Written evidence submitted by the Center for Democracy & Technology to the Joint Committee on Human Rights regarding the Draft Investigatory Powers Bill

7 December 2015

Introduction

1. The Center for Democracy & Technology is a non-governmental organisation that works to advance human rights online, and is committed to finding forward-looking and technically sound solutions to the most pressing challenges facing users of electronic communications technologies. Since its founding more than 20 years ago, CDT has played a leading role in shaping policies, practices and norms that empower individuals to use these technologies effectively as speakers, entrepreneurs and active citizens. The organisation is based in Washington, DC, and actively contributes to efforts to ensure that the surveillance practices of the United Kingdom and other European states respect human rights.

2. CDT submits this written evidence to the Joint Committee on Human Rights to highlight the inconsistency of the surveillance authorisation scheme contemplated by the draft Bill with the United Kingdom's human rights obligations.

3. We conclude that whilst the scheme could represent some degree of improvement over the current system, it would be seriously undermined by a lack of genuine independence, major gaps in authorisation powers, and other factors. It is vital to address these shortcomings if the scheme is to be effective and consistent in preventing abuses.

4. Although our submission focuses on the proposed authorisation system, our concerns regarding the draft Bill's consistency with the UK's human rights obligations are not limited to this issue. As suggested below, we are deeply troubled by a range of other provisions that we believe are certain (in the case of nationwide, potentially indefinite data retention notices) or highly likely (in the case of many other practices) to lead to surveillance that is not '*strictly necessary for safeguarding the democratic institutions.*'[1] We would welcome additional opportunities to submit evidence on these topics.

The draft Bill's authorisation scheme is not fully capable of ensuring respect for human rights and risks perpetuating impunity for surveillance abuses

5. Although the Home Secretary has sought to portray the surveillance authorisation scheme that the draft Bill would create as a strong 'double-lock of Executive and judicial approval'[2], the reality is that the scheme contains gaping holes, is not consistent with the UK's human rights obligations and risks creating impunity for abuses.

6. In this context, we recall that the European Convention on Human Rights ('ECHR'), which is binding upon the UK, '*is a living instrument which must be interpreted in the light of present-day conditions*'; we submit that the Human Rights Act 1998 must be viewed in the same light.[3] Thus, when considering whether a proposed surveillance authorisation system is

[1] *Klass and others v Germany*, [1978] ECHR 4, Judgment (Plenary), 6 Sept. 1978, ¶ 42; *Rotaru v Romania*, [2000] ECHR 192, Judgment (Grand Chamber), 4 May 2000, ¶ 47; *Kennedy v the United Kingdom*, [2010] ECHR 682, Judgment, 18 May 2010, ¶ 153.
[2] Secretary of State for the Home Department, "Draft Investigatory Powers Bill: Guide to powers and safeguards" (preface to Draft Investigatory Powers Bill), ¶ 18 (internal quotation marks removed).
[3] *Hirsi Jamaa v Italy*, [2012] ECHR 1845, Judgment (Grand Chamber), 23 Feb. 2012, ¶ 175; *Soering v United Kingdom*, [1989] ECHR 14, Judgment (Plenary), 7 July 1989, ¶ 102. Regarding the Human Rights Act, see *P &*

consistent with the UK's human rights obligations, we urge the Committee to take note of the ever-expanding types of highly sensitive information about private life that the government is capable of capturing through surveillance. In our view, these developments make it more essential than ever for surveillance to be authorised by a fully independent body that has the power and expertise to review all of the necessary evidence and effectively prevent abuses.[4]

7. We acknowledge that the draft Bill's establishment of a body of judicial commissioners that is charged with approving at least some surveillance warrants might in some respects represent an improvement over the current system, which does not require any form of *ex ante* judicial approval. However, the commissioners' powers are so attenuated, and are accompanied by such a low degree of independence, that the creation of such a body risks giving the public the false impression that its rights are being protected through strong judicial checks, when in fact the risk of excessive government surveillance remains virtually unchanged.

    a. *Judicial commissioners would lack sufficient independence from the authorities carrying out the surveillance*

8. In order for the UK to comply with its obligations concerning the right to respect for private life under Article 8 of the ECHR, all of its secret surveillance practices must be '*subject to effective supervision*' by the judiciary or, at minimum, a similar body that is '*independent of the authorities carrying out the surveillance*'.[5]

9. Under the draft Bill, however, the judicial commissioners would not be fully independent of the Executive—the same entity whose authorities will be responsible for conducting much of the surveillance the draft Bill contemplates. The commissioners would be appointed directly and exclusively by the Prime Minister (albeit from the ranks of current or former judges); moreover, the draft Bill does not limit the number of commissioners who may serve at a given time, suggesting that if the Prime Minister is displeased with the composition of the body, he will have the power unilaterally to appoint new members whom he believes to be more sympathetic to his surveillance goals.[6]

10. Additionally, the judicial commissioners would serve for renewable three-year terms, meaning that their tenure would be at once potentially indefinite and precarious.[7] We are concerned that this situation would reduce the commissioners' ability to provide a truly independent and effective check on the surveillance powers the government seeks to exercise, and note that the European Court of Human Rights has previously characterised renewable four-year terms for judges as '*questionable*' when assessing the independence of a tribunal in the context of Article 6 of the Convention.[8] By contrast, judges appointed to the Foreign Intelligence Surveillance Court in the United States serve single, non-renewable terms of no more than seven years (whilst otherwise continuing to enjoy the life tenure guaranteed to federal judges under Article III of the US Constitution).[9]

Ors, Re (Northern Ireland) [2008] UKHL 38, 18 June 2008, ¶ 119 (Baroness Hale) (quoting Secretary of State for the Home Department, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL (1997), ¶ 2.5).

[4] See Center for Democracy & Technology, Third-Party Intervention, *Szabó and Vissy v Hungary*, European Court of Human Rights, Application n° 37138/14, 23 Sept. 2014, available at https://cdt.org/files/2014/09/cdt-hungary-intervention.pdf.

[5] *Rotaru*, *supra* n. 1, ¶ 59; *Klass*, *supra* n. 1, ¶ 56.

[6] Draft Investigatory Powers Bill (hereinafter 'Draft Bill'), § 167(1).

[7] *Ibid.* at § 168(2)-(3).

[8] *Incal v Turkey*, [1998] ECHR 48, Judgment (Grand Chamber), 9 June 1998, ¶ 68.

[9] 50 U.S.C. § 1803(d).

11. We are further concerned about the draft Bill's provisions permitting the head judicial commissioner, known as the Investigatory Powers Commissioner ('IPC'), to remove other judicial commissioners unilaterally (in consultation only with the Prime Minister) on grounds that are not set out in the legislation.[10] As the IPC will have been appointed by the Prime Minister[11], the inclusion of this unilateral power of removal heightens the risk that the judicial commissioners will face undue pressures to approve government surveillance measures.

b. Expansive surveillance powers, a weak review standard and the opportunity for non-adversarial IPC reviews of refusals would render judicial commissioners' gatekeeping function ineffective

12. In addition to this lack of independence, we have serious concerns regarding the requirement that judicial commissioners must apply 'the same principles as would be applied by a court on an application for judicial review'[12], as well as the undefined and potentially unforeseeable government surveillance measures that may result from the approval of a warrant. We believe that as a consequence of these features of the draft Bill, the proposed judicial commissioner system will not be '*vested with sufficient powers and competence to exercise an effective and continuous control*' over surveillance.[13]

13. Where the use of the judicial review standard is concerned, we share the fears of our colleagues at Liberty that this stricture will reduce the judicial commissioners' role to a 'rubber-stamping exercise' that is not sufficient to ensure the necessity and proportionality of government surveillance activities.[14] In our view, this attenuated form of review cannot be viewed as '*effective supervision*'.[15]

14. Additionally, we wish to highlight the multiple provisions of the draft Bill that would allow the government, after obtaining a judicial commissioner's approval of a surveillance warrant, to engage in 'any conduct which it is necessary to undertake in order to do what is expressly authorised or required' by the warrant—including, for example, 'the interception of communications not described in the warrant' (emphasis added).[16] We believe these provisions create a real risk that the judicial commissioners will not be informed of, or otherwise be able to foresee, the full extent of the surveillance measures the government may ultimately conduct pursuant to a warrant they have approved. Such uncertainty would render the commissioners' gatekeeping function largely illusory and, even if the commissioners were permitted to undertake a substantive review of the evidence underlying the warrant, would prevent them from making an accurate assessment of whether the desired surveillance measures would be necessary and proportionate in accordance with the strictures of the ECHR.

15. We also note with concern that if a judicial commissioner refuses to approve a warrant, the government may simply approach the IPC for what is effectively a second bite at the cherry in the absence of any adversarial process.[17] The investment of such immense power in the IPC, whose decision will constitute the final word, renders the other judicial commissioners' purported authority virtually meaningless.

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[10] Draft Bill, *supra* n. 6, § 168(6)-(7)
[11] *Ibid.* at § 167(1)(a).
[12] See, e.g., *ibid.* at § 19(2).
[13] See *Klass*, *supra* n. 1, para. 56.
[14] Liberty, 'Tracking, hacking and lip service to safeguards', 4 Nov. 2015, https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/tracking-hacking-and-lip-service-safeguards-liberty%E2%80%99s-analysis.
[15] *Rotaru*, *supra* n. 1, ¶ 59.
[16] Draft Bill, *supra* n. 6, §§ 12(5), 81(5), 106(5), 122(7) and 135(4).
[17] *Ibid.* at §§ 19(5), 90(5), 109(4), 123(4) and 138(4).

c. Certain wide-ranging and intrusive surveillance powers would not require judicial commissioners' approval

16. Finally, we believe the draft Bill's failure to establish any form of judicial or equivalent independent *ex ante* approval for the exercise of certain wide-ranging and intrusive surveillance powers would perpetuate an ongoing breach of Article 8 of the ECHR, which (as stated at paragraph 8 above) requires all secret government surveillance practices to be '*subject to effective supervision*' by the judiciary or an equivalent independent body.

i. Targeted acquisition of communications data, which may be highly revealing of the most intimate aspects of private life

17. In particular, the draft Bill does not require the judicial commissioners' approval for the targeted acquisition of communications data (except where the government seeks to identify a journalistic source—a practice that is itself problematic in human rights terms).[18] Indeed, the draft Bill even grants senior officers an apparently wide degree of discretion to authorise the targeted acquisition of such data for their own investigations or operations, with no external approval of any kind.[19]

18. This failure to require judicial approval for the targeted acquisition of communications data appears to ignore the fact that the European Court of Human Rights has long recognised that the protections of Article 8 of the ECHR extend to such data.[20] It also ignores similar statements by the Court of Justice of the European Union ('CJEU'), which has correctly observed that communications data '*may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.*'[21] As Professor Edward Felten, the former Chief Technologist of the US Federal Trade Commission, has confirmed in the context of litigation challenging the National Security Agency bulk telephone metadata collection programme that the US Congress has now abolished[22], communications data 'often yield information more easily than do the actual content of our communications.'[23] Thus, a refusal to require judicial authorisation for the collection of communications data is distinctly arbitrary and inconsistent with the Convention.

ii. Data retention notices, including those that could affect the entire population of the United Kingdom

19. The draft Bill also does not require judicial approval for the Home Secretary's issuance or renewal of data retention notices, even those that could affect every person in the United Kingdom (as well as his or her correspondents).[24] (As a separate matter, we believe such nationwide and potentially indefinite data retention mandates would violate EU law as set out in the CJEU's *Digital Rights Ireland* judgment.) In our view, the absence of judicial or equivalent independent *ex ante* approval for such sweeping surveillance measures is manifestly incompatible with the ECHR requirement described at paragraph 8 above.

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[18] *Ibid.* at § 46.
[19] *Ibid.* at § 47(2).
[20] See *Copland v United Kingdom*, [2007] ECHR 253, Judgment, 3 Apr. 2007, ¶ 43.
[21] *Digital Rights Ireland*, Judgment, [2014] EUECJ C-293/12, 8 Apr. 2014, ¶ 27.
[22] See USA FREEDOM Act, Public Law No: 114-23 (2 June 2015).
[23] Declaration of Professor Edward W Felten, *American Civil Liberties Union et al v Clapper et al*, US District Court for the Southern District of New York, Case no 13-cv-03994, 23 Aug. 2013, p. 1, available at https://www.aclu.org/files/pdfs/natsec/clapper/2013.08.26%20ACLU%20PI%20Brief%20-%20Declaration%20-%20Felten.pdf.
[24] Draft Bill, *supra* n. 6, § 71.

iii. National security notices, which are potentially sweeping and may include targeted or bulk surveillance or equipment interference

20. Equally troublingly, the draft Bill would confer upon the Home Secretary the power to issue 'national security notices' without any form of external approval. The provision of the draft Bill establishing such notices is vague and potentially extremely expansive: telecommunications operators would be required to 'take such specified steps as the Secretary of State considers necessary in the interests of national security.'[25] We are not reassured by the subsequent provision that such notices 'may not require the taking of any steps the main purpose of which is to do something for which a warrant or authorisation is required under this Act' (emphasis added), and are concerned that this power could effectively allow the Home Secretary to evade the judicial commissioner scheme even where the draft Bill otherwise imposes it.[26]

iv. 'Urgent' cases, which afford an opportunity for surveillance with virtual impunity

21. Lastly, we note that the draft Bill permits the government to engage in the targeted interception of communications content, targeted equipment interference or the acquisition of bulk personal datasets for up to six working days (that is, up to five working days following the date on which the Home Secretary issues the relevant warrant) in unspecified 'urgent' cases without a judicial commissioner's approval.[27] If the judicial commissioner ultimately refuses to approve the warrant, she or he is not obligated to order that the data obtained be destroyed, or to impose any conditions concerning the retention or use of the data.[28] Thus, even where the government collects data or engages in equipment interference unlawfully on an 'urgent' basis, it does so with potential impunity.

Conclusion

22. CDT is gravely concerned about many of the surveillance powers that are consolidated or proposed in the draft Bill, and it is with great trepidation that we observe that these powers would be exercised subject to a weak and non-independent form of judicial approval at best, and no *ex ante* judicial scrutiny whatsoever at worst. Although the proposed system may represent an improvement over the current one, its flaws undermine the entirety of the draft legislation. We strongly urge the Joint Committee on Human Rights to recommend that a far stronger and more independent form of judicial authorisation be included in the Bill when it is introduced to Parliament.

[25] *Ibid.* at § 188.
[26] *Ibid.* at § 188(4).
[27] *Ibid.* at §§ 20, 91, and 156.
[28] *Ibid*. at §§ 21(3), 92(3), and 157(3) (stating that a Judicial Commissioner 'may' order destruction or impose conditions on subsequent retention and use).