

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's briefing on Part 8 of the Investigatory Powers Bill for Committee Stage in the House of Commons**

**April 2016**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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## **Introduction**

Liberty welcomes the opportunity to provide briefing and amendments in relation to Part 8 of the Investigatory Powers Bill.

These amendments would:

- Provide for appointment of Judicial Commissioners by the Lord Chancellor rather than the Prime Minister following a process conducted by the Judicial Appointments Commission
- Remove renewable terms of appointment for Judicial Commissioners
- Separate the review and oversight functions currently assigned to the Judicial Commissioners, creating an Intelligence and Surveillance Commission to undertake oversight
- Provide for oversight functions to extend to all investigatory powers
- Create a presumption of notification following intrusive surveillance
- Increase the effectiveness of error reporting
- Clarify provisions relating to the Annual Report
- Remove the role of the Secretary of State in allocating funding and staff to the oversight and review bodies
- Delete provision allowing the Secretary of State to modify via regulations the functions of the Investigatory Powers Commissioner and Judicial Commissioners
- Allow all decisions, determinations and rulings made by the Investigatory Powers Tribunal to be appealed on a point of law.

## **Independent appointments of Judicial Commissioners**

### Amendment

Clause 194, page 148, line 36, delete 'Prime Minister' and insert 'Lord Chancellor'

Clause 194, page 148, line 36, after 'appoint' insert 'in accordance with the procedure set out in the Constitutional Reform Act 2003'

Clause 194, page 149, line 5, delete sub-clause (3)

Clause 194, page 149, line 12, delete sub-clause (4)

Clause 194, page 149, line 17, delete sub-clause (5)

### Effect

These amendments would require that Judicial Commissioners are appointed by the Lord Chancellor on the recommendation of the Judicial Appointments Commission under the Constitutional Reform Act 2003.

### Briefing

The Bill provides for the Prime Minister to appoint the Judicial Commissioners following consultation with senior judges. In a democracy premised on the separation of powers, it is inappropriate for the Prime Minister to make judicial appointments. It is vital for public confidence that the appointments process is, and is seen to be, entirely independent – especially as the Judicial Commissioner's role is to oversee the exercise of secret, intrusive, government powers.

In its written evidence to the Joint Committee on the Draft Investigatory Powers Bill, IOCCO (Interception of Communications Commissioner's Office) remarked that:

*'It is inappropriate for the Judicial Commissioners to be appointed by the Prime Minister as this dilutes public confidence and independence. The more modern arrangement and increasing standard internationally is for judicial appointments to be made by an independent body rather than the executive. It would be more appropriate for the Judicial Commissioners to be appointed by the Judicial Appointments Commission'.<sup>1</sup>*

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<sup>1</sup> IOCCO Evidence for the Joint Committee on the Draft Investigatory Powers Bill, page 15.

## **Remove renewable terms for Judicial Commissioners**

### Amendment

Clause 195, page 149, line 34, delete 'three' and insert 'six'

Clause 195, page 149, line 35, delete subclause 3

### Effect

These amendments would remove the three-year renewable terms for Judicial Commissioners and create a fixed term of six years.

### Briefing

There is a risk that the effect of potentially indefinite renewable of terms for Judicial Commissioners – especially in combination with Prime Ministerial appointments – could impact the independence of Judicial Commissioners, or indeed be perceived to do so.

The Joint Committee scrutinising the Draft Investigatory Powers Bill reported '*concerns that having renewable terms of appointment could have negative implications for public confidence in the independence of Judicial Commissioners (...) The Government should reconsider both the length of terms of appointment and whether they should be renewable*' (Recommendation 54).

In his evidence, David Anderson QC, the Independent Reviewer of Terrorism Legislation, saw the '*advantages of a single term*' so that '*there would be no question of people being careful around the renewal period.*' Therefore, this amendment seeks to improve the independence, both in practice and in perception, of Judicial Commissioners.

## **Create an independent oversight body**

### Amendment

Page 148, line 31, before 'oversight arrangements' insert 'Authorisation and'

Page 150, line 18, insert new clause 195A –

195A: The Intelligence and Surveillance Commission

- (1) The Prime Minister, on recommendation of The Commissioner for Public Appointments, must appoint a Commissioner to be known as the Intelligence and Surveillance Commissioner

Clause 196, page 150, line 21, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 196, page 150, line 38, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 198, page 153, line 5, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 198, page 153, line 27, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 198, page 153, line 30, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 198, page 153, line 42, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 198, page 154, line 8, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 156, line 36, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 3, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 5, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 7, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 10, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 13, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 19, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 201, page 157, line 39, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commissioner'

Clause 203, page 158, line 27, after 'Investigatory Powers Commissioner' insert ', Intelligence and Surveillance Commissioner,'

### Effect

These amendments would provide for the creation of a separate oversight body, the Intelligence and Surveillance Commission, as recommended by the Government's Reviewer of Terrorism Legislation, David Anderson QC in his report *A Question of Trust*. These amendments provide for the oversight functions currently residing with Judicial Commissioners to be placed with the Intelligence and Surveillance Commission.

### Briefing

The Bill proposes that the Investigatory Powers Commission (IPC) will replace the Interception of Communications Commissioner Office (IOCCO), the Office of Surveillance Commissioners (OSC) and the Intelligence Services Commissioner (ISCom). Their roles would be divested in the newly created Investigatory Powers Commissioner and fellow Judicial Commissioners, who would therefore have dual responsibility (a) for reviewing surveillance warrants issued by the Secretary of State and law enforcement chiefs and (b) for post-facto oversight of the use of intrusive powers. The IPC is additionally required to keep under review any aspect of the functions of the Agencies as directed by the Prime Minister<sup>2</sup> and these directions need not be published if Prime Minister considers it would be contrary to the public interest or prejudicial to the three grounds or the continued discharge of the functions of any public authority whose powers are reviewed by the IPC. The IPC

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<sup>2</sup> Investigatory Powers Bill 2016, clause 197.

must make an annual report to the PM about the carrying out of the functions of the Judicial Commissioners.

However, this approach confuses the roles of authorisation and oversight. It is constitutionally inappropriate for those involved in the decision-making process to also bear responsibility for oversight of those decisions. The conflation of these responsibilities gives rise to confusion and a conflict of interest.

The problem can be demonstrated by clause 196, which imposes obligations on Commissioners not to act in a way that may inhibit the effectiveness of particular operations when undertaking oversight functions. JCs are then told to disregard these obligations in circumstances where the JC is involved in reviewing warrants.

The Home Office has thus far refused to establish an independent Intelligence and Surveillance Commission as a statutory oversight body, despite recommendations, based on extensive evidence, from the Joint Committee and the Government's Reviewer of Terrorism Legislation, David Anderson QC. Instead, it has retained its own proposal for a team of Judicial Commissioners, appointed by the Prime Minister, funded by the Home Secretary, to both authorise *and* oversee the use of investigatory powers.

Liberty supports the consolidation of the byzantine model of surveillance oversight currently provided by several commissioners. However we are deeply concerned the Bill hands over these oversight functions to the newly created body of JCs, whose primary role is authorisation. JCs' independence and perceived independence will be wholly undermined by the clear conflicts of interest that will likely arise on a regular basis. Therefore, we believe that oversight of intrusive powers should be vested and consolidated in a new commission independent from the IPC, IPT and Executive – proposed here, as per David Anderson's recommendation, as the Intelligence and Surveillance Commission.



## Provide for consistent oversight functions

### Amendment

Clause 196, page 150, line 43, after ‘under section 216 (national security notices)’ insert ‘and under section 217 (technical capability notices)’

### Effect

This amendment would ensure that the oversight body is also able to oversee the giving and operation of technical capability notices - one of the most controversial powers in the Bill.

### Briefing

The Bill proposes to renew the power to force “*the removal of electronic protection*” from communications services under ‘technical capability notices’, and expand capabilities to remove encryption by broadening the framing of the power.<sup>3</sup> Currently, RIPA 2000 and paragraph 10 of the Schedule to *the RIPA (Maintenance of Interception Capability) Order 2002*<sup>4</sup> grants the State the power to force “*public telecommunications services*” to remove encryption. Under this Bill, communications services could be imposed with obligations not only to remove “*electronic protection*”, but with additional obligations including those “*relating to the security*” of the service provided, relating to “*apparatus owned or operated*” by the service, and “*obligations to provide facilities or services of a specified description*” – “*among other things*”,<sup>5</sup> which remain undefined.

Obligations to remove electronic protection can be issued in either a ‘national security notice’ or more likely, a ‘technical capability notice’ from the Secretary of State.<sup>6</sup> As the Bill is currently drafted, there is no judicial authorisation or test of necessity and proportionality required for either notice. The recipient of such a notice must comply with it<sup>7</sup> but must not disclose the existence or contents of it.<sup>8</sup> Thus, were an Apple v FBI scenario to occur in the

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<sup>3</sup> Whereas provisions under RIPA oblige “*public telecommunications services*”<sup>3</sup> to remove encryption, the Bill would oblige any “*telecommunications operator*”,<sup>3</sup> which is defined as “*a person who offers or provides a telecommunications service to persons in the United Kingdom, or controls or provides a telecommunications system which is (wholly or partly) in the United Kingdom or controlled from the United Kingdom.*”<sup>3</sup> This expanded definition would include not only public services such as Gmail, Facebook, Twitter and Dropbox, but also private offices, businesses, law firms, government department networks (such as the NHS), and institutional networks such as universities. This was confirmed by the Home Secretary in her oral evidence to the Joint Committee.

<sup>4</sup> Regulation of Investigatory Powers Act 2000, section 12 (1);

<sup>5</sup> Investigatory Powers Bill 2015, clause 217, subsection (4).

<sup>6</sup> Investigatory Powers Bill 2016, clause 218, subsection (1)

<sup>7</sup> Investigatory Powers Bill 2016, clause 218, subsection (9)

<sup>8</sup> Investigatory Powers Bill 2016, clause 218, subsection (8)

UK, Apple would not be able to disclose even the fact that it had been served with a notice, let alone challenge it in court.

Encryption is now a widely used standard to protect the ever-expanding uses of communications technologies in an increasingly hostile digital environment: from mobile phones and smart phones to personal hard drives, online banking and e-commerce, critical infrastructures, transport networks, institutional and business computer networks, cloud storage, emailing and messaging, web browsing and online shopping. Furthermore, encryption is recognised by the UN as a critical tool for protecting individuals' rights to privacy and freedom of expression – particularly for those in sensitive professions, and discriminated and minority groups.<sup>9</sup> The Government's coercion of telecommunications operators to maintain covert interception capabilities could force products and services to be designed with the required insecurity built-in.

Therefore, as an absolute minimum, the production and implementation of technical capability notices requires independent oversight by the appropriate body.

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<sup>9</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye* – UN Human Rights Council, 22 May 2015, paragraph 1

## **Remove unnecessary limitations on the oversight body**

### Amendment

Clause 196, page 151, line 18, delete subclause 4

Clause 196, page 151, line 42, delete subclause 5

Clause 196, page 151, line 49, delete subclause 6

Clause 196, page 152, line 6, delete subclause 7

### Effect

These amendments would remove unnecessary restrictions on oversight functions. The oversight functions are provided for in Clause 196, subclauses (1)-(3); therefore, given that the remit is clearly specified, it is superfluous to additionally identify areas that the oversight body must not review.

### Briefing

It is particularly restrictive to require that the oversight body does not act contrary to national security (cl. 196 (5)(a)) – a broad and undefined term - or in such a way that might be deemed to jeopardise the success of an intelligence operation (cl. 196 (6) (a)). The primary responsibility of the oversight body is to conduct robust oversight unimpeded – the ongoing practice of the intelligence agencies should be subject to oversight reports and recommendations, rather than the oversight functions being subject broad, undefined and entirely subjective limitations as asserted by those whose actions are supposed to be scrutinised.

## **Post-notification following intrusive surveillance**

### Amendment

Page 153, line 4, insert new clause 197A –

#### 197A: Notification

- (1) The Intelligence and Surveillance Commissioner is to notify the subject or subjects of investigative or surveillance conduct relating to the statutory functions identified in section 196, subsections (1), (2) and (3), including -
  - a. the interception or examination of communications,
  - b. the retention, accessing or examination of communications data or secondary data,
  - c. equipment interference,
  - d. access or examination of data retrieved from a bulk personal dataset,
  - e. covert human intelligence sources,
  - f. entry or interference with property.
  
- (2) The Intelligence and Surveillance Commissioner must only notify subjects of surveillance under subsection (1) upon completion of the relevant conduct or the cancellation of the authorisation or warrant.
  
- (3) The notification under subsection (1) must be sent by writing within thirty days of the completion of the relevant conduct or cancellation of the authorisation or warrant.
  
- (4) The Intelligence and Surveillance Commissioner must issue the notification under subsection (1) in writing, including details of –
  - a. the conduct that has taken place, and
  - b. the provisions under which the conduct has taken place, and
  - c. any known errors that took place within the course of the conduct.
  
- (5) The Intelligence and Surveillance Commissioner may postpone the notification under subsection (1) beyond the time limit under subsection (3) if the Commissioner assesses that notification may defeat the purposes of an on-going serious crime or national security investigation relating to the subject of surveillance.

(6) The Intelligence and Surveillance Commissioner must consult with the person to whom the warrant is addressed in order to fulfil an assessment under subsection (5).

Clause 198, page 153, line 39, delete subsection (7)

### Effect

These amendments would provide for a process of post-notification following a surveillance operation.

### Briefing

Liberty believes that the oversight body should be under a mandatory statutory duty to notify those subjected to surveillance once a particular operation or investigation has ended. At present, unlawful surveillance only comes to light as a result of a chance leak, whistleblowing or public interest litigation brought by Liberty and other NGOs and concerned citizens. This is deeply unsatisfactory.

If a person's Article 8 and other HRA protected rights have been infringed, in order to have access to an effective remedy as required under human rights law, the person must first be made aware of a possible breach. This was stated by the ECtHR in *Klass v Germany* in 1978 and reiterated in *Weber and Saravia v Germany* in 2006:

*"The Court reiterates that the question of subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively"* (see *Klass and Others*, cited above, pp. 26-27, § 57).<sup>10</sup>

In *Zakharov v Russia* the ECtHR found that that judicial remedies for those subjected to interception in Russia were generally ineffective, particularly in light of the total absence of any notification requirement with regard to the interception subject, without any meaningful ability of retrospective challenges to surveillance measures.

Liberty believes that in order to ensure accountability for surveillance, an independent oversight body should be required to notify those subjected to surveillance after an investigation or operation has ended unless there is an objectively justifiable reason for maintaining secrecy.

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<sup>10</sup> *Weber and Saravia v Germany*, 2006, application 54934/2000, paragraph 135.

## **Increase the effectiveness of error reporting**

### Amendment

Clause 198, page 153, line 7, delete 'if the Commissioner considers that –'

Clause 198, page 153, line 8, delete subsection (1)(a)

Clause 198, page 153, line 10, delete subsection (2)

Clause 198, page 153, line 14, delete subsection (3)

Clause 198, page 153, line 19, delete subsection (4)(a)

Clause 198, page 153, line 24, delete subsection (4)(b)(iii)

Clause 198, page 153, line 25, delete subsection (4)(b)(iv)

Clause 198, page 154, line 3, after 'public authority' insert 'or a telecommunications operator'

### Effect

These amendments would remove the stipulation that error reporting is only required for those errors subjectively deemed 'serious' and in circumstances where reporting the error is deemed in the public interest. These amendments also remove the requirement of 'significant harm' before an error may be reported, as the covert nature of surveillance activities obstructs the possibility of evaluating harm on the subject. Arguably, the disregard for the subject's right to know in itself constitutes harm. These amendments also remove the consideration of economic wellbeing in whether to notify a subject of surveillance, as this should be subsumed within a formal national security definition; and the consideration of the intelligence services' functions, as the necessary considerations should fall within the consideration of national security as per (4)(b)(i). These amendments would also ensure that errors by telecommunications operators, who may be carrying out a significant amount of the surveillance work on behalf of public authorities, are also subject to the appropriate oversight and reporting.

### Briefing

The Bill provides a new power for the Investigatory Powers Commissioner to inform someone subjected to a surveillance error by a public authority (but not a telecommunications operator) if the IPC is made is aware of it; considers it sufficiently serious; and that it is in the public interest; and that it does not prejudice national security, the prevention or detection of crime, the economic well-being of the UK, or the continued

discharge of the functions of any intelligence service.<sup>11</sup> For it to be serious it must have caused ‘*significant prejudice or harm to the person concerned*’. The Bill states that a breach of an individual’s rights under the *Human Rights Act 1998* is not sufficient for an error to be considered a serious error.<sup>12</sup> Before making its decision the IPC must ask the public authority responsible for the error to make submissions to the IPC about the matter concerned.

This is a narrow, arbitrary and highly discretionary power that will relate only to the most serious errors that the JCs discover during their very limited audit of the use of surveillance powers. It highlights the conflicted position that JCs may find themselves in and it does not discharge the Government’s human rights obligations to provide post-notification by default unless it can justify continued secrecy.

These amendments would improve the quality of error reporting to ensure robust and consistent oversight of surveillance powers.

### **Probe the intention of clause 199 (3)**

#### Amendment

Clause 199, page 154, line 18, delete subsection (2) and (3)

#### Effect

This probing amendment is intended to prompt further information on the situations in which it is envisaged that Judicial Commissioners will provide advice or information to public authorities, and similarly to raise questions as to the intention of then requiring Judicial Commissioners to ‘consult’ with the Secretary of State before providing certain information or advice.

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<sup>11</sup> The definition of an error includes failure to comply with requirements under this Act and in Code of Practice under Schedule 6.

<sup>12</sup> Investigatory Powers Bill 2016, clause 198, subsection (3)

## **Annual and other reports**

### Amendment

Clause 201, page 156, line 36, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 156, line 38, delete 'about the carrying out of the functions of the Judicial Commissioners'

Clause 201, page 156, line 40 after 'are' insert 'issued by the Judicial Commissioners and'

Clause 201, page 156, line 41, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 156, line 47, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 1, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 3, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 5, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 7, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 7, delete 'Judicial Commissioners' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 10, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 11, delete 'judicial commissioners' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 13, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

Clause 201, page 157, line 19, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'



Clause 201, page 157, page 39, delete 'Investigatory Powers Commissioner' and insert 'Intelligence and Surveillance Commission'

#### Effect

These amendments would ensure that the Intelligence and Surveillance Commission publishes an annual report.

#### Briefing

The Bill currently provides that the Investigatory Powers Commissioner prepares for the Prime Minister an Annual Report, which the Prime Minister must then publish and lay before Parliament. Outside the annual reporting mechanism, the Bill also permits the Prime Minister to request that the Commissioner makes any additional report, and the Commissioner may also report on any other matter relating to their functions as appropriate.

The reporting mechanism is a vital part of accountability and oversight, offering a necessary if small glimpse into the use of investigatory powers. In keeping with the recommendation that authorisation and oversight functions must be separate, it follows that the reporting obligation would sit more appropriately with the proposed Intelligence and Surveillance Commissioner rather than with the Investigatory Powers Commissioner.

#### Amendment

Clause 201, page 156, line 41, after 'authorisations' and before 'issued' insert 'requested and'

#### Effect

This amendment would require the Annual Report to include information on the number of requests for warrants or authorisations made.

#### Briefing

Under the Bill as drafted, the Annual Report must include statistics including the number of warrants or authorisations issued, given, considered, or approved. However there is no requirement to set out the number of requests made. This missing piece of information is essential. It is needed in order for the public to understand the volume of surveillance applications made by public authorities and to assess the extent to which the Judicial Commissioners do or do not consider that applications made are lawful and the proportion of the applications that are granted.

## Amendment

Clause 201, page 157, line 28, delete sub-clause (d)

## Effect

This amendment would delete “*prejudicial to the continued discharge of the functions of any public authority whose activities include activities that are subject to review by the Investigatory Powers Commissioner*” as a grounds for excluding a part of a report issued under this Part from publication. This ground is unnecessary as the clause already provides for redaction on the grounds of public interest, national security, and the prevention or detection of crime. It is also extremely broad and could be used to cover up illegitimate uses of investigatory powers simply on the basis that public authorities wish to continue to use powers in this manner.

## **Supplementary provisions – funding, staff and facilities**

### Amendment

Clause 204, page 158, line 38, after ‘facilities’ insert ‘of Investigatory Powers Commissioner and Judicial Commissioners’

Clause 204, page 158, line 41, delete ‘The Secretary of State must’ and insert ‘The Treasury must’

Clause 204, page 158, line 42, delete ‘and subject to the approval of the treasury’

Clause 204, page 158, line 43, after ‘with’ insert ‘funds to cover’

Clause 204, page 159, line 3, delete ‘Secretary of State considers’

### Effect

These amendments would remove the role of the Secretary of State in determining the funding, staff and facilities to be afforded to the Judicial Commissioners, leaving this to the Treasury and the IPC.

### Briefing

In order for judicial bodies to fulfil their function fully and independently, they must be adequately funded and they must not be dependent on those they purport to scrutinise for this funding. It is therefore inappropriate that, as drafted, the Bill allows the Secretary of State the power to determine funding of the IPC and judicial commissioners. These amendments would remove the power of the Secretary of State to determine the funding, staff and facilities of the Investigatory Powers Commissioner and other Judicial Commissioners. Instead, it will be for the Commissioner to consult with the Treasury to establish its funding.

### Amendment

Clause 204, page 159, line 5, insert new sub-clause (3) –

(3) The staff of the Judicial Commissioners must include independent technical experts.

### Effect

This amendment would ensure that judicial commissioners have access to technical experts.

## Briefing

In order for the Judicial Commissioners to fulfil their function properly, they must understand and probe the technical aspect of the use of investigatory powers. The proportionality of a warrant can only be assessed where it is clear what practical steps will be taken in order to enforce it, and there is an understanding of what this means for the volume and nature of information that it will retrieve. Similarly, in order for warrants to contain clear limits on action that may be taken, Judicial Commissioners must be able to make technical directions.

## Amendments

Clause 204, page 159, line 5, insert new clause 204A –

### 204A Funding, staff and facilities of Intelligence and Surveillance Commission

- (1) The Treasury must, after consultation with the Intelligence and Surveillance Commission as to number of staff and in light of the extent of the statutory and other functions of the Commission, provide the Commission with funds to cover:
  - a. Such staff, and
  - b. Such accommodation, equipment and other facilities,As necessary for the carrying out of the Commissioners' functions.
- (2) The staff of the Intelligence and Surveillance Commission must include:
  - a. Independent technical experts
  - b. Independent Legal experts

## Effect

This amendment would require the Treasury to provide the ISC with funds to cover its staff, facilities and accommodation. It would also require that the ISC staff include technical and legal experts.

In keeping with the recommendation that the review and oversight functions currently provided for in the single body of Judicial Commissioners be separated, these amendments would broadly replicate the provisions set out above in relation to Judicial Commissioners for the Intelligence and Surveillance Commission.

## **Supplementary provisions – modification of functions**

### Amendment

Clause 205, page 159, line 5, delete clause 205

### Effect

This amendment would delete provision allowing the Secretary of State to modify via regulations the functions of the Investigatory Powers Commissioner and Judicial Commissioners. It is inappropriate for the Secretary of State to retain power to amend the functions of a body charged, in part, with oversight of her work.

## **Investigatory Powers Tribunal**

### Amendment

Clause 208, page 160, line 13, after ‘determination’ insert ‘or ruling or decision, including relating to a procedural matter’ and delete ‘of a kind mentioned in section 68(4) or any decision of the tribunal or a kind mentioned in section 68(4C)’

### Effect

This amendment makes clear that all decisions, determinations and rulings can be appealed on a point of law.

### Briefing

Liberty welcomes the granting of a right of appeal from the IPT in the Bill which inserts new clause 67A RIPA. This amendment would ensure that all decisions, rulings or determinations can be appealed on a point of law, including procedural rulings, which the Bill currently excludes.

## **Technical Advisory Board**

### Amendment

Clause 211, page 164, line 19, delete clause 211

### Effect

This amendment would delete provision for the maintenance of a Technical Advisory Board.

Briefing

As noted above, it is essential that judicial commissioners and the oversight bodies have access to technical expertise in order to fulfil their functions. However it is imperative that this advice is entirely independent from the agencies subject to scrutiny. The composition and appointment process for the TAB means that it is wholly unsuited to offering an impartial assessment of the practical and technical necessity and impact of investigatory powers.

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