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United Kingdom

U.K. Investigatory Powers Bill—New Draft Published Yet Concerns Remain

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The U.K. government has introduced a revised Investigatory Powers Bill (Draft Bill) to Parliament, together with six draft Codes of Practice, which seeks to respond to comments and criticisms received through a number of consultations with industry and committees since the November 2015 draft of the Draft Bill (November Draft), which it replaced .

The Draft Bill, which was introduced to Parliament 1 March, sets out the powers available to the police, security and intelligence services to gather and access communications and communications data in the digital age, subject to what the Home Office calls "strict safeguards and world-leading oversight arrangements."

However, critics remain sceptical both of the short timescales to which the U.K. government is working, and the content of the Draft Bill itself, with the Internet Services Providers' Association (ISPA), for example, expressing disappointment that the Draft Bill is being fast-tracked and the News Media Association saying that it still doesn't include adequate safeguards to protect journalists' sources.

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Background.

The Draft Bill is designed to consolidate existing legislation on the state's ability to access communications data. It will repeal and replace part 1 of the Regulation

of the Investigatory Powers Act 2000 (RIPA) and emergency legislation passed in July 2014—the controversial Data Retention and Investigatory Powers Act 2014 (DRIPA) (14 WDPR 33, 8/22/14), which expires on 31 Dec. 2016 (see *The Reporter* 95[27]). DRIPA was introduced in response to the Court of Justice of the European Union's judgment of 8 April 2014 in *Joined Cases C-293/12 Digital Rights Ireland* (see *The Reporter* 92[110]) , which declared the Data Retention Directive (2006/24/EC) invalid.

Particular scrutiny of the November Draft came from the Joint Committee, the Intelligence and Security Committee and the Science and Technology Committee. Each of these committees supported the introduction of a new law, and raised concerns on the November Draft as follows:

The Joint Committee Report.

The Joint Committee said that the November Draft lacked "important clarity" in a number of areas and made 86 detailed recommendations aimed at ensuring that the powers within the November Draft were "workable," could be "clearly understood by those affected by them" and had "proper safeguards."

In particular, the Joint Committee felt that the government's approach to encryption, which wasn't designed to compromise security or require the creation of "backdoors," needed to be made clear in the drafting. It also felt that it hadn't received sufficient justification for either bulk powers or Internet connection records (ICRs).

The Joint Committee also suggested the establishment of a joint committee of the two Houses, to review the operation of the Draft Bill's powers five years following its enactment.

The Intelligence and Security Committee Report.

The Intelligence and Security Committee scrutinized those aspects of the November Draft relating to the intelligence agencies' investigatory powers, finding that the November Draft appeared to be suffering from "a lack of sufficient preparation" (16 WDPR 02, 2/25/16).

It therefore urged the government to "take time when bringing forward the new legislation" in order to "construct a comprehensive and clear legal framework for authorizing the actions of the intelligence agencies."

In addition, it also recommended major changes in those provisions relating to: (i) equipment interference (proposing that all information technology (IT) operations permitted to be carried out by the intelligence agencies should be brought under the same legislation, with the same authorisation process and the same safeguards); (ii) bulk personal datasets (proposing that class authorizations should be kept to an absolute minimum, given that each bulk personal datasets potentially contain personal information about a large number of individuals, the majority of whom won't be of any interest to the intelligence agencies); and (iii) communications data—proposing that the same safeguards should be applied to the examination of all communications data, irrespective of how it has been acquired.

The Science and Technology Committee Report.

This Science and Technology Committee said that the November Draft risked "undermining the UK's strongly performing Tech sector because of uncertainty about the costs of complying with the new legislation," and that U.K. businesses shouldn't be placed at a relative commercial disadvantage to overseas competitors by the proposed measures .

Further, it said, the costs of implementing the additional data storing measures in the November Draft "should be fully met by Government."

More specifically, the Science and Technology Committee raised issue with: (i) the uncertain use of definitions within the November Draft, (ii) a lack of clarity in respect of encryption and decryption obligations for communications providers; (iii) the scope of equipment interference powers; and (iv) the compliance burdens associated with the proposed Codes of Practice.

Key Changes to the Bill.

The government says that the Draft Bill, scheduled to pass into law before the end of 2016, has now been revised to reflect the majority of the Committees' recommendations. It believes that the Draft Bill is now "clearer, with tighter technical definitions and strict codes of practice," setting out exactly how the powers will be used and why they are needed.

In respect of drafting changes, the government claims that the revised Bill includes "stronger privacy safeguards," bolstering protections by:

- requiring the security services, as well as the police, to obtain a senior judge's permission before accessing communications data to identify a journalist's source;
- explicitly banning agencies from asking foreign intelligence agencies to undertake activity on their behalf unless they have a warrant approved by a Secretary of State and Judicial Commissioner;
- introducing additional safeguards in relation to interception and equipment interference warrants, reducing the period of time within which urgent warrants must be reviewed by a Judicial Commissioner from five to three days;
- strengthening the "double-lock" authorisation model endorsed by the Joint Committee, involving judges in the approval of warrants for the most intrusive powers, in respect of urgent warrants; and
- strengthening the office and powers of the new Investigatory Powers Commissioner, giving the Lord Chief Justice a role in his or her appointment and allowing for the Commissioner to inform people who have suffered as a result of the inappropriate use of powers.

In order to provide greater clarity on existing positions within the November Draft and, in particular, in order to address the concerns of the Joint Committee, the government has:

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- published an operational case for bulk powers, giving "unprecedented detail on why they need their existing powers and how they are used;"
- committed to "working with industry" to implement the retention of ICRs—the revised proposals accept the Joint Committee's recommendation that ICRs can be accessed to allow the pursuit of investigative leads; and
- clarified its position on encryption, making it clear that companies can only be asked to remove encryption that they themselves have applied, and only where it is practicable for them to do so—the government says that it isn't asking companies to weaken their security by undermining encryption.

Reaction to the Draft Bill.

Despite the government's attempts to address the issues raised by certain stakeholders, the reaction to the Draft Bill have been no more muted than the last. The key concerns centre around: (i) the fast-tracking of the approvals process for the Draft Bill; (ii) the over-extension of powers; and (iii) the level of scrutiny applied to provisions of the Draft Bill.

The overall message from industry is that more time and further debate is needed.

Government in a Rush.

The Open Rights Group (ORG) has called for the government to "stop rushing the Investigatory Powers Bill through Parliament," while Executive Director of the ORG, Jim Killock, said that the government was "treating the British public with contempt if it thinks it's acceptable to rush a Bill of this magnitude through Parliament."

In Mr Killock's view, Members of Parliament (MPs) and peers need sufficient time to consider "the fundamental threats to our privacy and security posed by the Investigatory Powers Bill" and, at the moment, many were preoccupied with what he called "important decisions about Europe." Mr Killock went on to say that the Draft Bill "barely pays lip service to the concerns raised by the committees that scrutinized [it]" and, if passed, would mean that the U.K. will have "one of the most draconian surveillance laws of any democracy," with "mass surveillance powers to monitor every citizen's browsing history."

Anticipating concerns about the need for detailed scrutiny of the Draft Bill, the government said that it "has always said the new legislation would be subject to full public and Parliamentary scrutiny to ensure we get this right." It also pointed out that, in addition to the scrutiny the November Draft received by the three committees mentioned above, investigatory powers have also been the subject of three independent reviews over the last two years, and that these reviews had played "an important role" in developing the proposals in the Draft Bill. These were completed by the Independent Reviewer of Terrorism Legislation David Anderson QC, the Intelligence and Security Committee of Parliament and a panel convened by the Royal United Services Institute.

The concern remains, however, that four months—between November 2015 and March 2016—was an insufficient amount of time in which to properly scrutinize and debate the Draft Bill's provisions, and that in any event, the concessions made, so far, still don't address the various concerns that have been raised. The overall message from industry is that more time and further debate is needed.

Scrutiny of the Bill's Provisions.

The ISPA added its voice to the fast-track discussion, stating that the Internet industry was "disappointed" with the fast tracking of the Draft Bill. It also added that, although it was widely agreed that a new legislative framework was needed, it had to balance the interests of privacy and security with the impact on the internet industry.

Whilst the ISPA welcomed the publication of further information alongside the Draft Bill, including the associated draft Codes of Practice, the government had "pledged a number of changes" that would "require close scrutiny."

Impact on Journalism and Press Freedoms.

The News Media Association reported that in a House of Commons debate on 15 March 2016, Labour and Scottish National Party (SNP) MPs, including Shadow Home Secretary Andy Burnham, raised concerns that the legislation would weaken existing protection for journalists' sources and leave journalists "wide open" to other powers.

According to the News Media Association (NMA), SNP MP Stuart McDonald warned that the legislation would allow warrants to be significantly modified without judicial oversight, which risked "running a coach and horses" through judicial protections, outlined in the Draft Bill.

The NMA has already warned that PACE type press freedom protections and procedures must be added to the Draft Bill so that it doesn't create a serious threat to agenda-setting investigative journalism invested in by news media publishers.

According to the NMA Mr Burnham said: "Clause 68, which makes the only reference to journalists in the entire Bill, sets out a judicial process for the revelation of a source. Its concern is that journalists are wide open to other powers in the Bill. Given the degree of trust people need to raise concerns via the political, legal or media route, and given the importance of that to democracy, I think the Government need to do further work in this area to win the trust and support of those crucial professions."

Comment.

Despite moves by the government to address the concerns and issues raised by stakeholders since the November Draft, the divisive nature and pervasive scope of the provisions have led to increasingly vocal calls for the Draft Bill to be subject to more extensive debate and scrutiny, in order to put in place appropriate checks and balances to allow the Draft Bill to have the teeth it requires, without eroding the freedoms of the public.

Some commentators have remarked that government's pre-occupation with Brexit may result in this Bill failing to get the attention it deserves if the government still seeks to achieve Royal Assent by the end of 2016, however, despite the strength of feeling behind the rights the Draft Bill affects, it seems that something has to give over the course of the next few months in order to avoid the enactment of a deeply unpopular and controversial Act of Parliament.

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