



NOTES

Investigatory Powers: Legal privilege and the ‘double lock’

A joint meeting of:
All Party Parliamentary Group on Legal and Constitutional Affairs, and
All Party Parliamentary Group on the Rule of Law

House of Commons, Committee Room 9

14.00 – 15.00

Tuesday 8 December

Chair:

- Lord Lester of Herne Hill QC (Chair)

Panel members:

- David Anderson QC, Independent Reviewer of Terrorism Legislation and author of ‘A Question of Trust’
- Professor Sir David Omand GCB, Visiting Professor Kings College and Vice-President of Royal United Services Institute
- Peter Carter QC, Doughty Street, Chair of the Bar Council Surveillance and Privacy Working Group

Apologies:

- Sir Keir Starmer QC MP, Chair of the APPG on Legal and Constitutional Affairs

Attendance

Parliamentarians

- Lord MacGregor
- Lord Strasburger
- Alex Chalk MP
- Bishop of Chester
- Andrew Murrison MP
- Baroness O'Neill
- Baroness Hamwee
- Lord Paddick
- Lord Gold
- Dominic Grieve QC MP, Chair of the APPG on the Rule of Law
- Andy Slaughter MP
- Lord Beecham
- Lord Woolf
- Lord Lester QC

Non-Parliamentarians

- Dr Lawrence McNamara, Bingham Centre
- Swee Leng Harris, Bingham Centre
- Richard Doughty, CILEX
- Angela Patrick, JUSTICE
- Owen Bowcott, The Guardian
- Sir Stanley Burnton, Interception of Communications Commissioner'
- Clare Duffy, Odysseus Trust
- Zoe McCallum, Odysseus Trust
- Jonathan Smithers, The Law Society
- Calum Jeffray, RUSI
- Jonathan Smithers, Law Society
- Dr Carolina Gasparoli, Law Society
- Tim Hill, Law Society
- James Gittings, Law Society
- Victoria Woodbine, Home Office
- Jenny Chant, Home Office
- Nicola Richardson, Home Office
- Christina Dykes, Office of Dominic Grieve QC MP
- Vinous Ali, Liberal Democrat Party
- Luke Robins-Grace, The Bar Council
- Chantal-Aimée Doerries, The Bar Council

Lord Lester QC

Apologies from Sir Keir Starmer QC MP, Chair of the APPG on Legal and Constitutional Affairs.

A Bill is anticipated in the New Year and is expected to be on the statute books by the end of 2016 when the Data Retention and Investigatory Powers Act sunset clause comes in to effect.

David Anderson QC, Independent Reviewer of Terrorism Legislation

David Anderson QC focused on the importance of the double lock mechanism. Judicial involvement in the authorisation of warrants, whilst probably the most high-profile issue, is possibly not the most important.

Mr Anderson QC remarked that the UK Home Secretary authorised 2,345 warrants compared with the Attorney General in Australia, who authorised some 500 in a similar time. Communications and IT firms in Silicon Valley have indicated that they prefer to co-operate with public authority request for data and access where warrants are issued by the courts, rather than by the executive..

Mr Anderson QC welcomed the Home Secretary's position that except in cases of urgency, no warrant would come into force without judicial approval. On the issue of the judicial review standard of authorisation, Mr Anderson QC agreed with Lord Pannick's analysis in *The Times*;¹ a judicial review test implies that, where Convention rights are involved, an intrusive review of whether the 'necessary and proportionate' test has been met will apply. Anderson's report recommended that where a national security warrant is sought in the interests of foreign policy or defence, some form of double lock would be appropriate. It was not reasonable that, for example, the necessity of a decision to spy on foreign officials should be left entirely to a judge.

On the other hand, the police usually ask a judge for a warrant. Both the Anderson report and RUSI reports agreed that a double lock was not necessary for Police warrants, but that judicial approval would be sufficient. This is the practice in the other countries of which Mr Anderson QC is aware.

For domestic national security warrants (classically, to intercept terrorist conspiracies), there would not be anything wrong with going straight to a judge, and so Mr Anderson QC queried if a 'double lock' was necessary, but agreed that the involvement of the Home Secretary does not raise any civil liberties concerns.

With regard to the authorisation of access to communications data, which is becoming increasingly intrusive, Anderson's report recommended a measure of independent authorisation and noted that the Bill does little to advance this. There is pressure from the European Court of Justice in the *Digital Rights Ireland* case of 2014—reflected in the *Davis/Watson* High Court judgment² this

¹ Lord David Pannick QC, 'Safeguards provide a fair balance on surveillance powers', *The Times* (12 November 2015).

² *David Davis and others v Secretary of State for the Home Department*, [2015] EWHC 2092 (Admin)

summer which declared the Data Retention and Investigatory Powers Act invalid—to increase the independence of authorisation procedures. Other national courts have taken a similar line, though the Court of Appeal in November offered a reprieve (by deciding to refer questions back to the European Court of Justice).

The Police use internal Police systems to request authorisation to access communications data, albeit with the safeguard of a single point of contact to advise and designate persons to authorise. Security and Intelligence Agencies require only line-manager sign-off. Applications are very numerous and it is important that any solution should not be unduly cumbersome. But, it needs to be understood that the law may yet turn out to require a greater measure of independent authorisation for communications data applications than is contemplated in the Bill.

As a final point, local authorities have for a short time required low-level judicial approval (generally from a lay magistrate or sheriff) for even the most trivial communications data request. This is at the opposite end of the scale from the specialist judicial commissioners envisaged for interception warrants. All who have looked at this system (including Surveillance Commissioners and Interception of Communications Commissioner's Office) have found it ineffective and Anderson's report had recommended its replacement. If local authorities are to be entrusted with trading standards or environmental health powers, it is important that they should have the ability to exercise them efficiently. If as the Bill suggests the requirement of approval by magistrate is to remain, consideration should be given e.g. to centralising requests in certain courts where training could be provided.

Professor Sir David Omand, Visiting Professor Kings College and Vice-President of Royal United Services Institute

Professor Sir David Omand outlined how executive power in relation to surveillance and covert intelligence gathering has become increasingly subject to the rule of law, and argued that the Draft Investigatory Powers Bill avows existing powers and will make them compliant with the principles of the rule of law. The use of judicial authorisation of warrants represents the introduction of greater safeguards in the system. Sir David stated that intelligence agencies are happy to comply with any legislation by Parliament, their only concern being that the mechanisms must work, there are adequate resources, and processes must be sufficiently swift to deal with cases of emergency.

He argued that it is constitutionally proper for the Secretary of State to sign warrants for the most intrusive surveillance activities of the security and intelligence agencies, for whose activities the Secretary of State is statutorily accountable to Parliament. A further, practical, consideration is that whilst applications may be judged lawful, they may not necessarily be wise in relation to foreign policy or other policy considerations. This is why the Home Secretary and Foreign Secretary should be involved in authorising the relevant activities of the secret agencies. Adding, as the Bill does, judicial approval of such warrants would provide public reassurance that there has been an independent review of the necessity and proportionality of the action proposed and would strengthen the UK case should a challenge to UK investigative powers come to the ECtHR or the ECJ..

Sir David argued that since the Police have a different constitutional relationship with the Home Secretary, and are not a government body, it would be appropriate for their warrant applications to go direct to the Judicial Commissioner. That was what the independent RUSI Inquiry had proposed, although there would be no harm done to the rule of law if the Home Secretary were, as the Bill proposes, to remain involved in the authorisation of warrants.

On legal professional privilege, the codes of practice provide protection already and this should be carried forward into the statutory Codes that would accompany the Investigatory Powers Act. Failure to follow the codes will be a disciplinary offence, and they can be changed and updated (subject to approval by Parliament) more easily than legislation. Legal privilege is important and that is well understood by the intelligence agencies. Detailed protections for legal privilege are, however, not needed in the legislation, as they will appear in codes of practice, and the overseeing judicial commissioners will ensure that internal processes are being followed to give effect to the code.

Sir David reminded the meeting that in considering the Bill it should always be borne in mind that the purpose of surveillance activity is the security and safety of the public. Some elements of the Bill will allow the authorisation of intrusive surveillance that will invade on privacy, but this may be necessary to protect public safety.

Peter Carter QC, Doughty Street, Chair of the Bar Council Surveillance and Privacy Working Group

Peter Carter QC endorsed Mr Anderson QC's approach in his report of framing the issue of surveillance and security as a question of trust, not safety, because absolute safety is an illusory objective. Anderson's report highlights the need for a democratic balance between safety of citizens and the freedom of citizens.

The Bar Council is not seeking to make representations on behalf of lawyers as such; legal privilege is that of the client, not the lawyer. Sometimes legal privilege is in fact inconvenient for lawyers, but they are nonetheless bound to keep confidential their clients' instructions. The policy behind this confidentiality is to encourage candour by clients to enable the best possible advice by lawyers.

Legal privilege covers communications made in the context of legal advice for active or pending litigation. Advice given to clients to encourage potential criminal activities is not covered by legal privilege. Whereas other privileges can be described as 'considerations' and may have eroded, legal privilege remains a 'right' because it is allied to the human right which entitles individuals to independent legal advice, which cannot be given unless it is in confidence and there is no risk that the State is prying.

Mr Carter QC has seen no evidence to demonstrate that surveillance by the state on legally privileged communications could be justified as keeping the country safer. The legally privileged communications that were accessed by the security services as part of the Belhadj investigatory powers tribunal turned out to be not in any way significant to their initial investigation. If security

agencies say that they need access to legally privileged communications to fight crime, Mr Carter's response is: show us the evidence.

The double lock is a good idea, but there are two reasons why it may not achieve its aim:

- The Secretary of State will have power to issue warrants in cases of emergency without judicial oversight. However, the Prime Minister is empowered to appoint as many judicial commissioners as he wishes, so there is no reason why there should not be enough of them available. Presently High Court Judges are used to reviewing warrants on a 24/7 basis. The possibility of a five day gap undermines the double lock.
- The test of judicial review has different definitions. *Wednesbury* unreasonableness is an inadequate test. As pointed out by Lord Pannick, in cases involving Convention rights, the test needs to be the impact on the rights. The Bill needs an alternative form of words that spells out the test as the 'necessary and proportionate' threshold.

Questions

Andrew Murrison MP asked about the political aspects of the appointment of judicial commissioners, with respect to Northern Ireland. Mr Carter QC said the advantage of judicial commissioners is that they are legally qualified, thereby potentially negating the perception that appointments might be politicised.

There followed discussion on using Attorneys General to authorise warrants as an alternative to the Home Secretary. Sir David suggested the Attorney General ought not to second guess the political judgments of the Cabinet Ministers who carried responsibility for home, overseas and Northern Irish affairs. Dominic Grieve QC MP said the Attorney General does not have an investigatory role. He or she has superintendence of prosecutors, but it would not be appropriate in our jurisdiction for Attorneys General to have this role.

Lord Lester asked whether it had been agreed by our courts that where there is a human rights question, the relevant test is not *Wednesbury* unreasonableness? Mr Carter QC referred to the case of *L* and Lord Judge's decision that they would not apply the strict judicial review approach, rather they would apply a 'hybrid' approach, but this approach was not explained in the judgment. Lord Pannick's article in *The Times* was referenced in which he argued that the wording of the Bill did not preclude use of the necessary and proportionate test. Mr Carter QC suggested the words 'judicial review' might be removed from the Bill, to avoid doubt that only the *Wednesbury* test would be applied.

Rt Rev the Lord Bishop of Chester (Peter Forster) asked about the perceived independence of the two locks. He suggested each needs to be independent of each other and if judicial commissioners faced limited tenure whether there might be a political influence on their appointment. Should there be more distance between appointment process and politics? Mr Anderson QC thought that it

might be possible to require the consultation or approval of the Lord Chief Justice for the appointment of Commissioners.

Baroness Hamwee pointed out that the codes of practice are not being reviewed along with the legislation and so queried how they could be scrutinised. Sir David explained that Schedule 6 sets out process for the codes of practice, and that more detail can be put in codes of practice than in legislation, hence that is where it is possible to include, for example, the instruction to the agencies and police that there is a presumption that communications between lawyer and client are privileged unless the contrary is established. Codes are compulsory, not advisory and are drafted in more accessible language than legislation. He suggested that the Joint Committee could insist that the relevant parts of the codes be drafted and shown to them prior to the report of the committee. A Home Office representative explained that the plan is that the draft codes will be ready to be released when the Bill is introduced. Mr Carter QC drew attention to the fact that section 6 only referred to codes relating to accessing data and queried why some were referenced in the legislation, but not all.

Lord Paul Strasburger pointed out that the Home Office has explained that judicial commissioners will have access to the same information as the Home Secretary, and so asked why should their authorisation be limited to the judicial review test? Mr Anderson QC explained that Parliament needed to give some guidance to the judicial commissioners as to the appropriate legal test, though it would be for the judges to work out the fine balance between reticence in the face of national security concerns and intervention to protect fundamental rights. Mr Carter QC said 'necessity and proportionality' would be better guidance, and that the words judicial review are superfluous (and if not superfluous then they are a fetter) and judicial commissioners might be overly deferential to the Home Secretary.

Lord Paddick asked if equipment interference is potentially more intrusive than access to data and so should such interference also be subject to a double lock? Sir David and Mr Anderson QC responded in the affirmative, and Mr Anderson QC noted that 20% of GCHQ output has been estimated as involving activities that would be defined as equipment interference, that the Police told his review that they would need to think about using these techniques, and that the Bill already provides for this.

Meeting end