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HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

INVESTIGATORY POWERS BILL

Fourth Sitting

Tuesday 12 April 2016

(Afternoon)

CONTENTS

Clauses 13 to 20 agreed to.
Clause 21 agreed to, with amendments.
Clauses 22 to 29 agreed to.
Written evidence reported to the House.
Adjourned till Thursday 14 April at half-past Eleven o'clock.

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 16 April 2016

The Committee consisted of the following Members:

Chairs: †Albert Owen, Nadine Dorries

† Atkins, Victoria *(Louth and Horncastle)* (Con)
† Buckland, Robert *(Solicitor General)*
† Cherry, Joanna *(Edinburgh South West)* (SNP)
Davies, Byron *(Gower)* (Con)
† Fernandes, Suella *(Fareham)* (Con)
† Frazer, Lucy *(South East Cambridgeshire)* (Con)
† Hayes, Mr John *(Minister for Security)*
† Hayman, Sue *(Workington)* (Lab)
† Hoare, Simon *(North Dorset)* (Con)
Kinnock, Stephen *(Aberavon)* (Lab)
† Kirby, Simon *(Brighton, Kemptown)* (Con)
Kyle, Peter *(Hove)* (Lab)
† Matheson, Christian *(City of Chester)* (Lab)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Starmer, Keir *(Holborn and St Pancras)* (Lab)
† Stephenson, Andrew *(Pendle)* (Con)
† Stevens, Jo *(Cardiff Central)* (Lab)
† Warman, Matt *(Boston and Skegness)* (Con)

Glenn McKee, Fergus Reid, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 12 April 2016

(Afternoon)

[Albert Owen *in the Chair*]

Investigatory Powers Bill

Clause 13

Warrants that may be issued under this Chapter

Amendment proposed (this day): 57, in clause 13, page 10, line 16, after "content", insert "or secondary data".—*(Keir Starmer.)*

This amendment, and others to Clause 13, seek to expand the requirement of targeted examination warrants to cover the examination of all information or material obtained through bulk interception warrant, or bulk equipment interference warrant, irrespective of whether the information is referable to an individual in the British Islands. They would also expand the requirement of targeted examination warrants to cover the examination of "secondary data" obtained through bulk interception warrants and "equipment data" and "information" obtained through bulk equipment interference warrants.

2 pm

Question again proposed, That the amendment be made.

The Chair: I remind the Committee that with this we are discussing the following:

Amendment 58, in clause 13, page 10, line 17, leave out from "examination" to end of line 18.

Amendment 59, in clause 13, page 10, line 17, leave out from "examination." to end of line 18 and insert

"of material referable to an individual known to be in the British Islands at that time, or British citizen outside the British Islands at that time."

Amendment 60, in clause 13, page 10, line 17, leave out from "examination." to end of line 18 and insert

"of material referable to an individual known to be in the British Islands at that time, or British, Canadian, American, New Zealand or Australian citizen outside the British Islands at that time."

Amendment 83, in clause 13, page 10, line 22, after "6", insert—

"In this Part "secondary data" means—

(a) in relation to a communication transmitted by means of a postal service, means any data falling within subsection (5);

(b) in relation to a communication transmitted by means of a telecommunication system, means any data falling within subsection (5) or (6)."

The Minister for Security (Mr John Hayes): I am delighted to welcome you to the Chair, Mr Owen. In your absence, under the stewardship of Ms Dorries, we had enlightening and rigorous scrutiny of the early provisions of the Bill and had got to the point of considering the third group of amendments. They are complicated, as illustrated by the shadow Minister's opening remarks. I was about to go into some detail about the safeguards that we have put in place. So that we are all up to speed, I will mention that I had referred briefly to the recommendations made by the independent reviewer, Mr David Anderson, in his report, "A Question of Trust", in relation to this area of the Bill—the use of material recovered under bulk warrants. I had reminded the Committee that the provisions before us reflect that advice. The Government have essentially taken the advice of David Anderson and built it into the Bill that we are now considering.

The current bulk access safeguards under the Regulations of Investigatory Powers Act 2000 have, of course, recently been scrutinised by the Investigatory Powers Tribunal. After extensive argument, the tribunal ruled that the current approach fully met the UK's obligations under the European convention on human rights. In particular, the tribunal ruled that it was not necessary to apply the protections that apply to content to related communications data—the other data associated with a communication but not its content that has been redefined as secondary data in the Bill—to ensure ECHR compliance.

Both targeted and bulk warrants authorise the collection of content and secondary data. That, I think, clears up one of the doubts that some Committee members may have had. A bulk warrant also authorises the circumstances in which content and secondary data can be selected for examination. The Secretary of State and the judicial commissioner, when authorising warrants, agree the operational purposes that determine what content and what secondary data can be examined. In other words, at the point when the warrant is issued, both the judicial commissioner, in the arrangements that we propose, and the Secretary of State, in those arrangements and now, are fully aware of the operational reasons for the request. There is no distinction in those terms—again, I think this addresses some of the points raised by the hon. and learned Member for Holborn and St Pancras—between content and secondary data.

Where the difference comes is in relation to the additional protections for persons in the UK. In fact, the hon. and learned Gentleman made reference to this. The Bill makes it clear that examination of the content, once it has been collected, of data relating to persons in the UK can take place only when an additional warrant has been issued. People should bear it in mind that there will already be a bulk warrant authorising collection; this is a separate process from the collection of data. An additional warrant must be issued that specifically authorises examination. There is a warrant to collect data and another warrant to examine data, and at the point when those warrants are considered by the Secretary of State and, under these new arrangements, by the judicial commissioner, the purposes will be clearly defined. The Secretary of State will be aware of why the request is being made and why it matters.

We talked earlier, in a different part of our consideration, about authorising powers only where they are necessary because nothing else will do the job—the point raised by the hon. and learned Gentleman. I want to emphasise that those considerations, around the broad issues—they are no less important because of their breadth—of proportionality and necessity, will govern all these matters.

Keir Starmer (Holborn and St Pancras) (Lab): To clarify, I think I heard the Minister say—if I misheard him, he can ignore this intervention—that two bulk

warrants would be put forward at the same time; one for the intercept and one for the examination. However, I am not sure that is right. I had always read this as one warrant within which different types of conduct are authorised. Therefore, the warrant could—I am looking at clause 119(4)—authorise both the interception and the selection for examination. I may be wrong about that, but I had always understood that one warrant would authorise all the conduct in one fell swoop at the beginning, rather than there being two warrants. If I misheard, I apologise.

Mr Hayes: Essentially, in order to obtain collection—to have bulk collection and examination—a warrant is required. The Bill makes it clear that the examination of content of persons in the UK requires an additional warrant. That is the point I was making.

Authorisation for persons in the UK does not apply to secondary data, because it is often not possible to determine the location of a person without taking those data. The reason why it looks like there is an inconsistency in respect of a set of data—or it might be perceived that way, without fuller consideration—is that, in relation to secondary data, it is not always possible to determine where someone is until the secondary data have been collected.

The point I made earlier was that it is a well and long-established principle that non-content is less important and less intrusive than content. Content is likely to be more intrusive, so what we are describing in these terms replicates the existing position—the long-established practice—which, as I said, was upheld by the Investigatory Powers Tribunal. This is the existing practice, and it has been examined and found to be appropriate and reasonable. I mentioned ECHR compliance in that respect.

I have described the existing regime and its examination, but the regime proposed under the Bill further enhances the safeguards that the security and intelligence agencies already apply when accessing data obtained under a bulk interception warrant. The access arrangements are set out in part 6 of the Bill: for example, secondary data, as well as content, can be accessed only for one or more of the operational purposes specified on the warrant and approved by the Secretary of State and the judicial commissioner. The Bill also includes a requirement that an analyst must consider the necessity and proportionality of any access to any data obtained under a bulk interception warrant in line with the operational purposes. Without putting words into the mouths of Committee members, it could be argued that it is all very well setting out the operational purposes at the outset and that, further, at that point they might be deemed to legitimise the use of the powers in terms of necessity and proportionality, but that that might not be the case further down the line. It is therefore important that we have introduced further analysis of the data collected under the bulk warrant, rather than just when collection is authorised.

Extending targeted examination warrants to non-content data, including secondary data, which is what the amendments propose, would be disproportionate and impractical. That would radically change the bulk data regime, reduce its efficacy and place a substantial burden on the security and intelligence agencies, requiring them to obtain highest level authorisation for data that would often resemble the kind of information routinely collected under a part 3 authorisation.

Joanna Cherry (Edinburgh South West) (SNP): I remind the Minister that when I spoke before lunchtime, I highlighted the fact that the Intelligence and Security Committee has a concern about secondary data derived from content not being protected. What does the Minister make of the ISC's concerns? Why have the Government dismissed them?

Mr Hayes: I wondered whether the ISC might be raised in this respect. Of course the hon. and learned Lady is right. With her typical diligence she has identified that the ISC does indeed make that point. The answer to the question is that we welcome scrutiny and we invite consideration of these proposals. All of the Committees that looked at these matters made a whole series of recommendations, some of which the Government accepted with alacrity, some of which the Government continue to consider, and some of which the Government do not agree with. It is true that that point has been made, and I said that this might reasonably be argued. However, I think that we have gone far enough in this area in balancing the proper desire for effective safeguards with the operational effectiveness of the agencies.

Bulk collection is really important. Without giving away too much sensitive information, I can happily let the Committee know that as Security Minister I have visited GCHQ, as the Committee would expect me to do. I have looked at the kind of work the staff there do in respect of bulk data collection, and I have seen the effect it has. Contrary to what might be described as a rather crude view of what bulk collection is all about, it is not searching for a needle in any haystack; it is being highly selective about which haystacks are looked at. It is about trying to establish connections, networks and relationships between organisations and individuals; places and people. I have no doubt that without these powers the work of our intelligence and security services would be inhibited. However, I accept that safeguards are needed: I do not for a moment suggest anything else.

I turn now to amendments 58, 59 and 60. These amendments seek to extend the circumstances in which a targeted examination warrant is required beyond the current situation in the Bill, such that they are not limited to persons in the UK. The intention of amendment 58 appears to be that an individual targeted examination warrant would be required from the Secretary of State and a judicial commissioner each time an analyst in an intelligence agency wished to examine the content of any communications acquired under a bulk data interception warrant. This would apply irrespective of where in the world the sender or recipient of the communication was located. As currently drafted, the Bill makes it clear that a targeted examination warrant must be sought if an analyst wished to examine the content of communications of individuals in the British islands which had been obtained under a bulk interception warrant.

Amending the scope of a targeted examination warrant as proposed would, in my view, fundamentally alter the operation of the bulk regime. I am advised to that effect by those who use these powers. There is plainly a rational justification for treating the communications of persons known to be in the British Isles differently to those of persons who are believed to be overseas. Within the UK, the interception of communications is a tool that is used to advance investigations into known threats,

[Mr John Hayes]

usually in conjunction with other capabilities and other tools. Of course, serious investigations of the kind we are talking about are complicated, and very often this will be only one of the means that are used to establish the patterns of activity of the networks I have described and the threats that I have outlined.

Christian Matheson (City of Chester) (Lab): I seek the Minister's clarification more than anything else. Is there a view in the Government that there is a difference between the external threat of people who are not in the British Isles and also are not British citizens, as opposed to those who are British citizens? Is it the Government's view that we have a responsibility to protect the privacy of British citizens, as we are charged to do, as opposed to those who may present an external threat to the United Kingdom?

2.15 pm

Mr Hayes: We legally have different responsibilities with respect to UK citizens. The hon. Gentleman is absolutely right. UK citizens are protected by all kinds of legal provisions, not only those in this Bill, far from it. He is absolutely right that different circumstances prevail. However, it is slightly more complicated than that, as he knows. We may be talking about people who are British but not in Britain at a particular time, or people who are not British but in Britain at a particular time. We may be speaking about people who are moving in and out of the country. These are often quite complex webs about which we are trying to establish more information. Of course, things such as surveillance and agent reporting will pay a part in this. All the conventional means by which these things are investigated would interface with the tools that the agencies currently use and are given greater detail and more safeguards in the Bill. The hon. Gentleman is right to say that we should have an approach that is appropriate to the circumstances and the kind of people we are dealing with.

It is important to emphasise again that applications for targeting reception warrants will be supported by a detailed intelligence case. There has to be a clear operational purpose—a case needs to be made. That means that the Secretary of State must be satisfied that the use of these powers is appropriate. The Bill quite rightly ensures that the agencies must provide the same detailed case if they want to examine communications of a person in the UK that have been intercepted under a bulk warrant.

The hon. Gentleman's point about threats outside the UK is important, because it is often only through bulk powers of the kind detailed in the Bill that we are able to discover threats outside the UK, particularly in countries such as Syria where we may have little or no physical presence and limited cover in respect of the security services, for obvious reasons. In those circumstances, the amount of information we have to deal with being very limited, bulk interception plays a critical part. It will often be necessary to examine the communications of individuals outside the UK, for obvious reasons, based on partial intelligence—the limited intelligence we have—in order to determine whether they merit further investigation or in order sometimes to eliminate people from the inquiries. Many of the powers that I am describing—indeed many of the powers in the Bill—as well as identifying, qualifying and making further steps more exact, are about eliminating people from consideration, because once we know more, we know they do not pose a real or current threat. It is therefore really important that we understand that this plays a vital role in mitigating the threat to the UK from overseas.

Requiring an analyst to seek permission from the Secretary of State or the judicial commissioner every time they consider it necessary to examine the content of a communication sent by a person outside the UK would inhibit the ability of the security and intelligence agencies to identify new and emerging threats from outside the UK.

I want to emphasise that the scale and character of the threats we face have changed and continue to do so. This is partly because of changing technology, the way in which people communicate, the adaptability of those who threaten us and the complexities of the modern world. Unless we have powers that match—indeed, outmatch—the powers that are in the hands of those who seek to do us harm, we will simply not be able to mitigate those threats in the way that is needed in defence of our country and countrymen.

The current bulk access safeguards under the Regulation of Investigatory Powers Act 2000 have recently been scrutinised. The Investigatory Powers Tribunal found in particular that there was sufficient justification for enhanced safeguards to be applied only where an analyst is seeking to examine the content of people in the British Isles. Nevertheless, the Bill enhances the safeguards and while I am sympathetic to the aims of amendments 59 and 60, they present practical challenges in their own right.

As hon. Members will appreciate, overseas-based individuals discovered in the course of an investigation do not uniformly present their nationality and passport details to agencies, so in practical terms the agencies will simply not be able to do what the amendments require. The amendments could also give rise to discrimination issues. As I explained, there is a clear justification for applying different safeguards to persons located outside the UK, but it is by no means clear that it is necessary to apply different protections to people of a particular nationality. Accordingly, providing for such a distinction in law could place the UK in breach of its international obligations, particularly our obligation not to discriminate on grounds of nationality.

It is right that we take a view about people who are operating in a way that is injurious to our interests from outside the UK, but it is equally right that we do not make prejudgments. Again, we are trying to strike a balance in this part of the Bill. The aim of the Bill is to place vital powers on a statutory footing that will stand the test of time. I believe that the strongest safeguards for the examination of communications, taking into account the challenges of identifying threats outside the UK, are necessary, and that we are in the right place with the Bill.

Finally, amendment 83 relates to the clause 14 definition of secondary data, which sets out how it can be obtained through an interception warrant provided for in part 2 of the Bill. The amendment seeks to replace the current definition in the Bill with a narrower one.

Suella Fernandes (Fareham) (Con): Welcome to the Chair, Mr Owen, for my first contribution to this Committee.

Regarding amendments 59 and 60, is it not the position that bulk interception is provided for under section 8(4) of RIPA and is therefore subject to tests of necessity and proportionality? If it relates to a British citizen within the British Isles and an analyst wishes to select for examination the content of the communication of an individual known to be located in the British islands, the analyst has to apply to the Secretary of State for additional authorisation under section 16(3) of RIPA—similar to section 8(1). There are robust and extensive safeguards in place for this purpose.

Mr Hayes: I am delighted to be able to say in response to that extremely well informed intervention that my hon. Friend is right. The Bill does not actually add to bulk powers, contrary to what some have assumed and even claimed. In the sense that it reinforces safeguards and maintains the ability of our agencies to collect bulk data, it builds on what we already do. The Bill pulls together much of the powers in existing legislation; part of its purpose is to put all of those powers in one place, making them easier to understand and more straightforward to navigate. She is absolutely right; we took those powers in RIPA because they were needed to deal with the changing threats and the character of what we knew we had to do to counter them. That was done in no way other than out of a proper, responsible desire to provide the intelligence agencies with what they needed to do their jobs.

To return to amendments 59 and 60, when people are discovered to be outside the country and are subject to an investigation by the security services they do not usually present their credentials for examination, and it is important that the powers we have fill what would otherwise be a gaping hole in our capacity to do what is right and necessary. The aim of the Bill is to place vital powers on a statutory footing that will stand the test of time.

Amendment 83 relates to clause 14 and the definition of secondary data. It is important to point out that it has always been the case that an interception warrant allows communications to be obtained in full. Historically, that has been characterised in law as obtaining the content of communication and of any accompanying "related communications data". However, as communications have become more sophisticated it has become necessary to revise the definitions to remove any ambiguities around the distinction between content and non-content data and to provide clear, simple and future-proof definitions that correctly classify all the data the intercepting agents require to carry out their functions.

Secondary data describes data that can be obtained through an interception warrant other than the content of communications themselves. Those data are less intrusive than content, but are a broader category of data than communications data. For example, it could include technical information, such as details of hardware configuration, or data relating to a specific communication or piece of content, such as the metadata associated with a photographic image—the date on which it was taken or the location—but not the photograph itself, which would, of course, be the content.

I want to make it clear that the data will always, by necessity, be acquired through interception. The definition does not expand the scope of the data that can be acquired under a warrant, but it makes clearer how the data should be categorised. Interception provides for the collection of a communication in full and the amendment would not serve to narrow the scope of interception. It would, however, reduce the level of clarity about what data other than content could be obtained under a warrant. It would also have the effect of undermining an important provision in the Bill. In some cases secondary data alone are all that are required to achieve the intended aim of an operation or investigation. That is an important point. Another misconception is that it is always necessary to acquire content to find out what we need to know. In fact, sometimes it is sufficient to acquire simpler facts and information. For that reason, clause 13 makes it clear that obtaining secondary data can be the primary purpose of an interception, and the kind of data that can be obtained under a warrant is also set out.

Narrowing the scope of secondary data would reduce the number of occasions on which the operational requirement could be achieved through the collection of those data alone, resulting in greater interference with privacy where a full interception warrant is sought. Where we do not need to go further we should not go further. Where secondary data are sufficient to achieve our purposes, let that be so.

Secondary data are defined as systems data and identifying data included as part of or otherwise linked to communications being intercepted. Systems data is any information that enables or facilitates the functioning of any system or service: for example, when using an application on a phone data will be exchanged between the phone and the application server, which makes the application work in a certain way. Systems data can also include information that is not related to an individual communication, such as messages sent between different network infrastructure providers, to enable the system to manage the flow of communications.

Most communications will contain information that identifies individuals, apparatus, systems and services or events, and sometimes the location of those individuals or events. The data are operationally critical to the intercepting agencies. In most cases, the information will form part of the systems data, but there will be cases when it does not. When the data are not systems data and can be logically separated from the communication, and would not reveal anything of what might reasonably be considered to be the meaning of the communication, they are identifying data. For example, if there are email addresses embedded in a webpage, those could be extracted as identifying data. The definitions of systems data and identifying data make clearer the scope of the non-content data that can be obtained under the interception warrant.

The fact that the definition of secondary data is linked to clear, central definitions of systems and identifying data ensures that there can be consistent application of powers across the Bill to protect privacy and that data can be handled appropriately regardless of the power under which it has been obtained.

2.30 pm

In a nutshell, the Bill provides a clearer breakdown of the kinds of data, why they matter, and where they

might be identified and used in a way that would be hard to identify in the variety of legislation that currently underpins the powers. It brings things together and makes them clearer. With that fairly lengthy but necessarily detailed explanation, I invite hon. Members not to press the amendments.

Christian Matheson: Mr Owen, it is traditional that hon. Members recognise the Chair. I do so not only because of your consummate skills in chairmanship, but because as the Member for Ynys Môn you bring back happy childhood memories of many childhood summer holidays in Benllech, Red Wharf Bay, Llangefni market and suchlike.

I listened to the Minister's detailed explanations—I pay tribute to him for the length and the detail he went to—sometimes with the vision of a wet towel around my head invoked by my hon. and learned Friend the Member for Holborn and St Pancras. This is not a very politically correct thing to say and hon. Members may find it disappointing, but frankly I do not give a tinker's cuss whether, in the defence of the realm, we seek access to information from outside the UK or outside British citizenry. Parliament has a responsibility to this country and we will exercise that. As we have discussed, we also have a responsibility to British citizens to respect their privacy. The crux of the Bill is the balance that we will achieve between those two competing demands.

I am not clear yet, particularly in respect of the point made by my hon. and learned Friend, as to whether the question of secondary data that will be extracted and that affects UK citizens has been correctly answered. If the Minister can give an assurance—I appreciate that he has already given a long and detailed answer—of his confidence that the privacy of UK citizens or people within the UK can be properly protected, I am sure we would be able to move on. The balance that we need to strike between protecting the privacy of UK citizens and protecting their personal security and the security of the nation is difficult.

Mr Hayes: To be absolutely clear, the means of the acquisition of content and secondary data and the operational purposes for which those data can be selected for examination will be explicitly authorised by the judicial commissioner and the Secretary of State. The operational case for the collection of those data must be explicit and sufficiently persuasive that the warrant is granted by the Secretary of State and by the judicial commissioner. I hope that gives the hon. Gentleman the assurance he desires.

Christian Matheson: I am most grateful for that assurance and explanation and, indeed, for the previous explanation. The Minister has gone into considerable depth on the matter and I am most grateful for that.

Keir Starmer: I, too, welcome you to the Chair of this Committee, Mr Owen. It is a privilege to serve under your chairmanship.

The assurance that has just been asked for cannot be given because the whole purpose of the provision is to enable the secondary data of any of us in this room that is caught by a bulk interception warrant to be looked at without any further warrant. If my data is swept up in a bulk interception warrant, even though I am not the target it can be examined without a separate warrant. That goes for every member of the Committee, every member of the public and everybody residing in the British Isles. The neat distinction between people here and people abroad breaks down in relation to this clause. I want us to be clear about that. The Minister is making the case that that is perfectly appropriate and necessary and that there are sufficient safeguards in place, but he is not making the case that this would not happen for those in the British Isles. It can and undoubtedly does happen, and it will happen under this regime. That means that all our secondary data are caught by this provision, even where we are not the primary target.

The Minister pointed to the double lock and the roles of the Secretary of State and judicial commissioner. He took an intervention on that, but I want to be absolutely clear on what those roles are and how necessity and proportionality play out. Clause 125 sets out what requirements must be met by a bulk interception warrant. Subsection (3) says:

> "A bulk interception warrant must specify the operational purposes for which any intercepted content or secondary data obtained under the warrant may be selected for examination."

The Minister points to that and says that there has got to be an operational purpose, which is true. However, we then read just how specific that operational purpose is likely to be:

> "In specifying any operational purposes, it is not sufficient simply to use the descriptions contained in section 121(1)(b) or (2)".

Those are just the general descriptions of national security and preventing serious crime, so it is not enough to say that the operational reason is national security or to prevent serious crime. Well, good—that that is all that had to be specified, it would not be very much. However, the purposes may still be general purposes, so the operational purposes are likely to be very broad—necessarily so in practical terms, given that it is a bulk warrant.

The role of the Secretary of State and the judicial commissioner is to decide whether the warrant is necessary and proportionate according to those purposes. We keep using the words "necessary and proportionate". We have to keep an eye on what the object of the necessity and proportionality is. The question for the Secretary of State and the judicial commissioner is whether it is necessary and proportionate for the very broad operational purposes that are permitted under clause 125. It is not a very detailed, specific examination by the Secretary of State or the judicial commissioner; nor could it be.

At some later date, there is further consideration when it comes to examination. If it was suggested that at the later stage of actual examination, rather than authority for examination, it goes back to the Secretary of State and judicial commissioner, that is just plain wrong. It does not go back at all. All that the judicial commissioner or Secretary of State do is to authorise the general purposes under the warrant. As far as selection is concerned, that is governed by clause 134(1) and (2). Subsection (2) specifies that:

> "The selection of intercepted content or secondary data for examination"

—that is at the heart of what we are talking about—

> "is carried out only for the specified purposes".

That relates to back to subsection (1). It continues,

> "only so far as is necessary"

—necessary to what? It then refers straight back to the "operational purposes" set out in clause 125. Even at that later stage, the question of necessity and proportionality is against the very broad operational purposes. The Minister has been very clear about this and I am not suggesting otherwise, but the idea that there is some forensic and carefully curtailed exercise that looks in detail at the individual circumstances of the case is pretty far-fetched. In the end, all anyone has to do is ask whether it is necessary or proportionate to the general operational purposes upon which the warrant was issued in the first place. That is very different from the test set out for targeted interception. It is the test that will be applied to all the secondary data of anybody in this room who ever finds themselves caught up in a bulk interception warrant. That is not far-fetched. There will be many bulk intercept warrants, which may well capture the content and secondary data of many members of the public who are not targets in any way.

As a result, although I applaud the Minister for his long and detailed answer, it was not very persuasive regarding the necessity of this scheme or the effectiveness of the safeguards. Simply saying that secondary data may be necessary to determine location is hardly enough to justify the provision. I recognise that secondary data are different to content and that bulk powers are different from targeted powers, but in the end, when this is unravelled, it shows that there is no effective safeguard. In the circumstances we will not divide the Committee on the amendment, but I reserve the right to return to the matter at a later stage. It goes to the heart of the Bill. When properly analysed and understood, the safeguard in this respect is barely a safeguard at all.

Mr Hayes: I do not want to delay the Committee unduly, but I will offer this response. First, I direct the hon. and learned Gentleman to the "Operational Case for Bulk Powers", which specifies the ways in which bulk powers will be used. The operational case will be specific. I am grateful to him for not pressing the amendment. I am happy to write to the Committee to reinforce our arguments and I think that we might reach a Hegelian synthesis—I am very keen on Hegel, as he knows. I agree that it is often necessary to examine the secondary data to determine the sender—he knows that that is the case—but I disagree about the lack of specificity on the operational purposes. We cannot give too much detail on that, for the reasons of sensitivity that he will understand, but I am happy to write to him to draw his and the Committee's attention to the "Operational Case for Bulk Powers", which is targeted at overseas threats but might, as he properly said, draw in some data from those who are in the UK. I hope that when I write to him he might decide not to bring these matters back further. I am grateful for his consideration.

Joanna Cherry: I, too, welcome you to the Chair, Mr Owen. It is a pleasure to serve under your chairmanship.

Before lunch, I spoke to amendment 83, concerning secondary data. I did not speak to amendment 84, because it was tabled but not selected, but it is really a corollary: it proposes leaving out clause 14.

I have listened carefully to what the Minister has said and I am grateful to him for his detailed explanation, but he does not take on board the concerns that I attempted to articulate on secondary data, notwithstanding the fact that similar concerns were articulated by the Intelligence and Security Committee. We will have to agree to differ for the time being. I associate myself with the comments made by the hon. and learned Member for Holborn and St Pancras about the other issues relating to the these amendments, in particular his pertinent and typically incisive point about clause 125(3).

Having sought clarification this morning from the Chair on the voting procedures, I do not intend to push the amendment to a vote, because I think that I would end up with something of a pyrrhic victory. However, I emphasise that I stand by the necessity for the grouped amendments and wish to revisit them later during the passage of the Bill. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 13 ordered to stand part of the Bill.

Clause 14

Obtaining secondary data

Question proposed, That the clause stand part of the Bill.

Joanna Cherry: I tabled an amendment to delete clause 14. I do not think it has been selected, but I have made my position clear. I wish to revisit this issue at a later stage.

Question put and agreed to.

Clause 14 accordingly ordered to stand part of the Bill.

Clause 15

Subject-matter of warrants

Joanna Cherry: I beg to move amendment 4, in clause 15, page 12, line 3, leave out "or organisation".

This amendment, and others to Clause 15, seek to preserve the capacity of a single warrant to permit the interception of multiple individuals while requiring an identifiable subject matter or premises to be provided.

The Chair: With this, it will be convenient to discuss the following: amendment 5, in clause 15, page 12, line 8, after "activity" insert

"where each person is named or otherwise identified".

Amendment 6, in clause 15, page 12, line 9, leave out "or organisation".

Amendment 7, in clause 15, page 12, line 11, after "operation", insert

"where each person is named or otherwise identified".

Amendment 8, in clause 15, page 12, line 12, leave out paragraph (2)(c).

Amendment 9, in clause 15, page 12, line 13, leave out subsection (3).

Amendment 52, in clause 27, page 21, line 7, leave out 'or organisation'.

Amendment 53, in clause 27, page 21, line 8, leave out 'or organisation'.

Amendment 54, in clause 27, page 21, line 13, leave out

'or describe as many of those persons as is reasonably practicable to name or describe' and insert 'or otherwise identify all of those persons'.

Amendment 55, in clause 27, page 21, line 15, leave out 'or organisation'.

Amendment 56, in clause 27, page 21, line 19, leave out

[The Chair]

'or describe as many of those persons or organisations or as many of those sets of premises, as it is reasonably practicable to name or describe' and insert 'all of those persons or sets of premises'.

Joanna Cherry: The effect of these amendments to clause 15 would be to retain the capacity of a single warrant to permit the interception of multiple individuals but require an identifiable subject matter or premises to be provided. Associated amendments to clause 27 would be required. This would narrow the current provisions, which, in my submission, effectively permit a limitless number of unidentified individuals to have their communications intercepted.

As drafted, clause 15 permits warrants to be issued in respect of people whose names are not known or knowable when the warrant is sought. That is confirmed by clause 27, which provides that a thematic warrant must describe the relevant purpose or activity, and

"name or describe as many of those persons…as…is reasonably practicable".

The creation of thematic warrants in the Bill means that communications intercepted in their billions under part 6 could be trawled thematically for groups sharing a common purpose or carrying out a particular activity. The difficulty with that is that it provides for an open-ended warrant that could encompass many hundreds or thousands of people, and the expansive scope of these warrants, combined with the broad grounds with which they can be authorised, does not impose sufficient limits on the authorities' interception powers.

The existence of thematic interception warrants was avowed by the Secretary of State in March 2015. The Intelligence and Security Committee has reported that the significant majority of section 8(1) warrants under RIPA relate to one specific individual but that some do not apply to named individuals or specific premises, and instead apply to groups of people. The current Home Secretary has apparently derived the authority to do so from a broad definition given to the word "person" that is found elsewhere in RIPA, despite the unequivocal reference to "one person" in section 8(1) of RIPA. I suggest that what has gone on in the past is a very unorthodox statutory construction.

Be that as it may, in considering the terms of this Bill the ISC has reported that the Interception of Communications Commissioner has

"made some strong recommendations about the management of thematic warrants"

and in some cases recommended that they be cancelled. The ISC has expressed further concerns about the extent to which this capability is used and the associated safeguards that go along with it. It has suggested that thematic warrants must be used sparingly and should be authorised for a shorter time than a standard section 8(1) warrant.

Reporting on the draft version of the Bill, the ISC noted that "unfortunately"—the Committee's word—its previous recommendation about thematic warrants

"has not been reflected in the draft Bill";

nor has it been reflected in the revised Bill, in which the scope for thematic warrants remains unchanged. It is not only the ISC that has concerns about this issue. The Joint Committee on the draft Bill also recommended that

"the language of the Bill be amended so that targeted interception and targeted equipment interference warrants cannot be used as a way to issue thematic warrants".

Many lawyers believe that the scope of warrants permitted under clause 15 as drafted would fail to comply with both the common law and European Court of Human Rights standards, as expounded in a very recent decision in Zakharov *v.* Russia from 4 December 2015. In that case, the ECHR found that Russia's interception scheme was in violation of article 8 of the European convention on human rights. Also, the Court cited the fact that Russian courts sometimes grant interception authorisations that do not mention a specific person or a specific telephone number to be tapped but authorise interception of all telephone communications in the area where a criminal offence has been committed. Although thematic warrants do not relate to geographical location, in my view and that of many far more distinguished lawyers, they are sufficiently broad to violate article 8 of the convention. Our amendments are required to make clauses 15 and 27 compatible with that article.

2.45 pm

In support of what I am saying, I remind the Committee of the evidence of Sir Stanley Burnton and Lord Judge on 24 March in the afternoon session. I have printed their evidence, because I do not like working on my iPad when it is as detailed as this. The hon. and learned Member for Holborn and St Pancras asked:

"One final swift question on thematic warrants and the breadth of the powers proposed in the Bill. Do any of the witnesses have headline concerns that the Committee can take away to work on as we consider the Bill line by line?"

Sir Stanley Burnton said:

"First, the existing formulation in RIPA is very unsatisfactory and unclear, and it does not cover many cases in which it would be sensible to have a so-called thematic warrant. However, the wording of clause 15(2) is very wide. If you just have a warrant that gives a name to a group of persons, you have not identified—certainly not in the warrant—all those persons to whom it is going to apply. There could be substantial changes in the application of the warrant without any modification. At the moment, the code of conduct envisages a requirement that names will be given so far as practicable. Our view is that the warrant should name or otherwise identify all those persons to whom the warrant will apply, as known to the applicant at that date."

There we have a pretty unequivocal view from the Interception of Communications Commissioner.

Lord Judge then intervened to indicate that he agreed with Sir Stanley on clause 15(2). He did not agree with the second point Sir Stanley made in relation to clause 30—we can come back to that later. He said in relation to clause 32,

"a part of the process that all of us involved in supervising surveillance attach a great deal of weight to is that we are looking at individuals. There has to be evidence that X requires this, that there is a situation in which it is necessary for this to happen, that it is proportionate in this particular individual's case and that there is no collateral interference. For example—there are many different examples—why should a women who happens to be married to or living with a man who is suspected and so on have her life entirely opened up in this way? Not having specific identified individuals ?leaves a very delicate situation. I suspect that the commissioners would find it very difficult to just say, 'Well, we're satisfied. There's this gang here and they're all pretty dangerous.' They might not be, and we have to be very alert to that."—[*Official Report, Investigatory Powers Bill Committee,* 24 March 2016; c. 70, Q222.]

There we also have pretty trenchant concerns expressed by the Chief Surveillance Commissioner.

Victoria Atkins (Louth and Horncastle) (Con): Is the purpose of the clause to address those circumstances where, for example, the security services or police know that someone has been kidnapped, but they do not know the names of the kidnap gang or even perhaps the number of gang members? The clause is designed to enable the security services to make the inquiries they need to make to save a life.

Joanna Cherry: I think I am correct in saying that this section is directed more towards security concerns than serious crime. I will no doubt be corrected, but I can only stand by what others who deal with surveillance issues have said in their evidence to the Committee. I would also like to point to what David Anderson QC said in his follow-up evidence to the Committee at paragraphs 4 and 5.

Victoria Atkins: Will the hon. and learned Lady give way?

Joanna Cherry: I am just going to continue with this.

Victoria Atkins *rose—*

The Chair: Order, the hon. and learned Lady will continue.

Joanna Cherry: David Anderson, in his typically helpful, studious and hard-working way followed up his oral evidence to us with some additional thoughts in written evidence. He has a section headed "Thematic Targeted Powers" in which he says:

"I recommended that the practice of issuing thematic warrants be continued into the new legislative regime…I envisaged their utility as being 'against a defined group or network whose characteristics are such that the extent of the interference can reasonably be foreseen, and assessed as necessary or proportionate, in advance'—for example, a specific organised crime group".

Perhaps that answers the hon. Lady's question. He went on to say:

"I also recommended that the addition of new persons or premises to the warrant should…require the approval of a judicial commissioner, so that the use of a thematic warrant did not dilute the strict authorisation procedure that would otherwise accompany the issue of a warrant targeted on a particular individual or premises".

His following statement is very important. He says:

"On both counts, the Bill is considerably more permissive than I had envisaged. Thus: The wording of clause 15 (interception) and still more so clause 90 (EI) is extremely broad".

This answers the hon. Lady's point. Even David Anderson, who envisaged thematic warrants having some utility against a defined group or network such as an organised crime group, says that the wording of clause 15 is considerably more permissive than he had envisaged.

Victoria Atkins: The hon. and learned Lady states the opinion that clause 15 is really aimed at dealing with the security services point. It is but, may I refer her to clause 18, which deals with the grounds on which warrants may be issued by the Secretary of State? It is very clear that it can be done for national security reasons but also for the purposes of preventing or detecting serious crime.

Joanna Cherry: The hon. Lady is absolutely right. I stand corrected. Fortunately I have the assistance of David Anderson on this point. He has made the point that whereas he sees envisaged their utility in identifying a defined group or network—for example, a specific organised crime group—he remains of the view that the wording of clause 15 is "extremely broad". It should concern all members of this Committee that the independent reviewer of terrorism legislation considers the wording of this clause to be extremely broad. If the Government will not take the Scottish National party's word for it, then they can take the word of the independent reviewer of terrorism legislation. I seek the Government's assurance that they will go away and look again at clause 15 and clause 27 very carefully, in the light not only of what I have said but, more importantly, what has been said by Sir Stanley Burnton, Lord Judge and David Anderson.

Lucy Frazer (South East Cambridgeshire) (Con): I thank the hon. and learned Lady for her very detailed points. Does she accept that even though David Anderson thinks that the wording is too broad, the amendments that she proposes would make the provision too narrow? If the words "or organisation" are taken out then only a person or a premises will be identified, which would not catch the circumstances that David Anderson is thinking about. In her submission, the hon. and learned Lady identified that while the current wording was too broad, some of the organisations that she mentioned did recognise that in some circumstances the thematic powers were useful.

Joanna Cherry: The hon. and learned Lady makes a point that I have to take on board to a certain extent. I suspect that my amendments to clause 15 go further than David Anderson would if he were drafting an amendment to this clause. We are at a very early stage in this procedure. I am really seeking an assurance from the Government that they will take on board, if not my concerns, then at the very least the concerns of Sir Stanley Burnton, Lord Judge and David Anderson, and that they will take away clause 15 and clause 27 and look at them again.

Keir Starmer: I will be brief because a lot of the detailed work has been done. I listened very carefully to the Minister, not only today but on other occasions, and he indicated that the Government want to improve the Bill and that they do not have a fixed view. I therefore make these submissions in the hope that the Minister and the Government will not circle the wagons around the existing formula in clause 15 simply because those are the words on the page. The warrants are supposed to be targeted, but when reading clause 15(2) it is clear that they are very wide. I will not repeat the concerns of Lord Judge, Sir Stanley Burnton and David Anderson, but they are three individuals with huge experience of the operation of these warrants.

I take the point about kidnap cases or examples of that type. They are exactly the cases that Lord Judge and Sir Stanley Burnton will have seen in real time and reviewed, and that David Anderson will have reviewed after the event. When those three distinguished individuals say that they have concerns about the breadth of the clauses, they do so against huge and probably unparalleled experience of what the warrants provide for. I doubt

[Keir Starmer]

that anyone would suggest that they are not alive to concerns about the warrants being practical and effective in the sort of circumstances that have been described.

3 pm

Simon Hoare (North Dorset) (Con): May I put a slightly counter idea to the hon. and learned Gentleman and the hon. and learned Member for Edinburgh South West? I accept the comments of David Anderson and others, but in some instances it will not be terribly wrong to have broad definitions in the Bill. Getting legislation made in this place is a difficult and lengthy process. We must fetter those who wish this country and its citizens ill, so it is potentially a good idea to have some breadth in the definitions.

Keir Starmer: I understand the spirit underpinning the hon. Gentleman's intervention, which is that in certain circumstances a broad power can be helpful because future situations are not known. In this case, the breadth of the provision matters above all else, however, because it concerns the subject matter of the warrant. Lest anyone think otherwise, when one looks at the code of practice, one does not find that it restricts what is in the Bill. Paragraph 5.12 of the draft code says, in stark terms:

"There is not a limit to the number of locations, persons or organisations that can be provided for by a thematic warrant."

In certain circumstances, the Minister and the Government might be able to point to things that are broad in the Bill but restricted by the code, but that would not be appropriate for the subject matter of a warrant and is not the situation in this case. I am grateful to the hon. Gentleman for the intervention, however, because I need to put my concern on the table, and I invite the Government to take the matter away and have another look at it.

I am concerned that in reality, the broadly drawn warrants will be modified. We will get to the modification procedures later. The broad warrant will be signed off by the Secretary of State and the judicial commissioner, but the modification, which may well add names as they become available, will not. There is therefore the further hidden danger that the provision is so broad that it will require modification procedures to be used more often than they should, in circumstances in which they are not adequate, for reasons that I will come on to.

At the end of the day, if someone with the authority and experience of Lord Judge, Sir Stanley Burnton and David Anderson—who have more authority and experience than anyone in this room—says that they have concerns about the breadth of the warrants, for the Government simply to say, "We're not going to have another look at it", runs counter to the spirit in which they have so far approached the scrutiny of the Bill.

Lucy Frazer: I wonder whether clause 15(1) is as wide as we think, given that subsection (2) seems to relate to a category of people that is not caught by subsection (1). We would not need subsection (2) unless it referred to a wider group than subsection (1). If that is right, someone must have particular characteristics to be caught under subsection (2), which suggests that subsection (1) is in fact narrow.

Keir Starmer: That is absolutely right. If subsection (1) was wide enough to incorporate subsection (2) we would not need it. Subsection (2) is there to enable a warrant to be granted in circumstances that would be constrained by subsection (1). It is permissive—that is why the word "may" is used.

It is subsection (2) that has been singled out. Sir Stanley Burnton was absolutely clear that the wording of the subsection was wide, and that was what he focused his attention on. If someone with the experience of the experts I have named says that there is a problem because the provision is too broad, I invite the Government, in the spirit of constructing a better Bill, to go away and think about that. Those people have unrivalled experience of seeing warrants in practice.

Mr Hayes: I do not want to detain the Committee too long on these amendments, but this is an important debate, because investigation of the kind we are discussing may not at the outset be able to identify particular individuals. The effect of the amendments would be to limit the ability of warrant requesting agencies to apply for a warrant against organisations, and to require the naming of individuals. It is not always possible to do that. That includes individuals using communication devices—it may be known that someone has received a telephone call from a particular number, but not necessarily know who or where they are.

Victoria Atkins: Would a horribly pertinent example be the man in the hat in Belgium? Until this week the security services abroad did not know who that person was and were desperately trying to find out his identity.

Mr Hayes: That is an example of what I meant. There could well be people, either here or travelling here, whose identity is known only in the broadest terms. They are part of a network, a wider group or organisation, but no detail is known about them. That does not apply only to terrorist investigations; it might apply to serious organised crime investigations, in which by their nature we are dealing with organisations that desire anonymity. That means that investigations are challenging and makes the powers in the Bill absolutely necessary.

It is perfectly possible that a terrorist or criminal organisation might be seeking to travel in or out of the United Kingdom. It might not be clear at the outset which individuals will be travelling, or that all those travelling share an identified common purpose and will be carrying on the same activity, as required by the definition of "group of persons".

It is also important to note that the Bill imposes strict limits on the scope of the warrant in relation to organisations. We need to be clear that activity against an organisation must be for the purpose of a single investigation or operation, and the Secretary of State and judicial commissioner will both need to be satisfied that the warrant is sufficiently limited to be able to meet the necessity and proportionality case. It is not just that it needs to be necessary and proportionate; it must be sufficiently limited to legitimise that.

Joanna Cherry: I am thinking about the example of the man in the hat. Is that really apposite here? We are talking about targeted interception warrants and targeted

examination warrants. We cannot intercept someone's communications, or examine them, before we have identified who or where they are. Simply knowing that there is a man in a hat is of absolutely no use to us until we find some way to narrow it down and identify who the man in the hat is, even if just that he is a man living in a particular place.

Mr Hayes: The hon. and learned Lady may have misunderstood. Part 2 targeted warrants, even if they are thematic, cannot be used to trawl information collected en masse or in bulk. Targeted interception warrant applications must specify the scope of the activity to be intercepted. They cannot be open-ended; they are time-limited and must provide sufficient information for the Secretary of State to assess that the activity proposed is necessary. Indeed, all targeted interception warrants will be time-limited to six months.

Where the interception of calls between a particular handset and a group of individuals, for example, may help to identify a kidnapper—we have heard the example of kidnapping—or show where a kidnapper is, the details of what they are planning or where they might be holding the victim, it is of course possible to identify individuals to whom the warrant relates at the point when it is sought. Where that is the case, the warrant requesting agency will be expected to add the identities of the suspects to the warrant as they become known. That is a further assurance and an important new safeguard, as the hon. and learned Member for Holborn and St Pancras knows. It will allow the Secretary of State and the judicial commissioner to oversee the conduct taking place under the warrant. That obligation will be given statutory force through the code of practice, as he said. Even though it will be in the code of practice, it will have statutory force.

Keir Starmer: Will the Minister confirm, just so we are clear what we are talking about, that that process, as envisaged in the code, is by way of modification and does not involve the double lock?

Mr Hayes: That is an interesting point. I will take further advice on that in the course of my peroration, which will be marginally longer than it was going to be as a result.

Because we recognise that it is important that these warrants are not open-ended, we have added that important safeguard. The fact that it is in the code of practice and not on the face of the Bill does not weaken its significance. I emphasise that it must have force and will be an obligation, as I have described it.

I will come back to the hon. and learned Gentleman's point, but first I will deal with amendments 8 and 9, which would remove the warrant requesting agency's ability to apply for a warrant for testing or training purposes. It is vital that those authorised to undertake interception are able to test new equipment and ensure that those responsible for using it are properly trained in its use. There are, however, strict controls that govern the handling of material obtained during such tests. We believe that it is right that it should be possible for equipment to be tested in scenarios where it can be checked that it is working properly, for example by armed forces on the battlefield. It would have serious consequences for our military if they did not have the ability to test equipment so that risks and mistakes are avoided.

Victoria Atkins: Returning to the point made by the hon. and learned Member for Edinburgh South West about the man in the hat, the reason for the ability to investigate communication devices and numbers to which names may not be attributed is precisely so such a person can be identified through devices seized from suspects who have already been arrested. Is my understanding correct on that? The hon. and learned Lady accused me of misunderstanding, but may I invite the Minister to clarify?

Mr Hayes: My hon. Friend is right, and I can enlighten the Committee by saying that I have seen this in practice. At the National Crime Agency I saw an investigation live, because it happened that while I was visiting, just such a warrant was being used. The identity of a number of those involved in a very serious potential crime was not known, and a warrant was used to piece together information from what was known to prevent an assassination. I will say no more than that for the sake of the necessary confidentiality, but that capability was needed to avert a very serious crime. That warrant was highly effective, and if I needed any persuading, it persuaded me then of the significance of the power we are discussing.

To return to the point made by the hon. and learned Member for Holborn and St Pancras, thematic warrants can be modified by adding people, as I think he was suggesting, but only where it is in the scope of the original activity authorised by the warrant and the purpose does not change. It must be for the purpose that the warrant requesting agency gave without the double lock; he is right about that. However, the Secretary of State must be notified when a person is added, so there is a further check in terms of that notification. Modifications are not permitted to change the scope of the warrant. The provision is not open ended—I do not think the hon. and learned Gentleman was suggesting that it was, but he might have been interpreted as doing so.

3.15 pm

Keir Starmer: We can probably pick up this baton when we get to clause 30, but I think the provision that the Minister has just mentioned comes from the code, rather than the Bill.

Mr Hayes: That is true, it is in the code. I think I indicated that earlier. None the less, it is an obligation. The reason we added to the codes, largely following the Joint Committee report, was that we wanted to provide additional assurances without the rigidity of placing too much on the face of the Bill.

There is always a tension—I spoke about it in our morning session—between how much is placed on the face of a Bill, which of course provides a degree of certainty but by its nature simultaneously provides rigidity, and how much is placed in supporting documentation. Codes of practice are important supplements to a Bill, and, in their final form, to an Act. It should be emphasised that they are not merely advisory documents—they are

[Mr John Hayes]

legally binding in their effect. As I also emphasised, these are draft codes of practice that we expect to publish in full, partly as a result of this Committee's consideration and what we learn from it.

The warrant application process will allow the Secretary of State to understand the potential risk that communications will be intercepted incidentally to the purpose of testing or training, and to approve the measures to be taken to reduce the chance of communication being accidentally intercepted. Clear safeguards are in place to protect the privacy of the citizen, so I invite the hon. and learned Member for Edinburgh South West to withdraw the amendment.

Joanna Cherry: I am not minded to withdraw the amendment. For the same reasons that the hon. and learned Member for Holborn and St Pancras gave earlier, and the reasons that I gave in relation to amendments to clause 13, I will not insist on a vote just now—I suppose that means that I do withdraw the amendment, but I reserve the right to bring it back at a later stage.

The Chair: For clarification, when the hon. Lady says that she will bring it back at a later stage, it will be on Report.

Joanna Cherry: Indeed. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 15 ordered to stand part of the Bill.

Clause 16 ordered to stand part of the Bill.

Clause 17

Power of Secretary of State to issue warrants

Keir Starmer: I beg to move amendment 11, in clause 17, page 13, line 5, leave out "Secretary of State" and insert "Judicial Commissioners".

This amendment, and others to Clause 17, seeks to remove the role of the Secretary of State in formally issuing interception warrants and instead requires Judicial Commissioners to issue such warrants.

The Chair: With this it will be convenient to discuss the following:

Amendment 12, in clause 17, page 13, line 8, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 13, in clause 17, page 13, line 10, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 14, in clause 17, page 13, line 12, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 15, in clause 17, page 13, line 16, leave out paragraph (1)(d).

Amendment 16, in clause 17, page 13, line 20, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 17, in clause 17, page 13, line 22, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 18, in clause 17, page 13, line 24, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 19, in clause 17, page 13, line 27, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 20, in clause 17, page 13, line 31, leave out paragraph (2)(d).

Amendment 21, in clause 17, page 13, line 35, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 22, in clause 17, page 13, line 37, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 23, in clause 17, page 13, line 39, leave out "Secretary of State" and insert "Judicial Commissioners"

Amendment 24, in clause 17, page 13, line 42, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 25, in clause 17, page 13, line 45, leave out paragraph (3)(d).

Amendment 26, in clause 17, page 14, line 5, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 27, in clause 17, page 14, line 8, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 101, in clause 17, page 14, line 11, leave out "For the power of the Scottish Ministers to issue warrants under this Chapter, see section 19."

This amendment reflects the removal of the role of the Scottish Ministers in formally issuing interception warrants sought by Amendment 36 (which proposes leaving out section 19).

Amendment 28, in clause 17, page 14, line 13, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 33, in clause 18, page 14, line 30, leave out "Secretary of State" and insert "Judicial Commissioners".

Amendment 34, in clause 18, page 14, line 31, leave out "Secretary of State" and insert "Judicial Commissioners".

Keir Starmer: To some extent the amendments overlap with the discussions we will no doubt have on clause 21 and new clause 5. The effect of this group of amendments is to replace the Secretary of State with the judicial commissioner as the primary and only decision-maker in relation to these categories of warrants.

This morning, the Minister said that he was surprised that we had tabled these amendments and I will give him three short answers to that. The first is that from the outset the Labour party called for judicial authorisation before the concept of the double lock was introduced. That was our primary and preferred position. Obviously, the introduction of the double lock, which involves a degree of judicial authorisation, is somewhat better than the Secretary of State being the sole determining decision-maker. Therefore the fact that we are supportive of a situation that is better than the current situation is hardly enough to knock us out from our primary position. The third position—and this is why it overlaps with clause 21—is that to some extent this all depends on

what role the judges have. If they are nearer to decision-makers under clause 21, the relationship with the Secretary of State is very different from the position if they are simply long-arm reviewers. I will reserve that for the discussion we will have on clause 21.

So far as the principle in favour of these amendments is concerned, I can be clear. They have been drafted to reflect, as far as possible, the detailed proposals of David Anderson in his report. Members of the Committee have probably seen that they are deliberately drafted to reflect the approach that he suggested was right—particularly when one takes into account new clause 5. I will summarise his reasons, rather than reading them verbatim, laid out in paragraphs 14.47 and 14.57 of his report. He indicates four reasons for the proposed structure. The first is the sheer number of warrants that the Home Secretary has to sign per year. As he sets out in paragraph 14.49, there are thousands of warrants per year, details of which are in the footnotes. Dealing with those warrants is a huge imposition on the Secretary of State's time, and they could be dealt with in a different way.

There is an important sub-issue here. Points have been made, this morning and on other occasions, about the accountability of the Secretary of State in relation to national security and foreign affairs. I understand how and why those points were made. As David Anderson points out, 70% of the warrants that the Secretary of State routinely signs off are in fact police warrants that do not raise issues of national security or matters of foreign affairs. In many respects, they are no different from the sorts of powers that the police exercise when they search and seize, or exercise other powers available to them through the usual routes of going to the Crown court. His starting point is that it is no longer sensible for the Secretary of State to handle these thousands of cases, particularly since 70% are in fact police cases, not involving national security or foreign affairs.

Secondly, in paragraph 14.50 David Anderson deals with improving public confidence. Thirdly, at 14.51 he deals with the position in the US, where there is a growing insistence that if warrants are to be complied with by those in the US, judicial sign-off of the warrant is required. David Anderson's concern was that, unless we move to a different system, we might find that warrants would not be honoured when we needed them to be honoured in other jurisdictions. That is obviously a serious point that I know the Government have taken into account.

The fourth reason, in paragraph 14.52, is that there is an established and well-functioning system for judicial approval by commissioners in comparably intrusive measures, when applied for by the police. He lists them as property interference, intrusive surveillance and long-term undercover police operations. Other police activities that require to be warranted go straight to the commissioner, not via the Secretary of State. Since 70% of those cases are the police exercising not dissimilar powers of interception under warrant, there is a powerful argument to say that that category of cases, if nothing else, ought to go straight to a judicial commissioner. That would be modelled on David Anderson's analysis, for the reasons that he has set out in those paragraphs.

I would like to highlight paragraph 14.56(a), because it has been said today and on other occasions that an important political accountability goes with the role of Secretary of State in relation to these warrants. Yes, that is the case to a certain level, but it must not be misunderstood. I have yet to find an example of any Secretary of State from any political party, certainly in recent history, ever accounting to Parliament for an individual warrant.

Victoria Atkins: What I genuinely do not understand about this argument is that, given that the Secretary of State is not permitted or authorised to account publicly for a warrant, how on earth will that be any different for a judicial commissioner? The nature of the material is sensitive, regardless of whether it is reviewed by the Secretary of State or by the judicial commissioner.

Keir Starmer: The point I am making is not that that judicial commissioner could be more accountable, or that there would be some forum in which the judge could go and explain. I completely accept that that is a limitation. I am meeting the argument against this proposal, which is that at the moment the Secretary of State has some political accountability which would be reduced or taken away if this amendment were accepted.

The point David Anderson makes is that it is of course a criminal offence to disclose that the warrant has been signed, so in fact the Secretary of State could not go to the Dispatch Box even in an extreme case. She would commit an offence if she went to the Dispatch Box to be held accountable for an individual decision. That is exactly why David Anderson writes as he does in paragraph 14.56 of his report. If any other members of the Committee have found an example of a Secretary of State ever actually being held accountable for an individual warrant, I personally would like to see the *Hansard* report of that taking place.

Suella Fernandes: On the question of accountability, there is a clear line of accountability to the Executive in the form of the Intelligence and Security Committee. It is a body of reviewers—elected, accountable and within the parliamentary and democratic process—who have access to this confidential information and can review the actions under this function. That is a clear line of accountability, which exists and is exercised.

Keir Starmer: Again—and I will be corrected if I am wrong on this—the statutory prohibition on the Secretary of State ever saying whether or not she signed a warrant applies across the board, whether in a Select Committee or in any other parliamentary proceedings. In other words, first, she could not be asked a question about an individual warrant because there would be no basis on which it could be put and, secondly, even if it were asked she could not answer it. I take the point that is being made but, wherever the accountability is placed, to hold the idea that there is individual accountability for the hugely important decisions that are made on individual warrants is to misunderstand how the regime works.

Lucy Frazer: One witness—I forget now who it was, but I think they were on the legal panel—said that there is accountability both ways. If the Secretary of State gets it right and there is no terrorist attack, there is nothing to be accountable for. If she gets it wrong, she is extremely accountable for the consequences of something that happened when she made the wrong judgment call about whether to issue a warrant.

Keir Starmer: I recall that evidence, but it is very difficult to see how that could work in practice, because none of us would ever know—nor could we know—whether a warrant had been put before the Secretary of State and whether she had signed it. That is prohibited for us and for the other oversight mechanisms. That is the problem. I accept the broader political accountability—if something goes horrendously wrong, one would expect the Home Secretary to make a statement about what the Government had been doing. However, the idea that on an individual, warrant by warrant basis there could be anything amounting to accountability is what David Anderson was driving at in his report, and it has never happened. That is the best evidence.

3.30 pm

Mr Hayes: The hon. and learned Gentleman is so wrong about this that I have an embarrassment of riches on which to draw. He is philosophically, politically and factually wrong, but let me deal first with his factual inaccuracy. The Home Secretary can talk about specific warrants to the ISC. The ISC does conduct detailed investigations into particular cases, as it did into the murder of Lee Rigby, when it scrutinises data in considerable detail. Of course all of that cannot be made public, because of the nature of the investigation, but the hon. and learned Gentleman misunderstands—perhaps because of inexperience—the role of the ISC in those terms. I will deal with his philosophical and political problems later.

Keir Starmer: Perhaps the Minister will point me to an example of the ISC ever making public any criticism of or comment about the Secretary of State's exercise of the powers in a way that could in any way be described seriously as politically accountable.

Mr Hayes: With respect to the hon. and learned Gentleman, he can hardly claim that the ISC is a puppet or poodle of Government given its report on the Bill. The ISC is extremely robust in its scrutiny of Ministers. It makes its views known to Ministers and is not frightened to make known to the House its views about the proposals, policies and performance of Government.

Keir Starmer: I do not think that the Minister was listening to what I said. I asked if he could point me to a single example of the Intelligence and Security Committee ever commenting publicly—in a way that could be accountable to the public—on the exercise by the Secretary of State of her powers to issue a warrant. It is all very well making generalised points, but I am asking for yes or no—the Minister must know.

Mr Hayes: The hon. and learned Gentleman said that the ISC could not ask the Secretary of State about particular warrants, but the ISC can and does ask the Secretary of State about particular warrants in pursuit of its inquiries into specific cases. Of course, because of the character of the ISC, rather like the practice of Ministers, it cannot make all that information publicly available. The whole point about the ISC is that it does not make all that it considers publicly available, but that does not mean that Ministers are not accountable to the Committee, which is made up of Members of this House from many political parties.

Keir Starmer: The answer to my question appears to be no, there has never been an example of the ISC or any Committee ever commenting publicly on the exercise by the Secretary of State of her specific powers to issue warrants or not. That is what leads David Anderson to the view that the political accountability card is overplayed in the discussion.

The Solicitor General (Robert Buckland): This is a very important aspect of the debate. On the last remark made by the hon. and learned Gentleman, about David Anderson's potential conclusion about political accountability being overplayed, I was interested in the arguments, but the fundamental point is the source of the authority that allows the Secretary of State as a democratically elected politician to make the decisions. Also, in particular in the context of national security, it is well set out in case law, as the hon. and learned Gentleman knows, that proper deference should be paid to the Executive on important decisions of national security. That is at the top end of the scale, then we move down—or across, in a different context—and is that not the issue?

The Chair: Interventions from Front and Back Benchers will all be short.

Keir Starmer: I have already accepted the general proposition that if some catastrophe occurred, the Secretary of State would be required or expected to make a statement, setting out what in general terms had been done. I accept that level of political accountability. I am talking about the specifics of signing off warrants and, therefore, what would be lost if the Secretary of State's role were taken over by the judicial commissioner. There is a question of deference on national security and foreign affairs, but we will get to that when we reach clause 21, because that deals with the scope of review by the judicial commissioner. The point I was making before the interventions, however, was drawing attention to David Anderson's paragraph 14.5, in which he sets out the reasons why the political accountability card is overplayed.

Victoria Atkins: The hon. and learned Gentleman may recall that we had the privilege of listening to two Labour Home Secretaries, Lord Reid and Charles Clarke. I asked Mr Clarke about his relationship with the security services and his experience of warrantry in the dreadful hours following the 7/7 bombings. I asked him how useful or important that was in the vital hours thereafter and his answer—I will be quick, Mr Owen—started with the words "critically important". Does that affect the hon. and learned Gentleman's view in any way?

Keir Starmer: No, it does not. With all due respect, thinking on accountability and safeguards in this field is on the move. The sort of regime that was perhaps thought appropriate five, 10 or 15 years ago is now accepted as not appropriate. One of the points of this legislation in many respects is to bring it up to date and make sure that scrutiny and safeguards are more powerful. The fact that an ex-Home Secretary thinks their role was very important and need not be interfered with did not surprise me, but neither did I find it persuasive.

I have probably exhausted my point. The amendments are intended to reflect the position set out by David Anderson for the very good reasons that he draws attention to in paragraph 14.56(a): the political accountability card is overplayed in resisting this argument.

Joanna Cherry: I just want to address the joint amendments briefly. I want to draw attention to amendment 101, which was tabled on behalf of the Scottish National party and reflects a later amendment to delete clause 19. Scottish Ministers issue warrants at present in relation to serious crime. If the amendments were taken on board, their role would be replaced by judicial commissioners, and they are comfortable with that. I simply draw attention to that consequential amendment.

I support everything that the hon. and learned Member for Holborn and St Pancras has said in support of the group of amendments to clause 17. I have just three points to make: three reasons why I support the amendments. First, I associate myself with the argument that arguments concerning Ministers' democratic or political accountability for surveillance warrants are misconceived and misplaced. Secondly, one-stage judicial authorisation is the norm in many comparable jurisdictions. Thirdly, and picking up another point made by David Anderson, judicial authorisation would encourage co-operation from technical firms in the United States of America.

I am grateful to the hon. and learned Member for Holborn and St Pancras for exploding the myth, also exploded by David Anderson, that Ministers are democratically accountable for their role in issuing warrants, because of course it is a criminal offence to disclose the existence of a warrant, and that will remain the case under clauses 49 and 51.

What is often advanced and has been advanced by Government Members is that a corollary to this argument is that Ministers are politically accountable for the agencies and will be required to resign if things go wrong. That is incorrect. Although the Home Secretary is responsible for setting the strategic direction of the Government's counter-terrorism policy and the Cabinet Minister is responsible for MI5, MI5 is like the police: operationally independent. MI5's director general retains operational independence for day to day decision making. Historically, when terrorist attacks have tragically succeeded, they have not led to political resignations in this country. Despite inquests and inquiries following the terrible tragedies of the 7/7 attacks and the ghastly murder of Fusilier Lee Rigby, and despite the fact that those inquests and inquiries uncovered internal errors in the agency's handling of information relating to those responsible for the attacks, this did not result in the political accountability that is now so strongly claimed.

The reality is that the oversight we have for such decisions and the accountability for the agency is provided by a patchwork of mechanisms, including the ISC—although I dissociate myself with the comments made by the hon. and learned Member for Holborn and St Pancras on the limitations of the ISC—and also by public inquiries and legal challenges brought against the Government. No doubt we could argue that such oversight and accountability as there is in relation to the operation of the security agencies could be enhanced, but it is simply not correct to argue that political accountability is provided by the ministerial sign-off on warrants, because it is not. I have been in the House for only nine months, but when questions around these issues are asked of Ministers, I have seen them repeatedly reply, probably quite properly, that they cannot answer for reasons of national security.

My second point is that one-stage judicial authorisation is the norm in comparable jurisdictions. It happens in America, where federal, investigative or law enforcement officers are generally required to obtain judicial authorisation for intercept. A court order must be issued by a judge of a US district court or a US court of appeals judge. In Australia, law enforcement interception warrants must be issued by an eligible judge or a nominated administrative appeals tribunal judge. In Canada, it is unlawful to intercept private communications unless the interception is in accordance with an authorisation issued by a judge. In New Zealand, police can only intercept a private communication in tightly prescribed circumstances, including requiring a warrant or emergency permit that can only be issued by a High Court judge. If the United Kingdom wants to be able to claim that it is in a world-class league for good practice in surveillance, in my submission, it should adopt one-stage judicial authorisation.

Those of us who are lawyers in the Committee or have ever dealt with the law are familiar with the concept of a judge being got out of his or her bed in the middle of the night to grant an interdict in Scotland or an injunction in England, in civil matters of far less importance than the sorts of matter the Bill deals with. In the aftermath of—God forbid—another attack in the United Kingdom such as 7/7, judges would be as readily available to deal with warrants as Ministers of the Crown are at present.

Thirdly, judicial authorisation would encourage co-operation from US technical firms. That point was pressed home by David Anderson QC in his review, when he said that given the United States tradition of judicial warrants, Silicon Valley technical firms feel uncomfortable with the United Kingdom model of political authorisation. Those firms operate in a global marketplace, which underlines the need for us to adhere to procedures fit for a world-leading democracy. The United Kingdom is alone among our democratic allies with similar legal systems in permitting political-only authorisation. The SNP supports the amendments for those three reasons.

Mr Hayes: This is an important debate, as my hon. and learned Friend the Solicitor General said. The shadow Minister is wrong, as I described earlier, factually, philosophically and politically. I will try to deal with those in turn.

The factual case is this. Accountability is a much more sophisticated thing than the shadow Minister suggests. Accountability is about who makes decisions, as well as about the decisions they make. People who are elected, by their nature, are accountable to those who elect them. The judgments they make and the powers they exercise reflect that direct relationship with the electorate. It is almost undeniably true that those of us sitting in this room and others like us are bound to be more influenced and affected by the wider public because we do not do a job unless they continue to have faith and belief in us. We are elected by them; we are answerable to them.

[Mr John Hayes]

The Home Secretaries, the Northern Ireland Secretaries and the Foreign Secretaries who make these decisions are elected constituency Members of Parliament who every day, every week and every month are communicating with constituents who have profoundly held views about the very matters over which those Secretaries exercise their judgment, in a way that people who are not elected simply do not. That line of accountability to the wider public should not be understated or underestimated.

Keir Starmer: How would a member of the public ever know, and therefore be able to judge, whether a Secretary of State had made a mistake in relation to a specific warrant?

Mr Hayes: I am prepared to acknowledge that I may not have made the argument sufficiently clearly, rather than to suggest that the hon. and learned Gentleman did not understand it. I was making the point that those who are missioned to make the decisions are likely to be more in touch with the sentiments, values, views and opinions of the public than those who are not elected, because of who they are and the job they do. That is not a particularly difficult concept to grasp, so I am amazed that he does not grasp it.

Keir Starmer: Perhaps the Minister can point me to the provision in the Bill that permits or requires the Secretary of State to take into account the wider public's views. There are strict legal tests of necessity and proportionality, and the idea that judges could not apply them to specified organisational purposes and so on is to underplay their duty. I have done loads of control order cases and TPIM cases in front of judges and they make such decisions day in, day out.

3.45 pm

Mr Hayes: Here is the nub of the difference between us. The hon. and learned Gentleman is a former lawyer who has happily now become a politician. I am a politician who has never had the disadvantage of being a lawyer. Luckily, I have many hon. Friends in the room who are able to supplement my skills in that regard. My fundamental point is that as a constituency Member of Parliament, with all the communications, contacts and understanding that that necessitates in respect of popular opinion—I reapply for my job, as he will, every five years—I am likely to be more in tune and in touch with popular sentiment when exercising all kinds of judgments, including judgments about the Bill, than someone who is not. That is not a particularly controversial view. It is an affirmation of the importance of representative democracy, and we are, after all, Members of a representative democratic forum.

Christian Matheson: Does the Minister understand the point my hon. and learned Friend the Member for Holborn and St Pancras is making about how a balance must be struck between being in touch with popular sentiment—the Minister made that case well—and being correct in terms of legal procedures?

Mr Hayes: Absolutely, thus the double lock. I am proud to be an elected person. I do not share the doubt-fuelled, guilt-ridden bourgeois liberal hesitation about decision making that has emasculated so much of the political class.

Simon Hoare: I thought my right hon. Friend was about to give a tinker's cuss, but obviously he refrained from doing so. I think he will agree that the main difference between the two Front Benches is the point made by the hon. Member for City of Chester in an earlier intervention. If the first duty of Government is the protection of the realm and Government can send troops on to our streets and into foreign battlefields and so on, suddenly passing any responsibility for or involvement in the granting of these warrants off to unaccountable judges would be an abdication.

Mr Hayes: I do take that view. The hon. Member for City of Chester did not explicitly articulate, but implied that there needed to be a balance between refusing to abdicate that duty, and indeed affirming it, alongside the affirmation of representative Government that I have already made, and taking into account the significance—as the hon. and learned Member for Holborn and St Pancras argued, David Anderson made this point clearly in his report—of judicial involvement, not least as a means of reinforcing the system. As he very honestly said, part of David Anderson's consideration was whether we could make what we do stand up to challenge, and having a judicial involvement through the double lock is a way of creating a system that is more robust and resistant to challenge: a system that people can have greater faith in, in that respect.

Christian Matheson: I am most grateful to the Minister for his generosity in giving way again. Having grown up in a village in rural Cheshire, I probably am quite bourgeois and certainly quite liberal, but I am finding the arguments of Government Members somewhat absurd, in that they seem to have a lack of trust in the judiciary to implement the law and understand what was meant from the original drafting of a law. I think my hon. and learned Friend the Member for Holborn and St Pancras was trying to convey the sense that the balance was not quite there.

Mr Hayes: No, the double lock will provide the judicial commissioner with the same information—the same explanation of need—as that offered to the Secretary of State: the Home Secretary, the Foreign Secretary, the Northern Ireland Secretary. What is more, they will apply the same test of proportionality and necessity, for it is indeed just that: a double lock. Unless both the judicial commissioner and the Home Secretary approve the application for the warrant, it will not happen. It is true that any party can ask for further information and the re-presentation of the warrant, and that may occur if there is uncertainty about the case that has been made, but the double lock has real effect. It is not that we do not believe in the judicial side of this deal; it has equal weight to the political involvement, but it is important that the Executive retain a role in this.

Let us be clear, the effect of these amendments will be to take the Executive out altogether—a substantial change in the Labour position. I suspected, unhappily, that the hon. and learned Member for Holborn and St Pancras might be a bourgeois liberal; I did not know he was going to be a born-again Bolshevik.

Keir Starmer: I am not sure I appreciate the tone with which the Minister is now conducting the debate, to be perfectly honest. To some extent, his comments have lost sight of the point I was making and that David Anderson made. The Minister invokes defence of the realm and national security, and so on, and has forgotten that 70% of these interception warrants are warrants for the police to exercise their powers—not particularly different to a lot of the other powers they exercise. They get search and seizure, they go into people's houses, they get their letters and they read them, so there is nothing special about content in an intercept to say, "It must be the Secretary of State: only she is in touch with real people." The police can get a warrant from a judge; they do so every day of the week. They go into people's houses, they get all their documents and they read the lot, so the idea that that is a function that cannot be exercised unless someone is democratically elected is very hard to sustain.

The Chair: Before the Minister continues, let me say that the shadow Minister will have an opportunity to respond.

Mr Hayes: I just say to the shadow Minister that he may not appreciate the tone, but I could be much tougher. The reason I could be much tougher is because these amendments—which I take great exception to, by the way—stand in direct contrast to the tone of the shadow Home Secretary's remarks when the draft Bill was published, when he welcomed the idea of a double lock. Speaking of the Home Secretary, he said:

"She has brought forward much stronger safeguards, particularly in the crucial area of judicial authorisation. It would help the future conduct of this important public debate if the House sent out the unified message today that this is neither a snooper's charter, nor a plan for mass surveillance."—[*Official Report*, 4 November 2015; Vol. 601, c. 973.]

That warm welcome of the double lock was affirmed several times since. It then metamorphosed into an equal lock, as the hon. and learned Member for Holborn and St Pancras and others said that the information provided to the judicial commissioner should be equivalent to that provided to the Home Secretary, and I can even understand the argument that the process might be simultaneous. I do not necessarily agree with it, but I at least understood it, though our case was that the matter should go first to the Home Secretary and then to the judicial commissioner. I thought it might be the Opposition's settled position that they wanted simultaneous consideration, but these amendments take the Home Secretary out of the process altogether. I can only assume that this change of heart—this about-turn—is not to the hon. and learned Gentleman's taste, because I know that he is a very sensible chap and I cannot believe that he really believes that the Executive should be removed from the process altogether. Either there has been a command from on high—thus, my point about Bolsheviks—or, I hope, these are merely probing amendments that seek to reach one of the earlier positions I thought he might take.

Lucy Frazer: The hon. and learned Member for Edinburgh South West mentioned in her opening speech and on this point the importance of international comparison. Did the Minister notice that she did not refer to paragraphs 8.46 to 8.48 of David Anderson's report, in which he extensively analyses the comparative jurisdictions?

The Chair: Order. The Minister cannot really respond to what another Member said.

Lucy Frazer: I said, "Did he notice?", not—

The Chair: I notice everything.

Mr Hayes: For the sake of brevity and to make sure I do not fall out in the future, I am going to say that, yes, I did notice it.

The shadow Home Secretary, speaking of the Home Secretary, went on to say:

"The two-stage process that she advocates seems to have the merits of both arguments: it will provide public and political accountability, and the independence that is needed to build trust in the system."—[*Official Report*, 4 November 2015; Vol. 601, c. 974.]

That is exactly the same point that I made to the hon. Member for City of Chester: it has, in the words of the shadow Home Secretary, the "merits of both arguments".

Perhaps the shadow Minister will forgive me if I sound a little more arch than I normally do, but I feel that this is such a surprising set of amendments, which is so out of keeping with what I hoped was emerging as a settled position on the balance between the Executive and the judiciary. I thought we would end up with a debate on this, but not one between two positions—our measured, compromise position, and a much more extreme position that I did not expect the official Opposition to adopt. I urge him to think about this again, because I think we reached a good settlement in the terms that I described. That is my political point.

Returning to my original point for a moment, given the evidence provided by the former Home Secretaries, John Reid and David Blunkett, and the former Northern Ireland Secretary, my right hon. Friend the Member for North Shropshire (Mr Paterson), I think the balance of opinion lies on our side of the argument. I note the Joint Committee's report and the fact that the ISC was silent on this issue in its most recent report. I feel that the balance of the argument lies with the proposals in the Bill. Perhaps we can look at the detail—I am happy to do that. Perhaps, in the spirit of trying to make positive progress, we can look at the information is provided to each party under the double-lock or at how the timing works—I do not know. I am not going to make any commitments on that, but I am more than happy to have a measured and reasonable debate about this. However, to take the Executive out of the process is politically very unwise, if I might say so, of the Opposition, and it is certainly not acceptable to the Government.

On the philosophical point, the shadow Minister understands—he is an educated and interesting man—that this strikes at the very heart of the separation of powers. My right hon. Friend the Member for North Shropshire said in evidence that

"these are executive decisions. They are operational decisions and must be made by a democratically elected Minister, accountable to Members of Parliament."

He did not want the judiciary involved at all. We did not take that route because we listened to David Anderson and others, but I take the former Minister's point.

Finally, so that we do not have any factual inaccuracies, the ISC made a clear recommendation on warranting in the Lee Rigby report that I mentioned earlier. The ISC

[Mr John Hayes]

does comment on warranting, contrary to what the shadow Minister says. It can both interrogate the Home Secretary on specific warrants and comment on warrants in respect of a particular investigation or inquiry. There is a line of accountability, as well as one to the wider public in the general terms that I described, to a well respected Committee of this House, which was established for exactly that purpose. On that basis, and having heard the argument, I urge Opposition Members to think again about these amendments.

Keir Starmer: In the exchanges we have had, I have probably said all I needed to in response to the Minister's points. David Anderson might be surprised to find out that he is associated with the Bolshevik opposition apparently represented in the amendments. The amendments represent and reflect his thinking, but that is as may be—I will not press the amendments to a vote. I beg to ask leave to withdraw the amendment.

4 pm

Joanna Cherry: On a point of order, Mr Owen, the amendments are also in my name, so will I, too, have to state my position on them?

The Chair: Yes. You may object. Do you wish to object?

Joanna Cherry: I would like to respond to one or two of the points made by the Minister, if I may briefly.

The Chair: There is a bit of a job share going on among the Front Benchers and I am getting a little confused. The mover of an Opposition amendment is the person who finishes on behalf of the Opposition. Mr Starmer has had the opportunity to do that and you have had your opportunity to speak; we are now going to vote.

Joanna Cherry: I hear what you are saying, Mr Owen. My position is that the amendments are crucial to the Bill. I am not insisting or objecting—

The Chair: Order. The Question is that the Committee agrees to withdraw the lead amendment. If you do not wish that to happen, you may object and we will proceed to a vote.

Joanna Cherry: I will not object.

The Chair: Thank you.

Amendment, by leave, withdrawn.

Keir Starmer: I beg to move amendment 61, in clause 17, page 14, line 1, leave out subsection (4) and insert—

"(4) No warrant issued under this Part will be proportionate if the information sought could reasonably be obtained by other less intrusive means".

The Chair: With this it will be convenient to discuss amendment 93, in clause 27, page 21, line 6, at end insert—

"(2A) A warrant issued under this Chapter must state the specific purpose that is to be achieved by the warrant.

(2B) A warrant issued under this Chapter must outline the options for obtaining the relevant data and confirm that other less intrusive options have been tried but failed or have not been tried because they were bound to fail and the reasons why."

This amendment, and others to Clause 27, seek to preserve the capacity of a single warrant to permit the interception of multiple individuals but would require an identifiable subject matter or premises to be provided (in similar vein to the amendments to Clause 15).

Keir Starmer: I mentioned amendment 61 this morning. The interception of communications draft code of practice—at paragraph 4.7, as I indicated this morning—states:

"No interference with privacy should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means."

That is a clear and correct statement of principle.

Subsection (4), as drafted, is not so clear. It simply suggests that, if the information can reasonably be obtained by other, less intrusive means, that is a factor to be taken into account, but is not decisive, as set out in the draft code of practice. In our view, the Government cannot have it both ways: if the code is right, it should be elevated and put on the face of the Bill. That is what the amendment seeks to achieve, replacing subsection (4) and replacing it with what is, in essence, paragraph 4.7 of the draft code of practice, which in our view is the right way to articulate necessity in such circumstances.

The Chair: Joanna Cherry, do you wish to speak?

Joanna Cherry: I have not put my name to the amendment.

The Chair: If you wish to speak to any amendment, you may make your position clear at that time, even if you are not the mover of the amendment—

Joanna Cherry: My name is not on amendment 61, but is on amendment 93, but that is an amendment to clause 27.

The Chair: Amendment 93 is in this group, so you may wish to make a contribution.

Joanna Cherry: I am not going to at this stage, thank you, Mr Owen.

The Solicitor General: It is a pleasure to serve under your chairmanship, Mr Owen, for the first time in what I am sure will be a number of important sittings.

May I address the amendment moved by the hon. and learned Member for Holborn and St Pancras? I am grateful to him for rightly pointing our way to paragraph 4.7 of the draft code. Indeed, by reference, paragraph 4.8 gives a clear basis for the decision maker to assess the nature of the proportionality. Therein lies something of the problem with regard to the approach to be taken in the clause. It is tempting, on the face of it, to include the test in the primary legislation, but it might provoke more questions than answers.

Naturally, when one makes a bald statement about proportionality, people want to know more, so where does one end in terms of adding to the primary legislation the detail that is necessary for decision makers to reach

a considered conclusion? My simple argument is that the amendments therefore are not necessary. What makes this the right balance is the combination of the primary legislation that sets out the framework and a living document—the code of practice—that will be more easily amendable and accessible in terms of any changes that need to be made in the light of experience and practice.

We do not want to end up with a situation where this type of warrantry can only be obtained when all other avenues have been exhausted, a bit like the position when one comes to an ombudsman. That would be an artificial scenario to end up with and would cause problems operationally. I can think of examples where the exhaustion of other avenues will just not be practicable. For example, in a kidnap situation where an individual's life might be in danger, this type of warrantry would probably be the most appropriate step to take before any other type of intervention. Of course, there are occasions where other means of intelligence gathering, such as live human intelligence sources, might be high-risk or result in a higher degree of collateral inclusion.

I am concerned that we do not end up, despite the best intentions of the hon. and learned Gentleman, with an inflexible approach on the face of primary legislation. It is far better, in my submission, to keep the balance as it is, as clearly outlined in the code of practice and the framework within the clause.

Suella Fernandes: I echo everything that the Solicitor General says. Is not the amendment trite, in that it is clear for any practitioner, judge or decision maker that the question in the amendment—whether the information sought could reasonably be obtained by other less intrusive means—is part and parcel of, and essential to, the proportionality test?

The Solicitor General: My hon. Friend makes a powerful point. There is a danger when dealing with primary legislation of gilding the lily. I mean that in the spirit of co-operation that I know we have managed to engender in these debates, in the main. For those reasons, I respectfully ask the hon. and learned Gentleman to withdraw his amendment.

Keir Starmer: I am grateful to the Solicitor General for the way he has approached this, but it misunderstands the amendment. Of course, whether information could be reasonably obtained by other means is relevant to the assessment of proportionality and necessity. The amendment proposes that, having taken all the factors into account, if it transpires at the end of that exercise that the information could have been reasonably obtained by other less intrusive means, it is not proportionate—that is the end of the exercise. That, in our submission, is the right test that should be on the face of the Bill. At this stage, I will withdraw the amendment with a view to raising it at a later stage if it is appropriate to do so. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 17 ordered to stand part of the Bill.

Clause 18

Grounds on which warrants may be issued by Secretary of State

Joanna Cherry: I beg to move amendment 30, in clause 18, page 14, line 20, after "security", insert "or".

The Chair: With this it will be convenient to discuss the following:

Amendment 85, in clause 18, page 14, line 20, after "security" insert—

"where there is a reasonable suspicion that a serious criminal offence has been or is likely to be committed"

This amendment, and others to Clause 18, seeks to require that the grounds for an interception or examination warrant are tied to a threshold of reasonable suspicion of criminal behaviour, and that reference to a separate ground of "economic well-being, etc." is deleted from the face of the bill.

Amendment 86, in clause 18, page 14, line 21, after "crime" insert—

"where there is a reasonable suspicion that a serious criminal offence has been or is likely to be committed"

Amendment 31, in clause 18, page 14, line 21, leave out "or".

Amendment 32, in clause 18, page 14, line 22, leave out paragraph (2)(c).

Amendment 35, in clause 18, page 14, line 33, leave out subsection (4).

Joanna Cherry: These amendments would delete the separate ground for interception of economic wellbeing from the face of the Bill and require that grounds for interception are tied to a threshold of reasonable suspicion of criminal behaviour.

The Bill re-legislates for RIPA's three broad statutory grounds for issuing surveillance warrants. The Secretary of State may issue warrants for interception, hacking and so on

"in the interests of national security…for the purpose of preventing or detecting serious crime, or…in the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security".

That final ground can apply only where it relates to the acts or intentions of persons outside the British islands.

I support the amendments because all three main statutory grounds are, in my submission, unnecessarily vague and are left dangerously undefined. As the decision will continue to lie with the Secretary of State, the test will be met by whatever he or she subjectively decides is in the interests of the national security or economic wellbeing of the UK, having regard to popular sentiment rather than to what is necessary and proportionate, as we have now heard from the Minister's own mouth. The tests mean that individuals are not able to foresee when surveillance powers might be used, and they grant the Secretary of State a discretion that is so broad as to be arbitrary. The Joint Committee on the draft Bill recommended that the Bill should include a definition of national security, and I call upon the Government to produce such an amendment. If the Government sprinkle the Bill so liberally with the phrase "national security"—indeed, it is the Government's job to defend national security—they need to tell us what they mean by that phrase, so I call upon them to define it.

[Joanna Cherry]

The Joint Committee also recommended that the phrase "economic wellbeing" should be defined, but the ISC went further and said that economic wellbeing should be subsumed within a national security definition, finding it unnecessarily confusing and complicated. I heartily endorse the ISC's view in that regard. The third ground is an unnecessary repetition unless there is something sinister behind the definition of "economic wellbeing," and many Members of the official Opposition, and indeed of my own party, have serious concerns about what that might be about.

Recently, the Prime Minister went so far as to say, ridiculously in my view, that the Labour party is now a "threat to national security". I am not a member of the Labour party, although I once was when I was a student.

Christian Matheson: Join us again.

Joanna Cherry: I am very happy to join Labour in many aspects of this Bill, but I have taken a slightly more radical path in middle age as an SNP MP. It is a disgrace to suggest that the Labour party is a threat to national security, and such loose language shows us that the continued undefined use of the term "national security" in enabling legislation is not sustainable.

The ISC also queried both the agencies and the Home Office on the economic wellbeing ground, and it reported that neither the agencies nor the Home Office have "provided any sensible explanation." I hope that we might get a sensible explanation from the Government today, and I wait to hear whether we get one. Regrettably, the recommendations of the ISC and the Joint Committee have been dismissed, and the core purposes for which the extraordinary powers can now be used remain undefined and dangerously flexible within the Bill.

That is the nub of my concerns about the definitions of "national security" and "economic wellbeing." The SNP amendments go slightly further than the Labour party is prepared to go at this stage by requiring reasonable suspicion. At the moment, the three grounds contain no requirement for reasonable suspicion that an individual has committed or intends to commit a serious criminal offence, nor even suspicion or evidence that a serious crime has been or is going to be committed. In my submission, that gives licence for speculative surveillance.

Briefly, on the national security ground, the courts have in the past responded with considerable deference to Government claims of national security, viewing them not so much as a matter of law but as Executive-led policy judgments. As a legal test, national security is meaningless unless the Government attempt to tell us what they mean by it. The second ground is similarly broad and open-ended because the Government have not sought to clarify the circumstances in which national security, as opposed to the prevention and detection of serious crime, will be in play.

I invite the Government to table an amendment to tell us what they mean by national security, to explain why it is necessary to have a ground revolving purely around economic wellbeing, to explain why they have discounted the recommendations of the Joint Committee and the ISC, and to tell us why there is no requirement for reasonable suspicion in these grounds.

4.15 pm

Simon Hoare: In opening, let me address what I detect is the elephant in the Committee Room, as amplified by the amendment as it was. As I made clear in the July 2015 debate on the Anderson report and on Second Reading, I am not a lawyer, so I view the proposal through the narrow prism of the man on the Clapham omnibus, for want of a better phrase: a practical proposal to try to keep my constituents and others as safe as the Government possibly can. I do not view it through the perfectly proper prism of trained legal eyes and I would not be able to do that.

Coming to the breadth point that the hon. and learned Lady who speaks for the SNP has been making, it is clear to me that, from a legal point of view or from a lawyer's point of view, the narrower, tighter and more prescriptive the language in statute, the better. It narrows, eliminates, eradicates or whatever the opportunity for a wider debate about the interpretation of this or that word, almost like Coolidge, whose immediate response when told that a senator who had always opposed him had died, was: "I wonder what he meant by that." I think we should be rather careful. I make no apology for viewing this as just an ordinary guy—a father, a husband, a constituent and a Member of Parliament—who believes it is my duty to support any Government of the day who are seeking to keep our country safe.

Joanna Cherry: Does the hon. Gentleman also accept that, as Members of Parliament, we have a duty to protect our constituents' civil liberties and privacy? Lawyers look for narrow definitions and certainty not for their pleasure, but to protect their clients. The reason why Members of Parliament should look for narrow definitions and certainties is to protect their constituents.

Simon Hoare: Up to a point, Lord Copper. I find myself in broad agreement with the hon. Member for City of Chester. Likewise, I could not give a tinker's cuss about most of these things as long as I can look a constituent in the eye were something horrible to happen on the streets of Shaftesbury, Blandford Forum, Gillingham or any of the villages in my constituency. They might look at me and say, "Mr Hoare, are you convinced that you supported everything you possibly could to avoid this atrocity?" I would prefer to say, "Yes, I did." If it impinged upon or offended against the virgo intacta of civil liberties as a sort of purist academic—I use that word not in an abusive way—definition, I would side with the security argument at every step and turn.

I am not using that as the Luddite argument that someone who has done nothing wrong has nothing to be afraid of. It is absolutely right that to govern is to choose. It straddles that often imperceptible divide between the application of the rule of law and discharging the first duty of the state—to keep the realm safe—and preserving the sacred and long-cherished liberties and freedoms that we all enjoy.

I accept what the hon. and learned Lady says on that point, but it is not just Liberty and Amnesty and other organisations that have access to legal counsel. It is not that the statue, as it emerges through all our processes, would be available only to us and the good guys. It would be available to those who wish us well, but I am going to hazard a guess that one or two of those who

wish this country ill—whether in terms of national security, serious crime or acting in an injurious way to our economic wellbeing—may just have recourse to a legally trained brain or two themselves. They, too, would be able to say, "Ah, we'll do it that way", because the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland or the Defence Secretary would be so hogtied by the narrow definitions contained in the statute of the Bill, because people sought to stand—this is a phrase I used on Second Reading—like vestal virgins, defending the flame of civil liberty, because that is the flame that must be defended above all others and national security must be secondary to it. That is a perfectly acceptable and reasonable position to take, but it is one with which I profoundly disagree. It offends everything that motivates me as a politician.

We need to be very careful about having, either in the proposed amendments or during the progress of the Bill in Committee and on Report, an obsessive regard to trying to narrow down our language. Providing that the double lock with the judicial oversight remains for all circumstances whereby these warrants and other facilities can be granted—as long as that judicial view is there—that would seem to be in order to secure the provision for the short, medium and longer term, so that we do not have to come back through the legislative process to continually update the narrow language in the Bill to reflect circumstances or address scenarios that, without sounding too much like Donald Rumsfeld, in 2016, we did not think existed or could exist.

It is not from some sort of bovine, recidivist, reactionary, "We are the law and order side of the Tory party" sentiment that I find this quest for the narrowing down of our language to be wrong. It would fetter and constrain the decisions of Ministers and those who, on a daily basis, put their lives at risk under the rule of law to keep us safe. I shall be opposing this set of amendments, just as I will any other amendment, not because my Front Bencher or my Whip advises me to, but merely because I think that there is nothing intrinsically wrong—this is the non-lawyer's approach—in having broad definitions that provide accountable scope to those who take the decision, so that they are able to take those decisions in response to circumstances as they arise.

Christian Matheson: There has been the requisite level of jousting and debate, and sometimes temperatures have risen a little bit, but I have found Ministers at least prepared to justify their arguments and to listen to other arguments. I say that, importantly, because this clause and the amendments are of profound importance to me and to many Opposition Members. I have absolutely no doubt that there are occasions when attacks on the United Kingdom can be carried out on an economic, rather than a military or criminal, basis. Let us consider a hypothetical example of a country that is adept at undertaking cybercrime against the London stock exchange to manipulate stock market activity or shares, or to bring the stock exchange down. That, of course, would have a serious effect on the operation of the City of London. I accept that that can happen.

The hon. and learned Member for Edinburgh South West talked about criminal activity. I have no doubt that the activity in the scenario I described would be considered criminal activity, but when my good friend the hon. Member for North Dorset talked about the elephant in the room, I thought he was going to mention the real elephant in the room and he did not. The real elephant in the room, certainly for me, is that, on such a broad definition of economic activity, the activities of trade unions in the United Kingdom could be brought under the scope of the Bill. I ask Members not to try to intervene to correct me because unfortunately that is the case. That is the real elephant in the room.

I do not believe that Ministers today do not consider trade unions to be an important and relevant part of civil society, but on Second Reading my right hon. Friend the Member for Leigh (Andy Burnham) gave the example of the Shrewsbury pickets, whose case was examined by the Secret Intelligence Service, and made the point that their convictions still stand. Indeed, there are right hon. and hon. Members of this House today who were right hon. or hon. Members of the House or indeed the Government in the 1980s when trade unions were seen as "the enemy within" and banned from representing members at GCHQ because it was considered that trade union membership and activity was incompatible with a commitment to international security, which is a position that is as absurd as it is downright insulting. I genuinely believe that Government Members have moved on from that positon.

Government Members may well wish to point to subsection (4), which suggests that:

> "A warrant may be considered necessary as mentioned...only if the information which it is considered necessary to obtain is information relating to the acts or intentions of persons outside the British Islands."

They may feel that that gives sufficient protection. I must say that, in my experience, unfortunately it does not.

At this point I remind the Committee that I am a member of the GMB and Unite trade unions and I was formerly a senior official with Unite. That experience gives me insight that I wonder whether Ministers and Government Members, through no fault of their own, do not have. My plea is that they bear in mind that our economy is a globalised one, employers and industries are globalising and, in response, trade unions have had to do the same. Trade unions will gather together in bilateral agreements or bilateral alliances. In the UK, they may well join international trade union organisations such as the IMF—I should point out that that is the International Metalworkers Federation rather than any large economic body—or, as I did, they may well form a globalised trade union with other trade unions so that they meet globalised employers on the same basis and cannot be picked off, one against the other.

In the past, for example—this was quite a regular occurrence—I found myself in Canada on negotiations with mining and mineral extraction employers based in Brazil, working with trade unions from outside the UK. There were disputes with British Airways, which at the time was incorporated through International Airlines Group in Spain, and I found myself in Bangladesh working with the Bangladeshi trade unions that we were trying to form to help them develop trade union strength against the exploitation of shipbreakers. Globalised trade unions pursuing genuine avenues of trade disputes with globalised employers are a modern-day reality.

When the hon. Member for North Dorset talked about the elephant in the room, I thought he was going to mention the great fears that Opposition Members

[Christian Matheson]

have that trade union membership could be seen as damaging to the nation's economic wellbeing. If we seek to amend the clause to give the greater clarity that I understand Government Members do not wish to see, it is for good reasons of bitter experience—reasons that Ministers are perhaps not aware of, because of their own personal experience.

4.30 pm

There is genuine fear that trade unions in the United Kingdom undertaking legitimate trade disputes on behalf of their members may be dragged into a situation where that action is considered to be damaging to the economic wellbeing of one of our largest employers and therefore has an effect on national economic wellbeing. There is a fear that that may fall within the scope of the clause.

I ask Ministers and Government Members, in the spirit of the Committee's conduct so far, to consider this carefully and to take away my pleas and those of Opposition Members that sufficient safeguards be written into the Bill to give genuine protection to trade unions that are simply trying to defend the wellbeing of their members and their members' families. I am grateful for the opportunity to put this case. I remind Members of my declaration of interest, which is my membership of trade unions.

Keir Starmer: It is a pleasure to follow my hon. Friend, whose comments I endorse. I saw the Ministers nodding that they will take that away and consider it, and I am grateful for that indication. Rather than the broader points that have been discussed so far, I will concentrate my comments on clause 18(2)(c), which deals with

"the interests of the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security".

The short point is this: if economic harm to the wellbeing of the United Kingdom is so serious that it amounts to a threat to national security, it is covered within subsection (2)(a). If harm to the economic wellbeing of the United Kingdom is a serious crime, it is already within subsection (2)(b). The Intelligence and Security Committee has made the point that

"if 'national security' is sufficient in itself, then 'economic well-being…so far as [is] relevant to the interests of national security' is redundant, since it is a subset of the former."

The ISC went on to say:

"We have questioned both the Agencies and the Home Office on this matter and neither have provided any sensible explanation. In our opinion, this area is already sufficiently complex so drafters should seek to minimise confusion wherever possible. We therefore recommend that 'economic well-being' is removed".

The Committee makes the same point that if economic wellbeing is already subsumed into paragraphs (a) and (b), paragraph (c) is not necessary. The Committee has asked repeatedly what paragraph (c) covers if not what is already within paragraphs (a) and (b), and I ask that question here today. I ask the Minister or anyone else to give me a single example of what it is envisaged paragraph (c) covers that does not fall within paragraphs (a) and (b).

Subsection (4) has been referred to today and on Second Reading as providing some sort of comfort that subsection (2)(c) is not a matter of concern. It says:

"A warrant may be considered necessary as mentioned in subsection (2)(c) only if the information which it is considered necessary to obtain is information relating to the acts or intentions of persons outside the British Islands."

To be clear, that does not mean the communication itself is outside the British islands, but that the communication relates to acts or intentions of persons outside the British islands. I endorse everything that was said about trade union and other activities that may be outside the British islands, but the suggestion that this provision would only catch communications outside the British islands is a wrong reading, in my submission.

The question on the table for the Minister is whether a single example can be given of something coming within subsection (2)(c) that does not come within subsections 2(a) and (2)(b). If not, how can the clause be justified?

Mr Hayes: I start my contribution to this short debate by confessing a pretty profound prejudice, which is that I am committed to and supportive of trade unions. I am a member of a trade union; my father was a shop steward; my grandfather was chairman of his union branch. I come from a long history of trade unionism, and I believe that the trade union movement in Britain has done immense good for the interests of the people. I am a Disraelian Tory, and so I believe in the elevation of the people, in which trade unions have played an important part. I could wax lyrical about one of my heroes, Joseph Chamberlain, in terms of the elevation of the people, but we do not have time for that. When I approach this clause and this subject, I do so with that profound prejudice. By the way, just as an aside, prejudice is immensely underrated in the modern age, but it is important that we balance all that is rational with all that we feel. Feelings matter.

I make it categorically clear that, as the hon. Member for City of Chester generously said, not only individual Ministers in this Government, but the Government as a whole have no intention that these powers should be used for the kind of political purposes he describes. That is not our intention. Actually—it is always good to go further than one's officials want—I think we might need to be more emphatic about that in some form, because I want to make it crystal clear that the kind of scenario that he describes cannot happen in our country.

Our country is a free and open place where we celebrate the differences between people and the role played by the trade unions. I am prepared to go as far as necessary down the road to make that categorically clear. To that end, I suggest that I meet Frances O'Grady of the TUC to discuss this. I know her well. I went on a joint business-trade union delegation with her to Germany to look at apprenticeships when I was Skills Minister. I am more than happy to engage with the trade union movement to see what more we can do.

However, let us return to the point about economic wellbeing and these amendments. At the outset of his remarks, the hon. Gentleman rightly recognised that threats to economic wellbeing could be immensely damaging and fundamental in their effect and could be the business of a foreign potentate or another source of malevolence. He described a cyber-attack, which might be an attack

on our critical infrastructure, on our financial services system or, heaven knows, on Government itself. The age we live in means that cybercrime, perpetrated either locally or internationally, is a threat that we must recognise and have the means to address, so it is right that the law—this Bill, which I hope will become an Act—includes reference to the interests of the economic wellbeing of the UK, but it is equally true, as the Opposition argued on Second Reading and elsewhere, that that interest is closely tied to national security.

One argument that has been made is that if we were to define national security more tightly, we might assuage fears of the kind the hon. Gentleman described. The trouble with defining national security more tightly is that that might of itself create additional rigidity that is unhelpful to the agencies in pursuit of their work. Successive Governments have hesitated to describe national security prescriptively, and having looked at these matters closely I understand why. Successive Governments have affirmed the idea that a small number of law enforcement agencies, the security and intelligence services and the armed forces need to be able to seek and use interception warrants for national security, for preventing and detecting serious crime and in the interests of economic wellbeing. I am reluctant, therefore, either to take economic wellbeing out of that list or to define national security more narrowly. I think that the breadth of those definitions is important for operational effectiveness.

There may none the less be more that we can do to deal with political fears, if I can put it in those terms. The existing law is clear that none of these powers can be used in the interest of a political party or in a particular political interest, but it may be that we can do more to offer reassurance. I am going a little further than we have until now because I want to create a bridge that we can cross. The Security Service Act 1989 and the Intelligence Services Act 1994 provide some protection, because they deal particularly with the issue of the interests of any political party being served by the powers. A case has been made about the Shrewsbury 24. Indeed, there was a debate in Westminster Hall on that very subject—I have the transcript here with me—promoted by the hon. Member for Liverpool, Walton (Steve Rotheram), who is a very good man and a very proud trade unionist; I know him well. The events at that time preceded the legislation that tightened protection. Notwithstanding that, I have heard the argument that has been made today.

The other reason why I do not want to significantly change the language on economic wellbeing, although I understand the argument about ambiguity, is that the phrase "economic wellbeing" reflects the language in domestic legislation—as my hon. and learned Friend the Solicitor General will know—the European convention on human rights and the European Union directive that covers the scope of interception powers. It is difficult to think of a better, more appropriate or more widely recognised term. Substituting another term could be taken to imply that the agencies should not engage in certain activities in the future that they undertake now. One can easily imagine a future judicial commissioner querying why the language has changed from that used in the Regulation of Investigatory Powers Act 2000, and asking whether what the agencies do should change, too.

I am hesitant to make that fundamental change. I am not sure it would do anything for transparency. Indeed, removing economic wellbeing and placing what is done under the broader umbrella of national security might lead to less, rather than more, clarity in the process. As the hon. Member for City of Chester described, some of the events that would be included under the heading "economic wellbeing" could be sudden and of crisis proportions, such as the cyber-attack to which he and I referred, and require prompt and decisive action. Such crises are, by their nature, unpredictable and we must not limit the agencies' ability to deal with them.

4.45 pm

Amendments 85 and 86 seek to limit the statutory purpose for which an interception warrant may be used. They would limit the issue of warrants for national security and for the purpose of preventing or detecting serious crime to only those cases where there is a reasonable suspicion that a serious criminal offence has been, or is likely to be, committed. The problem with that is that it has always been the case that the security and intelligence agencies, the armed forces and a small number of law enforcement agencies are able to seek interception warrants for the purposes I have described. That is reinforced both in RIPA and in the statutory functions of GCHQ, MI5 and the Secret Intelligence Service.

It would not be appropriate to hinder the ability of agencies to take investigative action. Threats to the UK are constantly evolving and it would be dangerous to limit the ability to deal with those threats in the way that the amendments certainly would. Cyber-attacks of the kind the hon. Gentleman described might come from an initially unknown or uncertain source. Whether it would stand up in law if we said that a crime had been committed, or was very soon likely to be—if we were to go about the business of investigating them under the amended legislation, assuming the amendment was passed—is a matter of some doubt, so I am not convinced by the amendment.

I will return to the hon. Gentleman's specific points, as they seem very good. If he will permit me, I will be happy to write to him and the other members of the Committee. I think he said that—if he did not, I am sure that at some point he will—clause 225 sets out the general definitions of a serious crime and the Bill already makes clear that interception can only be used in the prevention and detection of serious crime and spells out what that means. Warrants in respect of serious crime would nearly always pass the reasonable suspicion test, but in some cases intelligence derived from interception is the only means by which reasonable suspicion can be established—for example, in the investigation into an organised criminal group. I do consider the safeguards in the Bill, including strict limits on the circumstances in which these powers can be used, to be effective. I do think that is a robust framework, but I am mindful of the specific points about political and trade union activity. I will look at that again and will take any steps that I think are reasonable to provide assurance to the hon. Gentleman, his hon. Friends, and others.

Joanna Cherry: I listened carefully to the Minister, and I noted that he said he wanted to provide a bridge on the issue of national security and can perhaps deal

[Joanna Cherry]

with issues and political fears related to that, but that he does not want to significantly change the language on economic wellbeing and is not happy with the SNP amendments in relation to reasonable suspicion. I do not want to get too bogged down on trade union rights and I certainly do not want to kick down the bridge that the Minister wants to build, but I have to say that, on trade union rights, actions speak louder than words. This Government have introduced some of the most draconian anti-trade union legislation that has been seen in this country for many years—worse than Mrs Thatcher's. In that context, I do wonder whether we can be assured about the Government's intentions in relation to trade unions. However, the Minister is an honourable man; I take him at his word and will listen to what he has to say in the future on this issue. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 18 ordered to stand part of the Bill.

Clauses 19 and 20 ordered to stand part of the Bill.

Clause 21

APPROVAL OF WARRANTS BY JUDICIAL COMMISSIONERS

Keir Starmer: I beg to move amendment 62, in clause 21, page 17, line 4, leave out from "must" to "the following matters" in line 5 and insert "determine".

The Chair: With this it will be convenient to discuss amendment 89, in clause 21, page 17, line 10, leave out subsection (2).

Keir Starmer: This is where we pick up the discussion about scrutiny. As the amendments to clause 17 were withdrawn, the premise here is that of a dual function, carried out first by the Secretary of State and then by the judicial commissioners. To be clear, we welcome the involvement of judicial commissioners, and the amendments focus on their role in the process. We have had the discussion about whether the judicial commissioners should be the default decision-makers—this is a different exercise.

What is clear in clause 21(1) and (2) is that what is envisaged in the Bill is a review exercise by the commissioners. That is clear from the words "must review". Subsection (1) states that the judicial commissioner must review the person's—in this case, the Secretary of State's—conclusions as to necessity and proportionality, and subsection (2) states that

"the Judicial Commissioner must apply the same principles as would be applied by a court on an application for judicial review."

It is therefore a review mechanism, and it is a review according to judicial review principles.

Two problems arise from that. The first is that it is not, therefore, truly a double lock. A double lock denotes a decision by the Secretary of State, which survives in clause 17, and a decision by a judge—a judicial commissioner—under clause 21, but this is not that sort of double lock.

The second problem, the reference to judicial review, is equally profound. Committee members will remember my question to Lord Judge:

"Do you agree with me that as the Bill is currently drafted, it is not clear what Parliament intends"—

in relation to judicial review of warrants—

"and therefore it will fall to the judges? In other words, it is broadly enough drafted to cover a longer-arm review or a closer intense review depending on what judges decide as cases evolve. It could accommodate both approaches."

That is the problem with judicial review here.

I will quote Lord Judge's response, because he captures the real cause for concern here:

"I think 'judicial review' is a very easy phrase to use. It sounds convincing, but it means different things to different people. People say, 'Wednesbury unreasonableness'—that was a case decided by the Court of Appeal in 1948 or 1947, and it has evolved. Personally, I think that when Parliament is creating structures such as these, it should define what it means by 'judicial review'. What test will be applied by the judicial—I call him that—commissioner, so that he knows what his function is, the Secretary of State knows what the areas of responsibility are and the public know exactly who decides what and in what circumstances? I myself do not think that judicial review is a sufficient indication of those matters."—[*Official Report, Investigatory Powers Public Bill Committee,* 24 March 2016; c. 67-68, Q220.]

That is one of the most experienced and well-respected judges in the country indicating that in those circumstances judicial review is not a sufficient indication of the test.

Amendment 62 would require the judicial commissioner to decide for him or herself on necessity and proportionality. Amendment 89 would take out the reference to judicial review. The scheme and structure of the Bill would therefore be retained. There would be a double lock. Both the Secretary of State and the judicial commissioner must be satisfied that necessity and proportionality is made out, at which point the warrant would come into effect, unless of course it is an urgent warrant. There would be clarity about the role of the judge.

In previous exchanges, it has been accepted that the judicial commissioner will see the material that is before Secretary of State and therefore can make that decision. The lock therefore becomes what we have termed an equal lock, where both parties make a decision on the substantive merits of the case. That gets rid of the potential ambiguity with which Lord Judge was concerned. It would then be absolutely clear that this is truly a double lock. It is a simple and straightforward amendment that would bring real clarity to the exercise.

Suella Fernandes: I am listening to the hon. and learned Gentleman with interest, and I appreciate his exploration of the meaning of this term. What is his opinion of Lord Pannick's assessment of the insertion of judicial review? He concludes that it is sufficient, flexible but clear and strikes the right balance.

Keir Starmer: I know and respect Lord Pannick hugely, but there is no guarantee in the Bill that his preferred way of approaching this under judicial review principles is the one that will be carried out in practice; he has no control over the test that will be applied. Lord Judge's concern is that some judges may consider that this is an area where they virtually take the decision, which is what they do in certain cases involving particular human rights issues, where they get very close to the decision, while other judges will be much more deferential.

With the best will in the world, Lord Pannick puts forward the view that judicial review will work, but there is no guarantee of that. Unless it is set out in the Bill, the test will be simply left to be applied on a

case-by-case basis. Nobody, in this formulation, could argue that a judge who applied long-arm reasonableness was acting in any way other than in accordance with the test.

Obviously, I respect what Lord Pannick says, but Lord Judge was making a different point that goes back to accountability, to some extent. He was alive to the fact that once judges are involved in the decision-making process, a torch will be shone on them in relation to these warrants. There will be inhibitions on what they can say and the circumstances in which anybody could hold them to account. We have rehearsed that. I read into his answer that he wanted absolute clarity and a tightness of test so that the judges knew what they were to do and could operate within those confines, thus protecting themselves from the suggestion that they had applied too close or too loose a test. It is partly about clarity, with one eye on judicial accountability in the longer term for the decisions that have to be made.

Lucy Frazer: The hon. and learned Gentleman earlier cited Sir Stanley Burnton and said, pretty much verbatim, that he would encourage Government Members to look carefully at any submissions that Sir Stanley Burnton made, as he was extremely knowledgeable. On this issue, Sir Stanley said that he was happy with the test and that it might be difficult to draft it more tightly. Another experienced member of the panel who gave evidence, Lord Reid, specifically stated that he thought the judges' role was

"about oversight…and not about decision making."—[*Official Report, Investigatory Powers Public Bill Committee,* 24 March 2016; c. 84, Q259.]

Keir Starmer: Sir Stanley is a friend and colleague, and I have had the privilege of appearing in front of him on a number of occasions in cases involving national security, in particular control order cases. I think that what he was indicating was that, in his experience and on his own approach, as any of the cases will demonstrate, he is in favour of intense review by the judge. He anticipates that the measure allows that intense review. I have no doubt that that is the approach he personally would take, because that would be consistent with the approach that he has always taken in such cases.

5 pm

The problem is that the clauses are of general application for all judges. I know and respect Sir Stanley greatly, and I have no doubt that he would interpret the measure as requiring him to exercise very close scrutiny, but that does not mean it is clear enough on its face or that the test is simple enough. It is a question of whether there is a double lock in the true sense of the Secretary of State making a decision and then a judge making a decision, or whether it is something less than that, where the Secretary of State makes a decision and the judge then reviews what the Secretary of State has done. According to this formula, the judge could do it according to the old-fashioned, 1948 Wednesbury test, which would involve a long-arm review even to the point where a judge would say, "I personally do not think that this is necessary or proportionate, but in the circumstances I do not think that what the Secretary of State has done is so unreasonable that no reasonable Secretary of State would have done it." That is the danger that everyone involved in the discussion is concerned about. The amendment would make it crystal clear that nothing is lost by the simple test proposed, while a great deal would be gained for the application of the test and, actually, for the judges themselves as they carry out their new role. That is a serious consideration.

Suella Fernandes: It is an important issue. Evidence to the Joint Committee from Sir Stanley Burnton and Lord Judge was unequivocal, in that Wednesbury unreasonableness would have no place in this context. That seems to be maintained by Sir Stanley Burnton in the evidence that we have received more recently. Does the hon. and learned Gentleman agree that Wednesbury unreasonableness has no role in this context, especially by virtue of reference to necessity and proportionality?

Keir Starmer: The reference to proportionality and necessity does not help in this context, because the question for the judge on this formula is not, "Is the measure necessary? Is it proportionate?" Judges often make, and are well used to making, that decision. The decision for them on this formula is whether, when the Secretary of State decided that it was necessary and proportionate, she was exercising her powers in a way that cannot be questioned, applying the principles of judicial review. That is the real difference.

Whether I think the long-arm Wednesbury test is appropriate is neither here nor there. So long as we have clause 22(2), it is open to a judge to apply the old-fashioned Wednesbury test, because that is within the principles of judicial review. The case law obviously varies. The closest possible scrutiny is usual in control order or TPIMs cases, but there are many other examples involving national security where the judges have persistently said that long-arm review applies. There are two strong lines of case law, and I am arguing that one is better than the other. The point is whether the Bill is clear enough about the test to be applied.

This is a real opportunity, as much as a challenge, for the Government. The provision is a new one, and it is a double lock if properly applied. It ought to be substantive. The judge ought to decide whether a warrant is necessary or proportionate. As long as he or she does, the warrant comes into existence and can be relied upon. In the 21st century, that is the right approach when such a provision is going into statute for the first time.

Lucy Frazer: I think the hon. and learned Gentleman is saying that he favours the same test being applied by both the judge and the Home Secretary. If so, that is in conflict with Sir Stanley's evidence. He said that he would give significant weight to the view of the Home Secretary. If he gave significant weight to the Home Secretary, necessarily he would be reviewing what the Home Secretary has done. If that is appropriate, the word should be "review", whether it is judicial review or not. It is a review, not an assessment afresh of the same decision.

Keir Starmer: I am grateful for that intervention. There are several different positions here, and we are finding our way. The amendments would take out the review element and make it clear that it is a double lock. There would then be a separate decision by the Secretary

[Keir Starmer]

of State and a decision by a judge on the same material. Of course, a judge would always give weight to the Secretary of State's view, but they would still come to a decision of their own. That is position No. 1, and let me be clear that that is what the amendment is aimed at—a true and equal lock.

Joanna Cherry: Does the hon. and learned Gentleman agree that amendment 89, tabled by my hon. Friend the Member for Paisley and Renfrewshire North and I, would specifically take out subsection (2) and the reference to judicial review? That would make clear what he is saying: amendment 62, which I also support, would amend subsection (1) so that the judge would determine the review in regard to necessity and proportionality, and judicial review would come out completely.

Keir Starmer: I agree. I notice that my name is not on amendment 89. I think it should have been, because amendment 62 only works if subsection (2) comes out, but that is neither here nor there at this stage. I am not quite sure what happened, but given that both amendments have been tabled, it does not matter one way or another.

To be clear, the position is that it should be a substantive decision by the judge according to necessity and proportionality, and those terms obviously have their own special application. Through amendment 89, the review, whether by judicial review principles or otherwise, would come out, making it a true double and equal lock.

It is a new approach and a new provision, so it is for Parliament to decide on the appropriate way forward, but the amendments would give clarity and a real safeguard with an equal lock. That is the position. There probably is a fall-back position, which is that if it is to be a review of some sort, amendment 89 should stand on its own feet—that the review should not be on the principles of judicial review, and something more would need to be written into the Bill.

I do not know what response the Minister will give, but this matter goes to the heart of the issue, and it may be that further consideration needs to be given to the precise test. As it stands, the test is insufficiently precise and will lead to difficulties in its application. It is a matter of real concern to the judiciary. Lord Judge does not make such comments without a good deal of thought. If he is concerned about the provision, the Government should be, too. The simple way through is to have a simple but substantive double and equal lock.

The Solicitor General: The debate has been interesting. On a point of order, Mr Owen, I want to ensure that we are dealing with both groups of amendments. The grouping that I have seeks to group new clauses 1 and 5 in one group—

The Chair: I am grateful to the Minister. We are dealing with amendments 62 and 89.

The Solicitor General: That is fine. I am grateful to you, Mr Owen. I will address those amendments, rather than the new clauses, which will be dealt with in the usual way, but the purport of the argument is similar.

To summarise, amendment 89 would remove the provision in the Bill that specifies that when reviewing the decision by a Secretary of State or a Scottish Minister to issue a warrant, the judicial commissioner must apply the same principles as would be applied by a court in an application for judicial review. Instead, the amendment would require him or her to determine the necessity and proportionality of a warrant for him or herself.

There has been a lot of debate on the important report by David Anderson and the Royal United Services Institute review. They have played a huge part in bringing the Bill to germination and its current state. There is a danger here. I listened very carefully to the evidence of Lord Judge and, indeed, asked him a number of questions. The dilemma that I put to him still remains. I can see the attractiveness in seeking to narrow or prescribe the particular criteria to be applied by the commissioners in every instance, but there is a danger that, in doing so, we fetter the proper discretion of judges exercising their review function in looking at each case purely on a case-by-case basis.

The hon. and learned Member for Holborn and St Pancras set out his stall very clearly. He prays in aid the equal lock, as he calls it. In essence, he wants a different approach from that which the Government say we should take. We make no apology that the decision made by the Secretary of State is reviewed by the judicial commissioner before coming into force. That is a very simple, staged approach that clearly reflects the way in which case law is going and is also ahead of the curve when it comes to the development of judicial oversight of warrantry in these particular cases.

I will deal with the Anderson carve-out, if I may use that phrase. The problem with the genuine intention of David Anderson in trying to carve out what he recognised to be an important part of the function of Government—namely, national security and foreign affairs, where he recognised that the Executive are the part of our constitution best placed to deal with those matters—and then creating a certification process is that that, in itself, is juridicable. An Executive decision will be made that is, in itself, capable of challenge. My concern is that, however well intentioned attempts to create a hard and fast definition that creates a theoretical space for Ministers to act might be, we will end up with further difficulty, further lack of clarity and, frankly, further litigation that means that the Bill is not future-proof in the way that I want it to be.

Keir Starmer: To save time—I probably should have made this clearer an hour ago when we were rowing about other things—I had seen this certification clause, or new clause 1, as going with the amendments to clause 17. In other words, it was my acceptance that, on certain measures, there ought to be a certificate from the Secretary of State for the limited accountability that I accept is there. Therefore, if it is helpful, amendments 62 and 89 are intended to be taken on their own, not cluttered by the certification process, which possibly would have been better discussed under clause 17.

The Solicitor General: I am grateful to the hon. and learned Gentleman. I remind myself that we will be able to debate those new clauses but I thought it important to look, in essence, at the full picture of David Anderson's

recommendations, bearing in mind that we had quite a lively debate about the role of the Executive. It would be a mischaracterisation of Mr Anderson's view about the role of the Executive to say that somehow there was a wholesale move away from the Executive's position with regard to warrantry and what Government Members certainly strongly feel is the important role of the Executive.

Coming back to where we are with regard to the judicial review test, we have already heard reference to the noble Lord Pannick. The intervention he has made is powerful and it is important that he thinks the test is robust. The criticism is, perhaps, not justified. Of course, that is not the only basis on which we have reached that conclusion. We all know—those of us who are lawyers and those who are not—the growing importance of judicial review in our public life. It is a concept that has evolved and that will continue to evolve. It is flexible, too.

Joanna Cherry: It is so general. I have advised people on the potential for judicial review. Does the Minister agree that it is difficult to advise a client on the potential for judicial review in the absence of a reasoned decision? In this Bill, there is no duty on the Secretary of State to give a reasoned decision, so judicial review scrutiny will be happening in a vacuum in the context of a decision for which no written reasons have been given because the Bill does not demand it.

5.15 pm

The Solicitor General: Herein lies the problem. We have the judicial lock—the commissioners, of course, will be giving reasons—so that there is a check and balance upon the decision of the Executive. The hon. and learned Lady makes a proper point, because Executive decisions are administrative decisions that are judicable. I want to avoid further unnecessary and, frankly, unhelpful litigation that will get in the way of the important work of warrantry, which has to be undertaken, bearing in mind not only the interests of national security but, looking down the scale, the various scenarios that will confront commissioners, such as serious crime cases. The flexible scrutiny will allow differing approaches to be taken. Returning to the main point, I am worried that we might end up creating something that is too inflexible, which will create injustice rather than solve the problem.

Joanna Cherry: But how will the judicial commissioner scrutinise the Secretary of State's decision, having regard to judicial review principles, when she is under no duty to give reasons for it? How will they do it practically?

The Solicitor General: They will have access to all the material that the primary decision maker has. The hon. and learned Lady is right to ask the question but, simply speaking, the judicial commissioner will have access to the material that the Secretary of State has. In fact, the judicial commissioner will be able to ask for more material, so there should not be any fear that the vacuum she mentioned will exist in relation to the judicial lock.

Returning to the obvious experience of judicial commissioners, I am keen to ensure that we end up in a position where commissioners feel that, on a case-by-case basis, they are not only free to agree with the Secretary of State, but are absolutely free to disagree. If there is not that element of flexibility, this double lock will be meaningless. Again, without casting any imputation upon the good intentions of those who have tabled amendments, my concern is that, first, this amendment is based on a difference of opinion on the nature of the judicial commissioner stage. Secondly, there is a danger that we might end up in a position where decisions are being second-guessed in a way with which the judiciary would feel uncomfortable, and where the balance between the actions of the Executive and proper scrutiny by the judiciary is not clearly delineated.

Suella Fernandes: Does my hon. and learned Friend agree that a similar inclusion of a reference to judicial review has worked well in other legislation and in other regimes, such as in relation to control orders and terrorism prevention and investigation measures? We have a history of such references not causing major problems.

The Solicitor General: I entirely agree with my hon. Friend. It would not be right for me to make an easy draw-across to the TPIM regime. The hon. and learned Member for Holborn and St Pancras has experience of TPIMs, and I was on the Bill Committee that passed the TPIM law back in 2011, so I have a keen interest in the evolution from what were control orders to TPIMs. The point is staring us all in the face: myriad different circumstances will confront judicial commissioners. It would be too easy for the Committee to come to a conclusion that, somehow, we should create an artificially hard and fast set of criteria that would prevent the judicial commissioners from exercising their duties when considering the varying scale and nature of the applications that they will receive.

Simon Hoare: My understanding of what the Solicitor General is saying—perhaps he will confirm this—and my reading of the Bill is that the bar is being set a lot higher than the hon. and learned Member for Edinburgh South West seems to imply. The onus in the first instance will be on those who will be making the case for the warrant. The Home Secretary, for example, will then review it to see whether it passes the tests in the Act and will do so, as will the author of the case before the Minister, in the knowledge that they will be, for want of a better phrase, peer reviewed by a commissioner. Therefore, the review of the review of the review is almost a triple lock of the case made by the authority seeking the warrant.

The Solicitor General: That is an interesting way of putting it. I want to make it clear that the review is on an appeal. There is a danger that we will end up mistakenly looking at some sort of a de novo application entirely on its merits, not an appeal. There are other mechanisms by which this matter could be taken further up. At this stage, it is part and parcel of the decision being made. That is an important point of clarification.

Keir Starmer: Can the Solicitor General point me to the words in clauses 1 and 2 that would make it wrong for a judge to apply long-armed judicial review principles to a decision?

The Solicitor General: I am not going to point to that because, as I have said, it is important to have wide discretion. But equally, as Sir Stanley Burnton said, there will be other approaches and judges will be compelled to take a much closer look or hands-on approach—I think Sir Stanley said "stringent approach"—when looking at the case. But that will depend on the case before the commissioner. For example, a case of extreme importance with potentially draconian impacts deserves a very close look under the microscope. That is important. What I want to get across is that there should be not a sliding scale, but a gradation and wide discretion in the test that allows differing approaches to be taken.

In response to the hon. and learned Gentleman, I would be surprised to see bald decisions on Wednesbury unreasonableness. Bearing in mind that, most of the time, European convention on human rights points will have to be engaged, and, by dint of that, necessity and proportionality will have to come into play anyway. Perhaps the point is too axiomatic to be made, but it is important that we do not get too fixated by a worry that judges will take an old-fashioned clubbish approach to whether the Home Secretary is totally out or order. I do not believe that will be the case, bearing in mind the calibre and experience of the commissioners who have done the work up to now and who I expect will carry on doing it in the unified commission that we will create.

In a nutshell—the point does not improve on repetition—there is a danger that in going down the seductive line of seeking greater clarity, we may end up fettering the reviewer's discretion, which I do not think is in anyone's interest and does not support the thrust of what all hon. Members want: an effective lock mechanism that properly involves the judiciary in a way that is unprecedented but welcome in our mature democracy.

Joanna Cherry: I have heard nothing that answers what in my submission is a knockout point about lack of reasons. I am not tooting my own trumpet because it was not my idea. I got the point from my learned devilmaster, Laura Dunlop QC, a distinguished silk at the Scottish Bar and former law commissioner. I asked her to look at this and she said the first thing that occurred to her was how can there be scrutiny under judicial review principles when there is a vacuum of any reasoning. I have not heard any answer to that question in what the Solicitor General has said, with all due respect to him.

On that basis, I remain of the view that amendments 62 and 89 will be essential in due course, but following the course of action we have taken today, I will not insist on them at this stage. I reserve the right to bring them forward at a later stage, about which the Chairman has advised me.

Keir Starmer: I am grateful to the Solicitor General. I have listened carefully to what he has said. There is a difference between us, because I seek to ensure through the amendment that the judicial commissioner is a proper decision maker.

To make the argument that the judges might be fettered is really to misunderstand the amendment that I have tabled. The duty of the judge is to apply the test that Parliament sets out in statute. That is straightforward, and if Parliament is clear about the test, the judge is exercising his or her duties properly in applying the test. There is no question there, but there is this fundamental point between us as to whether it should be review or decision making. I think that is clear enough.

In light of the argument, at this stage I will not push this amendment to a vote, but I will reserve it for a later stage. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Mr Hayes: I beg to move amendment 2, in clause 21, page 17, line 13, leave out from "a" to "grounds" and insert

"decision of the Secretary of State to issue a warrant,".

This amendment makes a minor drafting change to take account of the fact that Clause 21 may also apply in a case where a warrant has already been issued (see Clause 22).

The Chair: With this, it will be convenient to discuss Government amendment 3.

Mr Hayes: These are minor drafting changes, to take account of the fact that clause 21 may also apply in cases where warrants have already been issued by the Secretary of State, and that urgent procedures are covered in clause 22, and that clause 21 may also apply in a case where the warrant has been issued by Scottish Ministers. They are uncontentious changes, and I beg to move the amendment on that basis.

Amendment 2 agreed to.

Amendment made: 3, in clause 21, page 17, line 15, leave out from "a" to "grounds" and insert

"decision of the Scottish Ministers to issue a warrant,".—*(Mr John Hayes.)*

This amendment makes a minor drafting change to take account of the fact that Clause 21 may also apply in a case where a warrant has already been issued (see Clause 22).

Keir Starmer: I beg to move amendment 102, in clause 21, page 17, line 23, at end insert—

"(6) In consideration of any warrant pursuant to this Part, a Judicial Commissioner may instruct a special advocate to represent the interests of any person or persons subject to the warrant or the wider public interest.

(7) A Judicial Commissioner must instruct a special advocate when considering applications for a warrant—

(a) in the interests of national security; or

(b) involving the consideration of items subject to legal professional privilege.

(8) For the purposes of these proceedings special advocates are persons appointed by the relevant law officer.

(9) The 'appropriate law officer' is—

(a) in relation to warrants in England and Wales, the Attorney General,

(b) in relation to warrants in Scotland, in relation to (7)(a), the Advocate General for Scotland, and in relation to (7)(b), the Lord Advocate, and

(c) in relation to warrants in Northern Ireland, the Advocate General for Northern Ireland.

(10) A person may be appointed as a special advocate only if—

(a) in the case of an appointment by the Attorney General, the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,

(b) in the case of an appointment by the Advocate General for Scotland or the Lord Advocate, the person is an advocate or a solicitor who has rights of audience in the Court of Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

(c) in the case of an appointment by the Advocate General for Northern Ireland, the person is a member of the Bar of Northern Ireland."

The Chair: With this it will be convenient to discuss the following:

Amendment 38, in clause 21, page 17, line 23, at end add—

"(6) In considering a warrant pursuant to this Part, a Judicial Commissioner may instruct a special advocate to represent the interests of any person or persons subject to the warrant or the wider public interest.

(7) In considering a warrant pursuant to this Part which is being sought—

(a) in the interests of national security;

(b) in the interest of the economic well-being of the United Kingdom in so far as those interests are also relevant to the interests of national security; or

(c) involving the consideration of items subject to legal professional privilege,

a Judicial Commissioner must instruct a special advocate to represent the interests of any person or persons subject to the warrant or the wider public interest.

(8) For the purposes of this section a special advocate is a person appointed by the appropriate law officer for the country of the United Kingdom to which the warrant relates or mostly relates—

(a) for England and Wales, the Attorney General,

(b) for Scotland, the Advocate General for Scotland, and

(c) for Northern Ireland, the Advocate General for Northern Ireland.

(9) A person may only be appointed as a special advocate by the—

(a) Attorney General, if the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,

(b) the Advocate General for Scotland, if the person is an advocate or a solicitor who has rights of audience in the Court of Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

(c) the Advocate General for Northern Ireland, if the person is a member of the Bar of Northern Ireland."

Amendment 39, in clause 21, page 17, line 23, at end insert—

"(6) In consideration of any warrant pursuant to this Part, a Judicial Commissioner may instruct a special advocate to represent the interests of any person or persons subject to the warrant or the wider public interest.

(7) For the purposes of this section a special advocate is a person appointed by the appropriate law officer for the country of the United Kingdom to which the warrant relates or mostly relates—

(a) for England and Wales, the Attorney General,

(b) for Scotland, the Advocate General for Scotland, and

(c) for Northern Ireland, the Advocate General for Northern Ireland.

(8) A person may only be appointed as a special advocate by the—

(a) Attorney General, if the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,

(b) the Advocate General for Scotland, if the person is an advocate or a solicitor who has rights of audience in the Court of Session or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

(c) the Advocate General for Northern Ireland, if the person is a member of the Bar of Northern Ireland."

Amendment 45, in clause 23, page 18, line 22, after "addressed", insert—

"(c) any Special Advocate appointed."

Amendment 46, in clause 23, page 18, line 23, after "warrant", insert

", or any Special Advocate appointed,".

Keir Starmer: I am very happy to speak, particularly on amendments 38 and 39. May I just be clear with Committee members about the difference between the amendments? They are alternatives. They are provisions that are intended to allow the judicial commissioner to instruct a special advocate to represent the interests of any person or persons subject to the warrant, or the wider public interest.

The difference between the two amendments is that amendment 39 is purely permissive, so that, if a judicial commissioner thinks that he or she wants the assistance of a special advocate, amendment 39 allows that. Amendment 38 is more prescriptive, because it sets out certain circumstances in which a special advocate should be appointed. However, they are deliberately put in alternative form.

I will speak predominantly to amendment 39. There will be circumstances, no doubt, where the judicial commissioner wants assistance from somebody other than the Secretary of State in conducting the exercise that he or she is conducting. If the test remains as set out in clause 21, there may be points that the judicial commissioner wants to hear about, to hear upon and to take into account. This amendment provides a mechanism for him or her to do so.

Experience in the past has shown that, if a clause such as this, or similar to this, is left out, problems arise. Then, there is an attempt, usually by the court, to find its own inherent jurisdiction to allow an amicus or somebody else to be instructed. And it is not straightforward, because some courts and tribunals have inherent jurisdiction and others do not. There are many arguments about that, which we probably do not need to rehearse this afternoon.

This amendment cuts through all that by saying that, if in any given circumstances, a judicial commissioner wants to hear submissions from "A.N. other party", it allows him or her to have someone make those submissions, either in writing or in person.

I am not personally wedded to the special advocate scheme. If the Solicitor General thinks there is any merit in that argument, I am very happy to work with the Government on a proposal to achieve the same end, but I think that the fall-back of relying on inherent jurisdiction is inherently risky.

5.30 pm

Joanna Cherry: SNP amendment 102 is very similar to amendment 39, which the hon. and learned Member for Holborn and St Pancras spoke to, but there are two differences. First, on the areas in which a judicial commissioner must instruct the special advocate, I have deleted

"in the interests of the economic well-being"

in line with an earlier amendment. Secondly, in relation to the appropriate Law Officer who appoints special advocates, I have inserted, for the purposes of

[Joanna Cherry]

subsection (7)(b), the Lord Advocate as opposed to the Advocate General. The reason for that is that subsection (7)(b) deals with

"the consideration of items subject to legal professional privilege",

which would relate to devolved rather than reserved matters in general terms. In my submission, it would be respectful for the Lord Advocate as well as the Advocate General to be consulted about special advocates.

I am wedded to the notion of special advocates. I do not have a huge amount to add to what the hon. and learned Gentleman said, other than to point out that David Anderson QC, in paragraph 18 of his written evidence to this Committee submitted following his oral evidence, states that he would

"like to confirm my view that the right of the Judicial Commissioners under the dual lock system should be clearly acknowledged"

and

"use standing counsel to act as amicus where appropriate in relation to applications for the approval of warrants".

The special advocate scheme that I advocate goes a bit further than that. The purpose of the special advocate would be

"to represent the interests of any person or persons subject to the warrant or the wider public interest"

in the protection of privacy. The amendment would place a judicial commissioner under a duty to appoint a special advocate in a case involving a claim of national security or one that is subject to legal professional privilege. The appointment of the special advocate would ensure that the material produced to support an application is subject to adversarial testing as far as possible. That is the broad thrust of the amendment.

The Solicitor General: I am grateful to the hon. and learned Member for Edinburgh South West and the hon. and learned Member for Holborn and St Pancras. The hon. and learned Lady was very clear about the different basis of her amendment. My concern is that there are two schools of thought here. There is the amicus curiae school of thought, with which I have a great deal of sympathy. One of the roles of the Law Officers is, when we are approached by various jurisdictions, to consider whether the attorney himself should intervene or whether the court should have an amicus appointed. The hon. and learned Gentleman is right to talk about some of the confusion that can exist in regard to inherent jurisdiction. I am going to take that point away and consider it.

I am concerned about a full-blown replication of the important special advocate system that we have to assist, for example, the Special Immigration Appeals Commission, or of the genesis of the Justice and Security Act 2013 and the closed material procedure. There is an important difference between the public interest in having special advocates and this type of scenario. In such cases, there are affected parties—usually respondents to important applications—for whom huge issues are at stake and who need that sort of quality representation within what we accept are exceptional and unusual departures from the principle of open justice. That is why special advocates were created. They perform an invaluable and important role.

I do not see the read-across from that to this scenario. What we have here is an investigatory procedure. It takes place at the early stages—to take a case example—of the investigation of a crime or a threat to national security. There may not be at that stage an identifiable suspect; there is, therefore, a difference and a difficulty in identifying the prejudice that could be caused to the interest of an individual who is a party to the proceedings. It is a different scenario and, tempting though it might be to introduce that type of regime, it would serve only to introduce delay, bureaucracy and extra expense with no tangible benefit to the integrity of the system.

In a nutshell, I will consider carefully the amicus curiae point, but I have wholly to reject a wider approach and the creation of a special advocate system which, frankly, would go beyond even the American jurisdiction, with which comparison is often made—in the foreign intelligence surveillance court in the US they have amici curiae available to assist the court. On that basis, I urge the hon. and learned Member to withdraw the amendment.

Keir Starmer: I have nothing to add. In the light of what the Solicitor General has said I will not press the amendment. I look forward to what he produces and to further discussing that. I beg to ask leave to withdraw the amendment.

Joanna Cherry: I have nothing to add either.

Amendment, by leave, withdrawn.

Question proposed, That the clause, as amended, stand part of the Bill.

The Chair: With this, it will be convenient to discuss:

New clause 1—*Power of Secretary of State to certify warrants—*

"(1) The Secretary of State may certify a warrant in those cases where—

(a) The Secretary of State has reasonable grounds to believe that the conduct authorised by the warrant is necessary pursuant to section 18(2)(a) (national security) and relates to—

(i) the defence of the United Kingdom by Armed Forces; or

(ii) the foreign policy of the United Kingdom.

(b) The Secretary of State considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(2) A warrant certified by the Secretary of State under subsection (1) is subject to approval by a Judicial Commissioner.

(3) In deciding whether to approve a warrant certified by the Secretary of State under subsection (1), the Judicial Commissioner must determine whether—

(a) the warrant is capable of certification by the Secretary of State under subsection (1); and

(b) in the opinion of the Judicial Commissioner, approving the warrant is necessary on relevant grounds under section 18(2)(a) and subsection (1)(a) or (b) of this section.

(4) Where a Judicial Commissioner refuses to approve a warrant certified by the Secretary of State under this Section, the Judicial Commissioner must produce written reasons for that decision.

(5) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, refuses to approve a warrant under subsection (3), the Secretary of State, or any special advocate appointed may ask the investigatory Powers Commissioner to decide whether to approve the warrant."

This new clause is intended to replace existing Clause 21 and provides for the Secretary of State to certify warrants in cases concerning defence or foreign policy before they are considered by a judicial commissioner.

New clause 5—*Power of Secretary of State to certify warrants*—

"(1) The Secretary of State may certify an application for a warrant in those cases where the Secretary of State has reasonable grounds to believe that an application is necessary pursuant to section 18(2)(a) (national security) and involves—

(a) the defence of the United Kingdom by Armed Forces; or

(b) the foreign policy of the United Kingdom.

(2) A warrant may be certified by the Secretary of State if—

(a) the Secretary of State considers that the warrant is necessary on grounds falling within section 18; and

(b) the Secretary of State considers that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(3) Any warrant certified by the Secretary of State subject to subsection (1) is subject to approval by a Judicial Commissioner.

(4) In deciding to approve a warrant pursuant to this section, the Judicial Commissioner must determine whether—

(a) the warrant is capable of certification by the Secretary of State subject to subsection (1);

(b) the warrant is necessary on relevant grounds subject to section 18(2)(a) and subsection (1)(a) or (b); and

(c) the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(5) Where a Judicial Commissioner refuses to approve the person's decision to approve a warrant under this section, the Judicial Commissioner must produce written reasons for the refusal.

(6) Where a Judicial Commissioner, other than the Investigatory Powers Commissioner, approves or refuses to approve a warrant under this Section, the person, or any Special Advocate appointed, may ask the Investigatory Powers Commissioner to decide whether to approve the decision to issue the warrant."

The Solicitor General: We have dealt admirably with many of the issues in the clause and I will not speak to the stand part debate.

Keir Starmer: I do not wish to speak to new clause 1. It stands or falls with the clause 17 amendments and is to that extent withdrawn along with them.

Joanna Cherry: My new clause 5 is in the same category as new clause 1, the ground of which I think we have covered. The new clauses are slightly different, in that they followed David Anderson's initial recommendation, but we will obviously revisit the matter at a later stage so I will not take up time unnecessarily to labour the point.

Question put and agreed to.

Clause 21, as amended, accordingly ordered to stand part of the Bill.

Clause 22

Approval of warrants issued in urgent cases

Joanna Cherry: I beg to move amendment 91, in clause 22, page 17, line 29, at end insert—

"(1A) A warrant under this section can only be issued in an emergency situation posing immediate danger of death or serious physical injury to a person."

This amendment, and others to Clause 22, seek to require urgent warrants can only be issued where it is necessary in an emergency situation posing immediate danger of death or serious physical injury; require that a Judicial Commissioner must immediately be informed that such a warrant has been issued; and reduce the period within which a Judicial Commissioner must decide whether to authorise the warrant to 24 hours after issue.

The Chair: With this it will be convenient to discuss the following:

Amendment 40, in clause 22, page 17, line 30, after "must", insert "immediately".

Amendment 41, in clause 22, page 17, line 35, leave out from "ending" to the end of line 36 and insert

"24 hours after the warrant was issued."

Amendment 42, in clause 22, page 17, line 35, leave out from "ending" to the end of line 36 and insert

"48 hours after the warrant was issued."

Joanna Cherry: Bear with me a moment, Mr Owen, I have my notes in a bit of a schmozzle, as we say in Scotland—*[Interruption.]* Or as they say in Ireland, to be accurate. In Scotland they would say they were in a fankle. If you give me two minutes, I will sort myself out.

The Chair: We do not have two minutes, but I will give you a bit of time.

Joanna Cherry: Thank you, Mr Owen, and apologies to Committee members. The purpose of the amendments is to—sorry, I have lost my train of thought completely.

The Solicitor General: I think we were dealing with urgent cases. I hope that is of some assistance.

Joanna Cherry: Yes, I am very grateful to the Solicitor General. I skipped ahead to modifications, so I will skip back to urgent. The purpose of the amendments is to specify that urgent warrants can be issued only when they are necessary, in an emergency situation that poses an immediate danger of death or serious physical injury, and that a judicial commissioner should be informed immediately that an urgent warrant has been issued. They also seek to reduce the period within which a judicial commissioner must decide whether to approve the issue of a warrant to 24 hours after its issue.

There were differing recommendations from the Joint Committee and the Intelligence and Security Committee. I think I am correct in saying that the ISC recommended 24 hours and the Joint Committee 48. In terms of case law, recent decisions of the European Court of Human Rights suggest that 48 hours would be an absolute minimum, so I would insist on that as a fall-back position.

Victoria Atkins: I sat with my hon. Friend the Member for Fareham and my hon. Friend and neighbour, the Member for Boston and Skegness, on the Joint Committee, where we debated this in great detail. It is right to say that it was not a unanimous decision of the Committee to change the time limit for the urgency provisions. Indeed, I said to the Committee that if that point was ever raised, I would make clear that the decision was not based on any evidence we heard. I will not say that members of the Committee drew the figure out of the air, but—*[Interruption.]*

Matt Warman (Boston and Skegness) (Con): Yes they did.

Victoria Atkins: Okay, out of the air. The Joint Committee arrived at that figure on the basis of no evidence. That may assist the hon. and learned Lady.

Joanna Cherry: I am grateful to the hon. Lady for being so precise and clear about that. Essentially, the concern about clause 22 is that the scope of the urgent mechanism is extremely broad and ill defined. In my view, it could fatally undermine any safeguard provided by a mechanism for judicial authorisation or indeed judicial review in the double lock.

The Bill provides that an urgent warrant can be issued by the Secretary of State in a case where she considers there is an "urgent need", which is not defined. We then have the three-day period. As the hon. Lady said, no specific reason has been given for the selection of three days. The Joint Committee took the view that it should be shortened significantly to provide for approval within 24 hours. I think the ISC suggested 48 hours—I apologise if I have got that the wrong way round.

The purpose of the amendments is to remove the urgent provision in the Bill altogether or to restrict it to very limited circumstances, with the urgent authorisation having to take place during a 24-hour period. The concern underlying the amendments is that in their absence, the provisions for urgent warrants in the Bill will drive a coach and horses through even the double lock provision, because they will enable the judicial authorisation part of the procedure to be bypassed in very loosely defined circumstances. That is the case as precisely as I can put it.

Keir Starmer: I will be brief. There is a real concern about the provision for urgent cases being three days. Although we need such a provision, that period allows warrants to be operable before the double lock can apply, and therefore the period should be as short as possible.

The problem is not only that three days is too much but that three days can, I think, be five days, because it is three working days, and therefore there is the potential for three days to morph into more than three. If I am wrong about that, I will happily be corrected. I have put my name to the amendments suggesting 24 and 48-hour periods, to give the Government the option to reduce the threshold to either of those and put it in terms of hours, which removes any possible confusion about the use of the word "days".

5.45 pm

The Solicitor General: This is, of course, an important issue that has already seen a good deal of consideration for the Government and a move away from the original proposal to three working days; the hon. and learned Gentleman is right about that.

Although we are considering the matter carefully, at this stage the right balance is being struck between the interests of the security services and the other agencies in ensuring that crime is detected and prevented at the earliest possibly opportunity, and the interests of preserving the balance between the rights of the individual and the need to deal with crime and threats to national security. I am happy to consider amending the relevant draft codes to deal with the question about the notification to judicial commissioners, so that it is made clear on the face of the code that that should happen as soon as reasonably practicable. That wording is more appropriate than "immediately", given that it may take a small period of time to draw together the materials that the commissioner will wish to review when considering whether to approve the warrant.

The hon. and learned Member for Edinburgh South West made a point about decision making in a vacuum. The commissioner will have the decision of the Secretary of State and all the materials upon which that Minister has made the decision, as well as access to further material. I think it is clear that the decision maker will have everything they need and more to come to an informed and reasoned decision based upon the principles of judicial review. On the basis of my undertaking to consider amending the draft code of practice, I hope that the hon. and learned Member for Holborn and St Pancras feels able to withdraw the amendment proposing the word "immediately".

Let me deal with the central points about the decision and the length of time within which the warrant should be approved. The effect of the amendments would be to reduce that, and I recognise that the Joint Committee that undertook the pre-legislative scrutiny of the Bill made a similar recommendation. We have therefore responded in an appropriate way by shortening the window within which urgent action can be taken. That has been widely welcomed. It is an important consideration and an example of how, throughout this procedure, the Government have taken note of reports, listened and acted accordingly on those recommendations.

It is not in anybody's interests to create so tight a statutory framework that decisions end up being rushed. I therefore consider that the three working days now provided for in the Bill should give sufficient time for the judicial commissioner to be presented with and to consider the grounds upon which the Secretary of State decided to issue the urgent warrant. My worry is that by reducing the time period even further, we would give the commissioner even less time, which would lead to the sort of decision making that would perhaps not be in anybody's interests, let alone those of the state.

Amendment 91 seeks to define urgency on the face of the Bill and to replace the definition currently provided for in the draft statutory codes of practice with a narrower definition. As the Committee will appreciate, we must provide law enforcement and the security and intelligence agencies with an operationally workable framework. We will have failed with this Bill if we provide the agencies with the powers that they need, but with ones that cannot keep up with the pace and scale of the threats that we face. I know that it is always a challenge for legislators to try and—to use the modern phrase—"future-proof" legislation, but it is important that we create a framework that is not only clear and simple to understand, but sufficiently flexible to take into account the fact that, from month to month, the nature of the threat changes.

I am afraid that the effect of the amendment would be to curtail that ability because the definition would be too narrow. The draft statutory codes of practice, which we have all been considering, define urgency, which is determined by whether it would be reasonably practicable to seek the judicial commissioner's approval to issue the

warrant in the requisite time. That time period would reflect when the authorisation needs to be in place to meet an operational or investigative need.

The code sets out the three categories with which we are familiar: first, where there is the imminent threat to life or serious harm, and I gave the example of a kidnap case earlier. The second is where there is an valuable intelligence-gathering opportunity, where the opportunity to do so is rare or fleeting—that might involve, for example, a group of terrorists who are just about to make that trip overseas and are making the final preparations to do so. The third is where there is a time-limited significant investigative opportunity—here I speak with years of experience of dealing with drugs cases—such as the imminent arrival of a major consignment of drugs or firearms, when timing is of the essence.

I am afraid that narrowing the definition of urgency so that it only relates to an immediate danger of death or serious physical injury to a person would mean significant lost opportunities when it comes to investigation and gathering of intelligence. It would have an impact on the ability to act in a way that would allow interception at a time, for example, that would be apposite to capture a particular drugs seizure.

Another example would be the terrorist cases that I deal with week in, week out—in terms of the function of the Law Officers granting consent to prosecution. If, for example, a group was making final preparations to travel out to Syria to join Daesh, it would cause a problem for the security and intelligence agencies if they were not able to seek urgent authorisation to intercept telephones because there was no immediate danger of death or serious physical injuries.

In my considered opinion, I am afraid that the amendment would allow a significant gap in the security, intelligence and law enforcement agencies' ability to keep us safe. I do not think that any hon. Member in this House wants that to happen. I know that it not their intention but it is my genuine concern. On that basis, I invite hon. Members to withdraw the amendment.

Joanna Cherry: I have listened carefully to the Solicitor General. The difficulty for him and the Government is this: according to recent case law from Strasbourg, a 48-hour timeframe for authorisation would be the maximum to harmonise the process with that recent case law. The case of Zakharov *v.* Russia included that a complaint for urgent interception could occur without judicial authorisation for up to 48 hours. There really is no reason why the UK should allow a longer period for approved surveillance than Russia. The difficulty with three working days is that if they fall over a weekend, it can mean five days or, indeed, if it is a bank holiday weekend, six days. On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 22 ordered to stand part of the Bill.

Clause 23

Failure to approve warrant issued in urgent case

Joanna Cherry: I beg to move amendment 43, in clause 23, page 18, line 7, leave out "may" and insert "must".

This amendment, and others to Clause 23, would require a Judicial Commissioner to order that material collected under an emergency warrant which he does not subsequently authorise, be destroyed, except in exceptional circumstances.

The Chair: With this it will be convenient to discuss amendment

Amendment 44, in clause 23, page 18, line 9, leave out paragraphs (3)(b) and (c) and insert—

"(3A) If the Judicial Commissioner determines that there are exceptional circumstances, the Judicial Commissioner must instead impose conditions as to the use or retention of any of that material."

Joanna Cherry: I will keep this fairly brief. The amendment would require a judicial commissioner to order that material collated under an urgent warrant that he does not authorise subsequently be destroyed, except in exceptional circumstances. As the Bill stands, should material be obtained under an urgent warrant that is later unapproved by the judicial commissioner, the judicial commissioner may, but is not required to, order destruction of material obtained. Once again, it is my argument that the provision, as it stands, creates a significant loophole that could be used to bypass the legal protections that purport to be provided by the judicial review mechanism.

An urgent warrant allows the relevant agency to access material that it may not be authorised to access in law. Permitting the retention of that material in anything other than exceptional circumstances creates a clear incentive to use the urgent process in inappropriate cases so, in order to ensure that the applying agencies—the agencies that apply for warrants—only use the urgent process where strictly necessary, the Bill needs to ensure that there are no advantages to be gained from seeking an urgent warrant where it is not strictly necessary. The amendment would ensure that where a judicial commissioner does not authorise the use of the warrant retrospectively, the position must be that the material collected is destroyed, except in exceptional circumstances.

The Solicitor General: I am once again grateful to the hon. and learned Lady for setting out her place clearly and with admirable succinctness. There is a problem with the amendment because it very much begs the question of what might constitute exceptional circumstances. The question of who will determine whether the threshold had been met in a given instance is also raised. Introducing that caveat to the Bill would unnecessarily complicate the commissioners' decision-making process. The commissioners will be extremely well qualified to decide how material should be used when cancelling a warrant. They will take into account all the relevant circumstances on a case-by-case basis, and the clause, as drafted, allows them to do just that without the necessity of introducing subjective terms.

The amendments also suggest that the only two viable options following the failure to approve a warrant issued in an urgent case are to destroy the data or, in undefined exceptional cases, to impose restrictions on their use. That is unnecessarily limiting. There may be occasions when vital intelligence is acquired that could be used to save lives or to prevent serious crime, and where using that intelligence may not involve any further undue incursions into privacy. In that situation a judicial

[The Solicitor General]

commissioner may wish to allow the intercepting agency to continue with its work without restriction in the interests of the great benefit it might have. Of course, that is a decision for the commissioner to determine, and clause 23, as drafted, allows just that. I am afraid that the amendments would mean that a judicial commissioner could not choose, after carefully considering the facts of the matter at hand, to allow such vital work to continue unrestricted. My worry is that the unintended consequences of such a proposal could seriously inhibit the work of the intercepting agencies.

Finally, the amendments would entirely remove the ability of a commissioner to decide what conditions may be imposed upon material selected for examination. By removing clause 23(3)(c), the remainder of the clause would relate only to material obtained under a warrant. Of course, a targeted examination warrant does not authorise the obtaining of any material, but rather the examination of material obtained under a bulk warrant, which is why clause 23(3)(c), as drafted, includes a specific provision that allows a judicial commissioner to direct how material that has been selected for examination under a rejected urgent warrant should be used.

In effect, the amendments attempt to change a carefully constructed safeguard that gives judicial commissioners absolute control over the actions of the intercepting agencies. I fear that the unintended result of these amendments would be an overall reduction of the judicial commissioners' powers. For those reasons I invite the hon. and learned Lady to withdraw her amendment.

Joanna Cherry: I have nothing to add, so I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 23 ordered to stand part of the Bill.

Clause 24

MEMBERS OF PARLIAMENT ETC.

Keir Starmer: I beg to move amendment 104, in clause 24, page 18, line 38, leave out subsections (1) and (2) and insert—

'(1) This section applies where a warrant issued under this Part would seek to authorise any activity which may involve access to special procedure material.

(2) Special procedure material subject to subsection (1) will include—

(a) communications which are subject to legal professional privilege;

(b) journalistic material which a person holds in confidence; and

(c) communications sent by, or intended for, a member of the relevant legislature.

(3) The warrant subject to subsection (1) may only be granted on application to a Judicial Commissioner.

(4) The Judicial Commissioner must be satisfied that there are reasonable grounds for believing that—

(a) a criminal offence has been committed;

(b) the material is likely to be of substantial value to the investigation of that offence;

(c) other proportionate methods of obtaining the information have been tried without success or were not tried because they were bound to fail;

(d) it is in the public interest that the warrant is granted, having regard to the—

(i) benefit likely to accrue to the investigation and prosecution if the information is accessed,

(ii) importance of the prosecution, and

(iii) importance of maintaining public confidence in the confidentiality of material subject to legal professional privilege, the integrity of journalists' sources, and/or communications with members of relevant legislature.

(5) Material is subject to legal professional privilege means—

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client and any other person with or in contemplation of legal proceedings or for the purposes of such proceedings;

(c) items enclosed with or referred to in such communications and made in—

(i) connection with the giving of legal advice, or

(ii) connection with the contemplation of legal proceedings or for the purposes of such proceedings.

(d) communications made with the intention of furthering a criminal purpose are not subject to legal professional privilege.

(6) A person holds journalistic material in confidence for the purposes of this section if—

(a) it is held subject to such an undertaking, restriction or obligation;

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.".

This amendment establishes a consistent approach to the safeguards afforded to parliamentarians, legally privileged material and journalists seeking to protect their sources.

The Chair: With this it will be convenient to discuss the following:

Amendment 92, in clause 24, page 18, line 38, leave out subsections (1) and (2) and insert—

'(1) This section applies where a warrant issued under this Part would seek to authorise any activity which may involve access to special procedure material.

(2) Special procedure material under subsection (1) will include—

(a) communications which are subject to legal professional privilege;

(b) journalistic material which a person holds in confidence;

(c) communications sent by, or intended for, a member of a relevant legislature.

(3) A warrant under subsection (1) may only be granted on application to a Judicial Commissioner.

(4) To approve a warrant under subsection (3), a Judicial Commissioner must be satisfied that there are reasonable grounds for believing that—

(a) a criminal offence has been committed,

(b) the material is likely to be of substantial value to the investigation of that offence,

(c) other proportionate methods of obtaining the information have been tried without success or were not tried because they were bound to fail, and

(d) it is in the public interest that the warrant is granted, having regard to the—

(i) the benefit likely to accrue to the investigation and prosecution if the information is accessed,

(ii) the importance of the prosecution, and

(iii) the importance of maintaining public confidence in the confidentiality of material subject to legal professional privilege, the integrity of journalists' sources, and/or communications with members of a relevant legislature.

(5) Material subject to legal professional privilege means—

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client and any other person with or in contemplation of legal proceedings or for the purposes of such proceedings;

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice or;

(ii) in connection with the contemplation of legal proceedings or for the purposes of such proceedings.

(d) communications made with the intention of furthering a criminal purpose are not subject to legal professional privilege.

(6) A person holds journalistic material in confidence for the purposes of this section if—

(a) it is held subject to such an undertaking, restriction or obligation; or

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.".

This amendment establishes a consistent approach to the safeguards afforded to parliamentarians, legally privileged material and journalists seeking to protect their sources.

Amendment 63, in clause 24, page 19, line 7, leave out subsection (2).

Amendment 64, in clause 24, page 19, line 8, at end insert—

'(2A) Where a warrant is likely to cover special procedure material, the procedure set out in subsection (2C) applies.

(2B) Where a warrant is likely to cover excluded procedure material, the procedure set out in subsection (2D) applies.

(2C) Further to requirements set out elsewhere in this part, the Judicial Commissioner may only issue a warrant likely to cover special procedure material if —

(a) There are reasonable grounds for believing that an indictable offence has been committed,

(b) There are reasonable grounds for believing that the material is likely to be of substantial value to the investigation in connection to the offence at (a),

(c) Other proportionate methods of obtaining the material have been tried without success or have not been tried because it appeared that they were bound to fail,

(d) It is in the public interest having regard to—

(i) the democratic importance of freedom of expression under article 10 ECHR to grant the warrant; or

(ii) the democratic interest in the confidentiality of correspondence with members of a relevant legislature.

(2D) Further to the requirements set out elsewhere in this part, the Judicial Commissioner may only issue a warrant likely to cover excluded procedure material in accordance with provisions in Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE) and Schedule 5 of the Terrorism Act 2000.

(2E) An application for a warrant under this Part must not be granted where the information could be sought using a warrant under Schedule 1 of PACE, unless seeking this information under PACE would defeat the purpose of the investigation.

(2F) In this section "special procedure material" means—

(a) special material as defined in section 14 of the Police and Criminal Evidence Act 1984; or

(b) correspondence sent by or intended for a member of the relevant legislature.

(2G) In this section "excluded procedure material" has the same meaning as in section 11 of the Police and Criminal Evidence Act 1984.".

Amendment 80, in clause 225, page 176, line 44, at end insert

"and for the purposes (and only the purposes) of this Act, including the application of paragraphs (a), (b) and (c), a "criminal purpose" includes the purpose of—

(i) doing or facilitating anything involving an imminent threat of death or serious injury or an imminent and serious threat to national security, or

(ii) concealing, or impeding the detection or prevention of, the doing or facilitation of any of those things;".

Keir Starmer: I will speak first to amendment 92, which is on page 18 of the amendment paper. The amendment would introduce additional protection for three special categories: those involving legal professional privilege; that involving journalistic material; and that involving members of a relevant legislature, including MPs. I will also address amendment 63, which is on page 19 of the amendment paper and would remove clause 24(2), to be replaced by amendment 64. For the benefit of the Solicitor General, I indicate that I will address only the principle. Having reviewed the wording, the amendments would not achieve the intended purpose for all the categories I mentioned, and therefore the amendment 104 will not be pressed to a vote. I am therefore speaking to the principles relating to legal professional privilege, journalistic material and members of a relevant legislature.

6 pm

Again for the benefit of the Solicitor General, I will make my submissions on legal professional privilege under the amendments to clause 25, which deals with said privilege. In other words, I recognise that amendment 92 does not work in the intended way for clause 24.

On the general principles, the first thing to say about journalistic material and communications sent by or intended for Members of this Parliament and other relevant legislatures is that the protection is not for the benefit of the journalist or the Member of Parliament but for the wider public good. One of the difficulties with clauses 24 and 25, but particularly clause 24, is that there is simply no reference in the Bill to any special protection for journalists in relation to intercept warrants.

I think the Minister for Security has just gone off to a meeting with the National Union of Journalists, at which the NUJ will raise its concerns with him. He may well have further points to make once he has had those discussions, but the provision for journalists is currently found only in paragraph 9.27 and the following paragraphs of the code. The provisions are there for Committee members to read, but they really do not amount to any special protection for journalists; they simply amount to an exhortation in the code for special attention and focus to be given to necessity and proportionality when dealing with confidential journalistic content.

Even if the wording does not work, the thrust behind amendment 92 is that, in relation to intercept warrants, there ought to be something in the Bill that recognises the special need to protect confidential journalistic material that is held in confidence. That is not recognised in the Bill, and it is not good enough to have it in a code of practice. I urge the Solicitor General and the Minister for Security, perhaps after hearing from the NUJ, to consider how and where on the face of the Bill it is appropriate to properly protect journalistic material. Of course clause 68 makes special reference to journalistic material, but that is strictly confined to communications data and does not apply to interception or to wider powers in the Bill.

As I say, I will not press the amendment to a vote because, on reflection, it does not serve its intended purpose, but I invite the Solicitor General to reflect on its principle and engage with us in putting something into the Bill that properly recognises and protects journalists. If I may, Mr Owen, I shall deal with legal professional privilege in a moment.

Joanna Cherry: Picking up on what the hon. and learned Gentleman just said, the purpose of amendment 104 is to address a lack of consistency of approach in the Bill regarding the protection afforded to correspondence with Members of Parliament, journalists and lawyers. I stress that the purpose behind the amendment is not to seek a particular privilege for parliamentarians, lawyers or journalists, but to protect the correspondence of members of the public with lawyers, parliamentarians and journalists.

The Bill contains different approaches. Clause 24 affords protections to Members of Parliament subject to targeted interception warrants, but not to journalists seeking to protect their sources. Similarly, although the provisions later in the Bill on access to communications data to target journalistic sources provide for authorisations to be subject to judicial review, access to other comms data that might engage the privilege afforded to Members of Parliament or to legally privileged material is not so protected.

Amendment 104 would provide consistency of approach to all three categories of privileged information, modelling the approach broadly on the provisions in the Police and Criminal Evidence Act 1984—an English Act for which I must say I have much admiration. I am still trying to get to grips with it, but I think it is a good piece of legislation. It protects legally privileged material and journalistic material from interference during police searches.

The amendment would also provide a special procedure for access to MPs' and journalists' correspondence, which would be dependent on independent judicial authorisation, as opposed to authorisation by politicians. With all due respect to the Home Secretary, I did not find her triple lock on protection for parliamentarians terribly convincing. That is not a point about the present Government—it could apply to any Government of any persuasion—but it seems to me that having the Prime Minister as the triple lock does not give the appearance of political impartiality. Where parliamentarians' communications are being interfered with, the authorisation should be judge-only.

Last night, I chaired an event with speakers from the Bar Council, the Law Society of England and Wales and the National Union of Journalists. They all consider that the protections in the Bill for journalists, for legal professional privilege and for parliamentarians are not sufficient. My own professional body, the Faculty of Advocates, which is the Scottish equivalent of England's Bar Council, also considers that the protections in the Bill are not sufficient, as does the Law Society of Scotland.

I will quote what the Law Society of Scotland said in its evidence to the Joint Committee:

> "On the 14 December we provided oral evidence to the Joint Committee, alongside the Law Society of England and Wales, expressing our shared and serious concerns in relation to professional legal privilege and the provisions of the Bill. Legal professional privilege"—

referred to in Scotland as the obligation of confidentiality—

> "is key to the rule of law and is essential to the administration of justice as it permits information to be exchanged between a lawyer and client without fear of it becoming known to a third party without the clear permission of the client. Many UK statutes give express protection of LPP and it is vigorously protected by the courts. The 'iniquity exception' alleviates concerns that LPP may be used to protect communications between a lawyer and client which are being used for a criminal purpose. Such purpose removes the protection from the communications, allowing them to be targeted using existing powers and not breaching LPP."

I do not wish to be seen to be making any special pleading, either as a lawyer and a politician or on behalf of the journalist profession. It is more about special pleading on behalf of the members of the public who contact journalists, parliamentarians and lawyers, and who wish to do so in confidence for a very good reason.

The Solicitor General: I am grateful to the hon. and learned Member for Holborn and St Pancras for seeking not to get ahead of himself with respect to the arguments on legal professional privilege. I feel a degree of sympathy, because the hon. and learned Member for Edinburgh South West was inevitably going to deal with these matters in the round. Although different considerations apply to each category—parliamentarians, journalists and legal professionals—both hon. and learned Members are absolutely right to lay emphasis not on individuals in those professions but on the client, the source and the constituent. That is why these roles have a special status: it is about the wider public interest. The Government absolutely understand that and we place it at the very heart of our consideration of how warrantry should operate in these areas.

As you will know, Mr Owen, there has already been significant movement by the Government as a result of the various reports that we know all too well. I am delighted that matters of legal professional privilege are now in the primary legislation in great measure. The debate will therefore be about the extent to which safeguards are placed in the primary legislation and about what form they take. I will heed the hon. and learned Gentleman's exhortation and not stray too far into that area.

I will therefore deal with the amendment to clause 24 and the question of parliamentarians. We heard last year the Prime Minister's statement about the issue and the important requirement that he or she is to be consulted before the Secretary of State can, with judicial commissioner approval, issue a warrant to acquire communications sent by or intended for a Member of a

relevant legislature. The clause applies to all warrants for targeted interception, with the exclusion of warrants authorised by Scottish Ministers, and includes the all-important requirement for the Prime Minister to be consulted before a targeted examination warrant can be issued to authorise the examination of a parliamentarian's communications collected under a bulk interception warrant.

Part 5 contains similar provisions for equipment interference carried out by the security and intelligence agencies. The important protection in clause 24 will apply to the communications of Members of Parliament, Members of the House of Lords, United Kingdom MEPs and Members of the devolved Parliaments and Assemblies. It is important to observe that for the first time, what was a doctrine for the best part of 50 years is now codified and enshrined in primary legislation.

It is important to remember in the spirit of the wider public interest that nobody, least of all parliamentarians, is above the law. The Wilson doctrine has perhaps been misunderstood for many years as a blanket exemption for parliamentarians, but that is exactly what it was not. It was actually an explanation that there will be times when the national or the public interest demands that the communications of Members of Parliament be intercepted because there might be criminal purpose behind them. We hope that that will never happen, but sadly human experience teaches us otherwise. It is therefore important to strike a balance between the proper exercise of the privileges of being a Member of this place or of the other Assemblies and Parliaments in the United Kingdom and the principle of equality before the law.

The amendments introduce the concept of special procedure material and try to combine the approach to the safeguards afforded to the three categories that I have discussed. To put it simply, I submit that what is on the face of the Bill and in the accompanying codes of practice already provide those safeguards and indeed go beyond what can be encompassed in primary legislation. At this stage, I will not say anything further, because I want to deal with points that I know hon. Members will raise about the other categories.

Keir Starmer: Can I ask the Minister about journalistic sources? I am concerned that there is nothing about them on the face of the Bill. He will know how anxious journalists are about this. Will he consider whether something should be put on the face of the Bill? There is an inconsistency: in other parts of the Bill, such as clause 68, there is express provision relating to journalists. There is something in the code of practice, but there is nothing on the face of the Bill, which is the problem. Without committing himself to a particular form of words, will he commit to considering one and perhaps liaising with us about what form it could take?

The Solicitor General: I am mindful of the fact that my colleague the Security Minister is meeting with the National Union of Journalists. I cannot commit the Government to a particular course of action, but let me put this on record. We are absolutely committed to the preservation and protection of a free press and freedom of expression in our democratic society. That includes the ability of sources to provide anonymous information to journalists, which is absolutely vital if we are to have throughput of important information that needs to be in the public domain.

At the same time, there is a danger. We must not unduly fetter, on the face of the legislation, the important work of our law enforcement, security and intelligence agencies. We live in an age of constant blogging and other social media tools. Journalists themselves do not like being defined as a profession. I have been criticised in the past for using that terminology when talking about journalists, for example in the context of the Leveson process. Now, however, there are increasingly wide and loose definitions of who are journalists and what journalism is, and my worry is that that will, and does, inadvertently prevent legitimate investigation of those who are threatening our national security or who are planning to commit serious crime.

6.15 pm

There is a problem here. In spirit, I am absolutely with the hon. and learned Gentleman in considering the matter, but the problem with defining "journalism" is that it might be defined too tightly and narrowly so as not to include legitimate sources of information, or it might be defined unfeasibly widely and so could provide a hiding place for the sort of individuals or groups that no one in this House would regard as serving the public interest—in fact, we would regard them as acting against the public interest. For that reason, I urge great caution when dealing with that aspect of the Bill.

The Bill strengthens safeguards for journalists because it will require that all interception and equipment interference warrants, including those relating to journalists or their sources, must be approved by a senior judge before coming into force. Warrant applications will make it clear if confidential journalist information is involved. Also, a judicial commissioner will need to be notified if such information is to be obtained. We would not want a situation in which, for example, material relating to the obnoxious and repugnant activities of Daesh somehow fell into a category that we would regard as wholly inappropriate. For those reasons, I invite hon. Members to withdraw the amendment.

Keir Starmer: I have already indicated that I am not putting the amendment to the test. I beg to ask leave to withdraw the amendment.

Joanna Cherry: That is my position as well. I am happy to have addressed the principle at this stage and to look at an amendment at a later stage.

Amendment, by leave, withdrawn.

Clause 24 ordered to stand part of the Bill.

Clause 25

ITEMS SUBJECT TO LEGAL PRIVILEGE

Keir Starmer: I beg to move amendment 49, in clause 25, page 19, line 22, after "items", insert "presumptively".

The Chair: With this it will be convenient to discuss the following:

Amendment 51, in clause 25, page 19, line 31, leave out paragraph (3)(a) and insert—

"(a) that compelling evidence indicates that the items in question consist of, or relate to, communications made for a criminal purpose such that it is necessary to authorise the interception, or (in the case of a targeted examination warrant) selection for examination, of those items, and".

Amendment 82, in clause 37, page 31, line 7, at end insert—

"(3) But this section does not authorise interception of a communication containing items presumptively subject to legal privilege."

Amendment 75, in clause 42, page 33, line 30, at end insert—

"(4) But this section, nor section 43 or section 44, do not authorise interception of a communication containing items presumptively subject to legal privilege."

Amendment 76, in clause 45, page 35, line 9, at end insert—

"(5) But this section does not authorise interception of a communication containing items subject to legal privilege."

Amendment 81, in clause 225, page 177, line 6, at end insert—

"presumptively subject to legal privilege", in relation to an item, means that disregarding any question of criminal purpose, the item falls to be treated as subject to legal privilege;".

New clause 2—*Items subject to legal privilege*—

"(1) A warrant under this Chapter, or under Chapter 1 of Part 6, may not authorise conduct undertaken for the purpose of doing anything in relation to—

(a) a communication, insofar as the communication consists of matters subject to legal privilege; or

(b) related communications data, insofar as the data relate to the communication of matters subject to legal privilege.

(2) For the purposes of subsection (1), legal privilege means—

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client and any other person with or in contemplation of legal proceedings or for the purposes of such proceedings;

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice, or

(ii) in connection with the contemplation of legal proceedings or for the purposes of such proceedings.

(3) Communications made with the intention of furthering a criminal purpose are not subject to legal privilege.

(4) An application which contains a statement that the purpose of a warrant is to access communications made for the purpose of furthering a criminal purpose, but which would otherwise attract legal privilege must be considered by a Judicial Commissioner.

(5) A Judicial Commissioner may issue a warrant sought under subsection (3), if satisfied that—

(a) there are reasonable grounds to believe that the communications are made with the intent of furthering a criminal purpose;

(b) that the material is likely to be of substantial value to the investigation in connection with which the application is made;

(c) that the material concerned is likely to be relevant evidence;

(d) other proportionate methods of obtaining the information have been tried without success or were not tried because they were bound to fail; and

(e) it is in the public interest that the warrant is granted, having regard to the—

(i) benefit likely to accrue to the investigation and prosecution if the information is accessed,

(ii) the importance of the prosecution, or

(iii) the importance of maintaining public confidence in the confidentiality of material subject to legal professional privilege.

(6) A code of practice issued under Schedule 6 must contain provision about—

(a) the steps to be taken to minimise the risk of conduct undertaken pursuant to a warrant to which this section applies resulting in accidental acquisition of a communication, or communications data, falling within subsection (1); and

(b) the steps to be taken if it appears that such conduct has accidentally resulted in acquisition of such a communication or data."

This new clause is intended to replace existing clause 25 and seeks to clarify the approach to legal privilege in line with existing law.

New clause 6—*Items subject to legal privilege*—

"(1) A warrant under this Chapter, or under Chapter 1 of Part 6, may not authorise conduct undertaken for the purpose of doing anything in relation to—

(a) a communication, insofar as the communication consists of matters subject to legal privilege;

(b) related communications data, insofar as the data relate to the communication of matters subject to legal privilege.

(2) For the purposes of subsection (1), legal privilege means—

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client and any other person with or in contemplation of legal proceedings or for the purposes of such proceedings;

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice; or

(ii) in connection with the contemplation of legal proceedings or for the purposes of such proceedings.

(d) communications made with the intention of furthering a criminal purpose are not subject to legal privilege.

(3) An application which contains a statement that the purpose of a warrant is to access communications made for the purpose of furthering a criminal purpose, but which would otherwise attract legal privilege must be considered by a Judicial Commissioner.

(4) A Judicial Commissioner may issue a warrant sought under subsection (3), if satisfied that—

(a) there are reasonable grounds to believe that the communications are made with the intent of furthering a criminal purpose;

(b) that the material is likely to be of substantial value to the investigation in connection with which the application is made; and

(c) that the material concerned is likely to be relevant evidence;

(d) other proportionate methods of obtaining the information have been tried without success or were not tried because they were bound to fail;

(e) it is in the public interest that the warrant is granted, having regard to the—

(i) the benefit likely to accrue to the investigation and prosecution if the information is accessed;

(ii) the importance of the prosecution; and

(iii) the importance of maintaining public confidence in the confidentiality of material subject to legal professional privilege.

(5) A code of practice issued under Schedule 6 must contain provision about—

(a) the steps to be taken to minimise the risk of conduct undertaken pursuant to a warrant to which this section applies resulting in accidental acquisition of a communication, or communications data, falling within subsection (1);

(b) the steps to be taken if it appears that such conduct has accidentally resulted in acquisition of such a communication or data."

This new clause clarifies the approach to legal professional privilege on the face of the Bill and brings it into line with the spirit of existing case law, the common law and PACE.

Keir Starmer: We come to this late, but the provision is an important one. I will try to be brief and to the point. The clause deals with legal privilege. I acknowledge that the Government have responded to the various recommendations so far, setting the provision out in a different form in the Bill.

There are, I am afraid, still problems. I have been discussing those with the Bar Council, which is concerned about the form in which the provision appears in the Bill. I invite the Committee to look at the clause. Subsections (1), (2) and (3) deal with a situation in which the purpose of an intercept warrant is to target material subject to legal privilege and, correspondingly, in relation to targeted examination. Those subsections are relevant to the targeting of material subject to legal privileges. Subsections (4), (5), (6) and (7) serve a slightly different purpose, which is the position if a warrant, although not targeted, may be likely to include items subject to legal privilege.

The difficulty with the first three subsections—this is the strong view of the Bar Council, borne out in the code of practice itself—is that

"Legal privilege does not apply to communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably)."

If the communication furthers a criminal purpose, legal privilege simply does not apply. If left unamended, subsections (1), (2) and (3) would allow the targeting of legally privileged material which does not further a criminal purpose, and therefore falls outside the limits of legal privilege itself.

The Bar Council's point, which is a good one, is that once legal privilege is properly understood it becomes clear that legally privileged material should not be targeted. If the argument is that we may have to target communications between a lawyer and client in which they further a crime—I accept that there have been examples of that—in those circumstances the material has already lost its legal privilege and therefore does not need to be targeted. In fact, something that is not legally privileged is being targeted. It is a very serious point, and new clause 2 was intended to help set out what the Bar Council suggests is a better formulation of clause 25. Subsection (3) of new clause 2 makes it clear that:

"Communications made with the intention of furthering a criminal purpose are not subject to legal privilege."

It approaches it on that basis in order to meet the argument that you cannot ring-fence something which, under the cloak of legal privilege, is in fact furthering a criminal intent. If that is right, it logically follows that clause 25(1), (2) and (3) should not stand as they are currently drafted. New clause 2 is essentially an alternative provision.

In other words, the test in 25(3) of "exceptional and compelling circumstances" is on the one hand welcome, though it is not welcome in a clause that targets legally privileged material that should not be targeted for the reasons I have outlined.

Lucy Frazer: I hope the hon. Gentleman will forgive me for thinking of this as I speak. Is there a risk that we could be unclear as to whether a communication is subject to legal privilege, and think that it is in furtherance of a criminal offence, and then it turns out not to have been? Is there a loophole or lacuna in the legislation that does not cover that eventuality?

Keir Starmer: There is. That is a very good point, and it is one that I have discussed with the Bar Council. In those circumstances, what is being targeted is material that is not legally privileged, though there might be something that is legally privileged within it. There should be safeguards put around that, and I readily accept that examples will arise, probably also in the bulk powers, in which, although the intention is not to target legally privileged material, it is very difficult to have a warrant which does not run the risk.

An example would be when there is a suspicion that a lawyer and client may be involved in some activity that would take the communication outside of legal privilege, but it is impossible to say at what point of the conversation or exchange it loses its legal privilege. That is an obvious example. The answer that the Bar Council gives to that, and that I agree with, is that in those circumstances, rather than having a warrant to target the legally privileged material, there is a regime that recognises that it may be that, when targeting what can legitimately be targeted—namely, the part of the communication that has lost its privilege—there is a risk that privileged communications are incidentally picked up. There should be a provision for dealing with that material and its disclosure.

The powerful point about subsections (1), (2) and (3) is that it is wrong, in principle, to target legally privileged material. It is possible to have a warrant that runs the risk, with a separate set of safeguards to ensure that, if the risk materialises—as it will in some cases—there are provisions for ring-fencing, safeguarding, and not disclosing that material. That is the intention behind the Bar Council amendment.

It may be that further tweaks or improvements can be made, but that is an important point of principle that I invite the Solicitor General to take away and consider. A clause that satisfied the Bar Council in terms of the legal protection of this important privilege would be a prize worth having. Although the Bar Council recognises, as I do, the movement that the Government have made here, they simply have not got this right, for the reasons that I have outlined.

[Keir Starmer]

Subsections (4), (5), (6) and (7) are focused, in a sense, on communications that are likely to include items of legal privilege, such as a warrant that touches on a solicitor or lawyer communicating with clients, where it is thought that privilege has been lost but also elements where it has not been lost. In those circumstances, the Bar Council's view and my view is that what is set out is again simply not strong enough, because there is no test or special provision.

New clause 2 is a comprehensive clause that would deal with that issue. In a sense, it goes with amendment 80, which amends a much later provision. It is intended to tidy up and clarify what the Bar Council says properly represents legal privilege and a regime for protecting it.

Suella Fernandes: Does the hon. and learned Gentleman not think that there is a special level of safeguard incorporated in the clause? A higher bar needs to be overcome. Only in "exceptional and compelling circumstances" will privilege be circumvented. Is that not a high standard to meet?

Keir Starmer: I accept that it is a high standard to meet, but it is focused on the wrong target. If it is wrong in principle to target legally privileged material on the basis that that material might involve communications that further crime, on a proper understanding, that material has already lost its legal privilege. Having a higher test to target something that has not lost its legal privilege is a good thing, but it is not enough. Material that has not lost its legal privilege should not be targeted, because it is in fact not furthering crime. The proper way to deal with it is to recognise that what one really wants to target is communications that have lost their privilege. However, there is a risk of including—unintentionally, because one does not want to target it—other material, and that requires a different approach and a different regime. That is really the point. It is good to have a threshold, but the threshold does not work within the confines of this scheme.

I urge the Solicitor General to view the clause in that light and to reflect again on it. A lot of work has been done to try to get it into a better state, but that has not met with the approval of the Bar Council and, following analysis and discussion with the council, I can see why. New clause 2 is the council's attempt to get it right. It has spent a lot of time on it and is very concerned about it. I invite the Minister to reflect again and commit to looking again at the clause, perhaps with us and the Bar Council, to try to get a clause that meets with the approval of everyone concerned. If that can be achieved, it will be a prize worth having; if it cannot, it will be a waste of a bit of time on a good cause.

The Solicitor General: Although it comes at a late hour, this is an important debate. We have come a long way on this issue. There was silence as to the presence of legal professional privilege in the draft Bill. The Government have rightly listened to the evidence and have now made important amendments to clause 25.

6.30 pm

The nub of the dispute that divides the hon. and learned Gentleman and me this evening is his approach of seeking to define legal professional privilege for the purposes of this legislation. There are inherent dangers in taking an ad hoc approach to defining a particular privilege that is well understood. It might be unintentionally affected by a well-intentioned attempt to seek to define it in the legislation. In other words, putting a well-intentioned gloss on legal professional privilege might have unintended consequences in limiting its ambit, and I do not think anyone would want to do that.

The Government have been careful about the approach to legal professional privilege—I will refer to it as LPP, because I will be referring to it a lot in my remarks. The hon. and learned Gentleman is right to say that the iniquity exception means that that material is not subject to LPP. It is not a qualified sub-category within LPP; the material either is or it is not within the exception. Having dealt with many, many files on behalf of police authorities as counsel instructed to assess whether the iniquity exception applies, I well know how difficult it sometimes is. There will be files that clearly fall within the exception. There will, as hon. Friends have pointed out, be files that are somewhat more unclear, but there is a danger of going down the rather seductive approach advocated by the hon. and learned Gentleman and ending up in a position in which no one would want to be, namely, that somehow for the purposes of the Bill we have affected how legal professional privilege is understood and approached.

The difference between us is this: the Government's fear is that there will be exceptional cases—I do not think there will be many—in which the iniquity rule is not satisfied, where the material will be of relevant interest to the authorities and would be the appropriate subject for a warrant application with the double-lock mechanism. That is why we are using the phrase "exceptional circumstances".

Keir Starmer: I and the Bar Council would like an example of that. If it is being advanced that even where the iniquity exception is not made out—in other words, it is properly legally privileged communications—there none the less may be circumstances in which the privilege yields under the Bill. We need to be clear about the circumstances he envisages. In a sense, he is suggesting that the communications can be targeted once they have lost their quality in cases where the iniquity exception is not made out—in other words, where it is a proper professional exchange between lawyer and client, fully protected until now. We had better have an example. The Bar Council will be very interested, because this issue goes to the heart of the privilege.

The Solicitor General: I know that the hon. and learned Gentleman has looked at the code, and the example I will give him is the example in the code under paragraph 8.37. I will read it into the record, because this is an important point. The example is:

> "An intelligence agency may need to deliberately target legally privileged communications where the legal consultation might yield intelligence that could prevent harm to a potential victim or victims. For example, if they have intelligence to suggest that an individual is about to conduct a terrorist attack and the consultation may reveal information that could assist in averting the attack (e.g. by revealing details about the location and movements of the individual) then they might want to target the legally privileged communications."

In other words, that is not the furtherance of a crime, because the legal adviser is not hearing or in any way participating in the outline of a plan. There might be information in there that seems to the adviser to be innocent information about the suspected terrorist living in a particular location or associating with particular individuals, but which, because of the surrounding intelligence in the case, may well give a basis for the intelligence agency to target that individual, because the information means more to the agency.

Keir Starmer: The Minister points to an example that I have discussed with the Bar Council. I must put its view on the record, which is that in those circumstances, there would be an offence if someone was not providing the relevant information about that sort of incident to other than the lawyer. We may need to take this discussion forward in an exchange of letters, with the benefit of what the Bar Council has to say, but in its view that is not a good example for what would be an exceptional incursion into legal privilege. That is why I urge the Minister, rather than batting this back at this stage, to take the opportunity to have further discussions with the Bar Council to get this provision into a form that is acceptable to all.

The Solicitor General: I am always happy to discuss matters with the Bar Council. As one of the leaders of the Bar, the hon. and learned Gentleman knows that I go to regular Bar Council meetings. I was with it on Saturday, and I listen carefully to what my friends and colleagues at the Bar have to say.

However, the example I am giving explains the situation. There might be information that is entirely innocuous to the lawyer. Let us say that there is a consultation happening. The lawyer might ask a few questions about the address and associates of the person that do not, to him or her, disclose an offence being committed, but which might, in the wider context, provide the security and intelligence authorities with evidential leads that build a wider picture of which the lawyer will be unaware. That is not the furtherance of a crime; it is innocent. What would be innocuous information to the lawyer might mean something more, because a wider context might give the appropriate agency the grounds upon which it could then make its application for warrantry.

There is a distinction. I am not saying that it will be commonplace—far from it. That is why we have worded the terms of the clause very carefully. We talk about "exceptional and compelling circumstances". I cannot imagine a higher threshold for an applicant to meet than those words.

An additional attraction is that, for the purposes of this legislation, we do not try to define what is meant by legal professional privilege. It is a bit like the argument about parliamentary privilege—the more we try to modernise and define it, the more it ceases to exist as a meaningful concept. One has to be careful about using vehicles like the Bill to define what is a very wide-ranging principle that applies to myriad circumstances involving lawyers and their clients. Although I am in the spirit of dialogue, that is why I would strongly hesitate before adopting the amendments.

Victoria Atkins: I have listened, with great care, to the submissions made by the hon. and learned Member for Holborn and St Pancras, and I have some sympathy with the position that he has put forward. One of the issues that has consoled me is that any such warrants that are proposed will have to meet the threshold of the double lock, namely the Home Secretary and the judicial commissioner, who, I imagine, will be very careful to protect legal professional privilege. Is my understanding correct?

The Solicitor General: My hon. Friend sums it up admirably. We have taken a different approach from RIPA, and rightly so. We have listened to the concerns expressed by the wider community, not just members of the profession, and are fully cognisant of the importance of legal professional privilege. It was part of my daily professional life for nearly 20 years so, as a Minister and as a lawyer, I fully understand its importance. Therefore, I hope that the example I have given gives an important insight into what we regard as "exceptional and compelling circumstances". For those reasons, I urge the hon. and learned Member for Holborn and St Pancras to withdraw the amendment.

Keir Starmer: I will not take much time. The Solicitor General prays in aid the dangers of over-defining, but the danger of the clause is that it will cut across legal professional privilege. Let us be realistic about what that means: wire taps to listen to privileged legal communications where the iniquity exception does not apply. A lawyer will never again be able to say that a communication—even one within the proper limits of a legal communication—is protected, because there could be no such guarantee. There will always be the possibility that it will not be protected. At the moment, it can be said that as long as it does not fall into the inequity exception, a communication is protected. In the other examples that have been used, it would not be interceptors; it would be bugs in cells. In the end, that is the road that will be opened by this proposal. A lawyer believes that they are having a confidential discussion on proper terms and appropriately with their client, yet that is intercepted. That is why I think the Bar Council feels so strongly about it.

Of course, there is a danger in defining legal professional privilege, but there is a much greater danger in getting to a position where a lawyer can never again say, "I guarantee that, as long as it is within limits, this is a protected communication." That is at the heart of the Bar Council's concern. I have said all I need to say. That is the problem.

The Solicitor General: We have to be careful about this. We have prison rules, for example. The hon. and learned Gentleman and I know that there are already certain prescribed circumstances and scenarios that exist. I am not advocating a coach-and-horses approach that can be taken by authorities who have a cavalier regard for LPP. This is a very prescribed exception. The words "exceptional and compelling" are strong. He paints a nightmare scenario—I know that he does so with genuine concern for a privilege that he and I hold dear—but I think that we are getting the balance right and that what he envisages will not come to pass.

Keir Starmer: I stand only to give way.

Lucy Frazer: I am grateful to the hon. and learned Gentleman for standing to give way. I was trying to think of circumstances in which legal professional

[Lucy Frazer]

privilege—the relationship between the lawyer and their client—might not be as sacrosanct as the client might expect. For example, if the lawyer considers that there is a risk that their client is involved in money laundering, even if they are not, there are circumstances in which that right is circumscribed. That might not be a perfect example, but we are in the territory of there being the risk of great harm or wrongdoing and evidence that persists of that.

Keir Starmer: I am grateful for the intervention, and I recognise that point. The concern is that, if passed in this form, the Bill will allow interception where there is no question of the inequity exception. Perfectly lawful, proper, appropriate communications between lawyer and client, which are fully protected and recognised in all other circumstances, would come within the scope of an intercept warrant.

At this stage—particularly at this hour—I will not press the point. I urge the Solicitor General to keep at least a residual open mind, so that if a better version of the new clause can be tabled at a later stage, which meets some of the concerns he has outlined, he might look at the proposal again. As I say, this is an issue of real concern to the profession. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 25 agreed to.

Clauses 26 to 29 agreed to.

Ordered, That further consideration be now adjourned. *—(Simon Kirby.)*

6.44 pm

Adjourned till Thursday 14 April at half-past Eleven o'clock.