it is highly desirable that such oversight—both *ex ante* and *post hoc*—come from the judiciary; as the Grand Chamber of the European Court of Human Rights has observed, judicial control in this context ‘*affords the best guarantees of independence, impartiality and a proper procedure*’.⁵ However, it is also critical for a range of other institutions, both within and outside the government, to provide or assist oversight functions: examples include the media, advocacy organizations and oversight entities within multiple branches of government.

2) Do you support the proposal to establish a statutory Privacy and Civil Liberties Board, which would support the role of the Independent Reviewer of Terrorism Legislation?

Regrettably, we are unable to support the establishment of a PCLB as envisioned by Part 7 of the draft Counter-Terrorism and Security Bill, as we believe the Home Secretary’s near-plenary powers to determine the composition, procedures and tasks of the Board through secondary legislation will render the body non-independent.

We would, however, support the establishment through statutory law of a PCLB that would provide genuinely independent oversight of counter-terrorism activities as well as meaningful support for the work of the Independent Reviewer.

We note in this respect that most details of the functioning of the US PCLOB are prescribed by statutes that have been adopted by the full legislature.⁶ Based on our experience, we believe the public, the government, and the UK PCLB itself would all benefit from the democratic debate and adoption of a set of statutory laws establishing the most salient aspects of the Board and its activities.

3) To what extent do you consider that a Privacy and Civil Liberties Board would add value to the oversight arrangements for counter-terrorism legislation and related powers?

A genuinely independent and expert PCLB, created by statutory law and benefiting from adequate resources and staffing, would have strong potential to add value to the oversight arrangements for counter-terrorism legislation and related powers. We

⁴ Cf. *Klass and others*, *supra* n. 3, ¶ 42; *Malone v United Kingdom* (Plenary, 1984), ¶ 67.

⁵ *Rotaru v. Romania* (Grand Chamber, 2000), ¶ 59 (citing *Klass and others v. Germany* (Plenary, 1978), ¶ 55).

⁶ 42 U.S.C. § 2000ee, available at http://www.pclob.gov/library/42USC2000ee-PCLOB_Enabling_Statute.pdf.

recommend that the following considerations be taken into account in the Board's establishment and operation to ensure its effectiveness:

The PCLB should be fully independent of the entities whose activities it reviews.

As suggested above, while a body of this nature could provide valuable analysis of counter-terrorism legislation and policies and essential support to the Independent Reviewer, it will only be effective and credible if it is fully independent of the entities whose activities it is monitoring, including the Home Office (insofar as the body is tasked with reviewing activities in which the Home Office takes part).

In the event that Part 7 of the draft Counter-Terrorism and Security Bill is enacted in its current form, we would urge the Home Secretary to delegate her powers under this Part in a manner that ensures that the board is—to paraphrase Lord Chief Justice Hewart—both independent and seen to be independent.⁷ This is the only way to ensure that the Board will be effective and that the public will have confidence in its work.

By way of comparison, the US PCLOB's enabling statute establishes that body as 'an independent agency within the executive branch', meaning that it is not subservient to any other authority and is not in any way affiliated with the agencies whose surveillance activities it oversees.⁸ Furthermore, its members cannot be current employees of the US federal government, and the executive branch does not have the power to terminate their service on the Board. Congress substantially increased PCLOB's independence after an earlier iteration of the body (with different members) permitted the White House to censor portions of a report it had written.

The Board should be part of a complete, well-functioning and transparent system of checks on surveillance powers, including judicial checks. While a privacy and civil liberties board could provide valuable analysis of counter-terrorism legislation and policies, it is essential that such an entity be treated as only one component of the essential oversight functions that must be performed by the government, the judiciary, and independent entities such as the Independent Reviewer. While the PCLB could help to support these other oversight mechanisms, it should not supplant them.

Currently the Independent Reviewer is restricted to reviewing a limited set of counterterrorism statutes. We would urge that the Reviewer's recommendations concerning the nature of his mandate be adopted⁹, and that the PCLB similarly provide support in assessing the legality and effectiveness of any counterterrorism laws, policies, or practices the Reviewer may choose to address.

⁷ See *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256), Lord Hewart C.J. ('it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done').

⁸ *Supra* n. 6.

⁹ David Anderson, QC, *The Terrorism Acts in 2013* (2014).

The Board should be fully empowered to obtain all necessary documents and testimony. It is critical that both the PCLB and the Independent Reviewer be empowered to obtain all necessary information to fulfil their mandates as comprehensively and accurately as possible. In order to assess programmes and laws within their jurisdictions and maintain public confidence, it is essential that both the Board and the Reviewer be granted access to any classified information—including both documentary evidence and witness testimony—that they believe they require in order to carry out their duties. Revelations over the past two years concerning GCHQ and NSA surveillance provide powerful illustration of the fact that without access to classified information, it is impossible for any entity to undertake an effective examination of the impact of government activities on privacy or other civil liberties at even the most basic level. We strongly support the recommendation of current Independent Reviewer David Anderson, QC to this effect.¹⁰

Additionally, the Board’s ability to obtain all necessary documents and testimony should be supported by empowering it with subpoena authority. The US PCLOB is limited in this regard; it can only request that the Attorney General issue a subpoena.¹¹ Such a restriction can limit the ability of such a body to act efficiently and obtain essential information when evaluating programmes and practices. In the US, legislation has been introduced to address this problem.¹²

The Board should be transparent in its activities and its findings. Transparency is essential to achieving the goals of the PCLB, as it will allow the Board to better educate the public about the nature of government activities. Further, transparency will ensure that the Board is acting diligently and that government agencies are properly cooperating with the Board in the performance of its duties. The US PCLOB is required to issue at least two reports per year concerning its activities, findings and recommendations, as well as any minority views among its members, and is required to make its reports public ‘to the greatest extent that is consistent with the protection of classified information and applicable law’.¹³ Further, the US Board is required to ‘hold public hearings and otherwise inform the public of its activities, as appropriate and in a manner consistent with the protection of classified information and applicable law’.¹⁴ Finally, the US Board has been instrumental in reducing at least some instances of over-classification: for example, when issuing its report on Section 702 of the Foreign Intelligence Surveillance Act, the Board emphasised that it had sought and obtained the

¹⁰ David Anderson, QC, *Report on the Operation of the Terrorism Acts in 2013*, 11.3 (July 22, 2014), available at

www.gov.uk/government/publications/terrorism-acts-in-2013.

¹¹ IRPTA, § 1061(g), as amended by Pub. L. No. 110-53, § 801(a).

¹² S. 2903, 2014.

¹³ 42 USC § 2000ee(f)(1).

¹⁴ 42 USC § 2000ee(f)(2).

declassification of over one hundred new facts regarding programmes that have operated under the statute.¹⁵

The UK PCLB should similarly have transparency as a priority. The Board should be required to issue regular reports, and encouraged to make those reports publicly available to the greatest extent possible. The Board should also be required to hold public meetings regularly, and encouraged to hold other events that will enhance public awareness. Finally, the Board should be encouraged to seek the declassification of information and materials that will enhance public knowledge of important government programmes and activities without compromising national security needs.

The Board should have a properly expansive mandate. As technologies evolve, so too do counter-terrorism measures. Additionally, individual government counter-terrorism programmes are often linked to one another as part of broader strategies, meaning that the impact of various programmes on privacy and civil liberties will often need to be assessed with a view to the full context of the measures in question. For these reasons, and so the PCLB can provide adequate support to the Independent Reviewer, we believe the Board's mandate should be broad enough to enable the Reviewer to call upon the Board for assistance whenever he deems this to be necessary.

The Board should be adequately funded and staffed. The PCLB should be properly funded and staffed to conduct rigorous oversight in line with its mission. During its most recent semi-annual report, the US PCLOB cited hiring permanent staff as key to initiating its oversight responsibilities,¹⁶ and discussed the degree to which previous budget limitations had caused significant problems in hiring needed staff.¹⁷ During a January 2014 meeting of the Board, its Chair, David Medine, describe staff limits as burdensome.¹⁸ During a July 2014 meeting, Mr Medine stated that recent additions to the Board's staff would for the first time allow the Board to examine more than one issue area at a time.¹⁹ While we are encouraged by the progress the US Board has made in addressing this issue, we hope the Home Office will avoid such delays and challenges

¹⁵ See Statement of David Medine, *Privacy and Civil Liberties Board Public Meeting: Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), 8, available at <http://www.pclob.gov/library/20140702-Transcript.pdf>.

¹⁶ The Privacy and Civil Liberties Oversight Board, *Semi-Annual Report: September 2013 – March 2014* (July 23, 2013), 17, available at http://www.pclob.gov/library/Semi_Annual_Report-Jul2014.pdf.

¹⁷ *Id.*, at 7-8.

¹⁸ See, Statement of David Medine, *Privacy and Civil Liberties Board Public Meeting: Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (January 23, 2014), 61, available at <http://www.pclob.gov/library/20140123-Transcript.pdf>.

¹⁹ See, Statement of David Medine, *Privacy and Civil Liberties Board Public Meeting: Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), 14, available at <http://www.pclob.gov/library/20140702-Transcript.pdf>.

entirely by ensuring that the UK PCLB Board has sufficient funding to hire all necessary staff upon its creation.

In addition to legal staff, we recommend that the PCLB receive funding to hire its own technical experts. Issues addressed by the Board may require a high level of technical expertise to evaluate the impact of certain measures on individuals as well as the legal implications of those measures, and to assess any compliance issues. This makes technical assistance indispensable; however, forcing the Board to rely on technical experts from the agencies and departments it is overseeing would significantly undermine its oversight function. Thus, the Board should either retain its own experts or have the ability to consult with outside experts on relevant issues. While the US PCLOB does not include any computer scientists, the Board has the power to retain consultants with such qualifications where necessary.

The Board should consist of members with credibility and expertise. The appointment process should ensure that members of the PCLB have expertise and credibility in advancing the goals of the Board and fulfilling its mandate. The required qualifications of the members of such an oversight board should be considered carefully, as they will be key to ensuring public confidence in the body and its work. The US PCLOB includes lawyers with extensive expertise in privacy, data security and counterterrorism, as well as a former judge who served on an appeals court that regularly handles cases involving national security. Although the President appoints the Board's members, the Senate must confirm each of them. These requirements help to ensure that appointees are credible and that their recommendations will be taken seriously. The UK PCLB appointment process should similarly contain checks and public-facing proceedings that ensure highly qualified members devoted to privacy and civil liberties are appointed. We would also suggest that the credibility of the PCLB will be greatly enhanced if its members are diverse in terms of gender, race, ethnicity, religion, political opinion and type of professional experience.

5) Do you agree that the principles / objectives set out above at 5.1 of this consultation paper fully encompass the key elements required for effective oversight of UK counter-terrorism laws and powers?

While the principles and objectives set out in Section 5.1 of the consultation outline important review measures for the PCLB, if this Board is to effectively perform an oversight and/or assessment function that properly protects privacy and civil liberties, we believe its mandate should be broader. First, both the Independent Reviewer and the PCLB should be able to review a broad range of counter-terrorism laws and policies, rather than a limited, predetermined set of statutes. Some of the most controversial counter-terrorism programmes, in terms of the impact of those programmes on civil

liberties, are reportedly conducted pursuant to laws that are not currently within the Independent Reviewer's jurisdiction.²⁰

We also encourage a heightened focus on surveillance. Whilst privacy is only one of many civil liberties that are implicated by counter-terrorism laws and policies, we believe it deserves significant and sustained attention by oversight and evaluation mechanisms for several reasons. First, surveillance practices may disproportionately affect the civil liberties of individuals not suspected of wrongdoing. Second, surveillance practices must be kept confidential and obscured from general public discourse to a greater degree than a number of other counter-terrorism policies in order to preserve sources and methods. And third, surveillance practices have been uniquely amplified by new technologies, especially electronic communication technologies.

Conclusion

We regret that we cannot support the establishment of the PCLB as currently envisioned in the draft Counter-Terrorism and Security Bill. However, we would fully support the creation, through statutory law, of a body that would provide or facilitate genuinely independent oversight of all counter-terrorism legislation and powers. Such oversight is critical to preventing misconduct and ensuring the protection of civil liberties, and we strongly encourage the Home Office and the Parliament to revisit this issue as a matter of urgency.

²⁰ See, e.g., Ewen MacAskill et al., 'The legal loopholes that allow GCHQ to spy on the world', *The Guardian*, 21 June 2013, available at <http://www.theguardian.com/uk/2013/jun/21/legal-loopholes-gchq-spy-world>.