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GENERAL COMMITTEES

Public Bill Committee

INVESTIGATORY POWERS BILL

Seventh Sitting

Tuesday 19 April 2016

(Morning)

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Saturday 23 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 19 April 2016

(Morning)

[Nadine Dorries *in the Chair*]

Investigatory Powers Bill

9.25 am

The Minister for Security (Mr John Hayes): On a point of order, Madam Chairman. I will be writing to you today to summarise all of the areas on which the Solicitor General and I have offered to provide more information during the course of our sittings. I will do that each week, with a view to informing the debate and ensuring that all members of the Committee have the information.

The Chair: Thank you very much, Minister.

Clause 61

Relevant public authorities and designated senior officers

Keir Starmer (Holborn and St Pancras) (Lab): I beg to move amendment 135, in clause 61, page 49, line 32, leave out subsections (1) and (2) and insert—

"(1) For the purposes of this Part, a relevant public authority is—

(a) a police force maintained under section 2 of the Police Act 1996,

(b) the Metropolitan police force,

(c) the City of London police force,

(d) the Police Service of Scotland,

(e) the Police Service of Northern Ireland,

(f) the British Transport Police Force,

(g) the Ministry of Defence Police,

(h) the Royal Navy Police,

(i) the Royal Military Police,

(j) the Royal Air Force Police,

(k) the Security Service

(l) the Secret Intelligence Service,

(m) the GCHQ,

(n) the National Crime Agency and

(o) the Criminal Cases Review Commission.

(2) For the purposes of authorisations sought pursuant to section 53(7)(g) a relevant public authority also includes—

(a) a National Health Service Trust established under section 5 of the National Health Service and Community Care Act 1990 whose functions include the provision of emergency ambulance service,

(b) a fire and rescue authority under the Fire and Rescue Services Act 2004,

(c) the Northern Ireland Ambulance Service Health and Social Care trust,

(d) the Northern Ireland Fire and Rescue Service Board

(e) the Scottish Ambulance Service Board and

(f) the Welsh Ambulance Services National Health Service Trust.

(3) For the purposes of authorisations sought pursuant to Section 53(7)(h), a relevant public authority also includes—

(a) the Criminal Cases Review Commission and

(b) the Scottish Criminal Cases Review Commission".

The Chair: With this it will be convenient to discuss amendment 236, in clause 61, page 49, line 34, leave out subsection (2) and insert—

"(2) For the purposes of this Part, a relevant public authority is—

(a) a police force maintained under section 2 of the Police Act 1996,

(b) the Metropolitan Police Force,

(c) the City of London Police Force,

(d) the Police Service of Scotland,

(e) the Police Service of Northern Ireland,

(f) the British Transport Police Force,

(g) the Ministry of Defence Police,

(h) the Royal Navy Police,

(i) the Royal Military Police,

(j) the Royal Air Force Police,

(k) the Security Service,

(l) the Secret Intelligence Service,

(m) the GCHQ,

(n) the National Crime Agency,

(o) the Criminal Cases Review Commission, or

(p) the Scottish Criminal Cases Review Commission.

(2A) For the purposes of authorisations sought pursuant to 53(7)(g), a relevant public authority also includes—

(a) a National Health Service Trust established under section 5 of the National Health Service and Community Care Act 1990 whose functions include the provision of emergency ambulance service,

(b) a fire and rescue authority under the Fire and Rescue Services Act 2004,

(c) the Northern Ireland Ambulance Service Health and Social Care trust,

(d) the Northern Ireland Fire and Rescue Service Board,

(e) the Scottish Ambulance Service Board, and

(f) the Welsh Ambulance Services National Health Service Trust.

(2B) For the purposes of authorisations sought pursuant to Section 57(3)(h), a relevant public authority also includes—

(a) the Criminal Cases Review Commission and

(b) the Scottish Criminal Cases Review Commission."

This amendment ensures that only police forces and security agencies may request a communications data warrant, except where the warrant is issued for the purpose of preventing death, in which circumstances emergency and rescue services also fall within the definition.

Keir Starmer: It is a pleasure to continue to serve under your chairmanship, Ms Dorries.

The clause sets out the relevant public authorities and designated senior officers for the purposes of part 3 of the Bill—in essence, those who may exercise the powers of obtaining communications data throughout this part. Last week, I drew attention to schedule 4 to the Bill and, in particular, to the large number of public authorities listed as "relevant", including Food Standards Scotland, the Food Standards Agency, the Gambling Commission, the Office of Communications and the

Northern Ireland Fire and Rescue Service Board. The list of relevant public authorities in schedule 4 is very long.

I also drew attention to the designated senior officers, who are authorised to obtain communications data. They are listed in the second column in schedule 4. To remind the Committee, if we take the Food Standards Agency, the designated senior officer is a grade 6 officer; if we take the Northern Ireland Fire and Rescue Service Board, the officer is the watch manager of control; and, to take one more example, for the Office of Communications, the officer is a senior associate. The point that I made last week was that, where there are wide powers of retention under the Bill, which we will come to later, the threshold for accessing the data is vital. The number of relevant public authorities is too wide and the level of the designated senior officers too low to provide a proper safeguard.

The amendment is intended to address that defect by setting out in the legislation a narrower set of relevant public authorities, listed in paragraphs (a) to (o) of proposed new subsection (1). It is a shorter and tighter list, but would none the less be a functional and effective one. Proposed new subsections (2) and (3) are an attempt to tie in other relevant public authorities to the particular power that would be appropriate for them to exercise. The relevant public authorities for the purposes of authorisation under clause 53(7)(g) are listed under proposed new subsection (2) and, similarly, those for clause 53(7)(h) are listed under proposed new subsection (3).

The amendment would tighten up the drafting of the Bill to limit the number of relevant public authorities and tie the lists more closely to the particular objectives set out in clause 53. Logically, therefore, it follows from the point that I was making last week and anticipates the one that I will make later this morning about the scope of the retention powers.

Joanna Cherry (Edinburgh South West) (SNP): There is one small difference between amendment 135, which was tabled by the Labour party, and amendment 236, which was tabled by the Scottish National party. Amendment 236 includes, in proposed new subsection (2)(p), the Scottish Criminal Cases Review Commission, which is a separate body. I say that for completeness.

The Solicitor General (Robert Buckland): It is good to serve under your chairmanship once again, Ms Dorries. I welcome the spirit in which the amendments have been tabled. There is a common sense of purpose among Committee members to ensure that the ambit of the authorities that have power to access communications data should always be strictly scrutinised. In that spirit, the Government have progressively reduced the number of such authorities. They have reviewed that number and keep it under review. The list of such authorities in the Bill is not simply a replication of the list in the Regulation of Investigatory Powers Act 2000, but has been the subject of careful consideration.

It has been judged that it is necessary for those public authorities to be allowed to access communications data for a narrow range of purposes. For example, insider trading needs to be investigated, and the Financial Conduct Authority is the body to do that. The Maritime and Coastguard Agency will need access to such information to locate people lost at sea. Bodies such as the Food Standards Agency and the Department for Work and Pensions have been given clear remits by Parliament to investigate certain types of criminality and civil matters, because such investigations often require dedicated resources and specialist knowledge. To unduly restrict those agencies in their work would cause an imbalance.

I know that the hon. and learned Gentleman shares those views, because in his previous incarnation as the Director of Public Prosecutions he made it clear, for example, that communications data should be available to organisations such as the DWP in investigating any abuse of the welfare system or other public funds. I therefore know that he has a common purpose in mind.

The Bill for the first time brings together all the public authorities with access to communications data in primary legislation. That is an important and welcome step up from previous practice. I should be clear that all the authorities listed in the Bill were required to make the case that they needed the power to access communications data. Therefore, as I have outlined, the list in the Bill is not just a blind replication of existing lists. As I have said, we removed 13 public authorities from the list in February last year. Amendments that were tabled by my right hon. Friend the Minister for Security and that we will debate shortly will introduce further restrictions on certain public authorities. That shows that the Government are taking great care in this area.

Keir Starmer: I wonder whether the Solicitor General can assist the Committee, either now or at some later stage, by setting out some detail about how the case was made for each of the agencies, and in particular why the designated senior officer grades were chosen. That is quite a complicated question, but it is striking, from the Committee's point of view, that a watch manager is listed as a designated senior officer when one is talking about accessing communications data. I have already given other examples.

The Solicitor General: I shall try to assist the hon. and learned Gentleman. I will not be able to give him an exhaustive list here and now, as he is aware, and I am pretty sure that the information that he seeks is available in some form. We will, of course, help to signpost him to it.

I make the simple case about watch managers that there will be emergency situations, such as missing persons inquiries, in which fleetness of foot is essential. Suggesting that a more senior level of management would be appropriate risks important data being lost or not being available in those emergency situations. There are certain key situations where we are talking about the protection of life in which the balance needs to be struck in the way that we suggest in schedule 4.

With regard to schedule 4, public authorities cannot all acquire communications data for the full range of statutory purposes. Each can acquire data only for the purposes for which it has justified a need for them. That maintains the essential principle of proportionality, so that the public authorities concerned only have the powers for which they have made a compelling case.

[The Solicitor General]

To give some examples of the changes from RIPA, ambulance services will no longer be able to acquire communications data for the purposes of preventing and detecting crime, and the Prudential Regulation Authority will no longer be able to acquire communications data in any circumstances. In addition, the Bill allows for the ability of a public authority to access communications data to be removed, should a public authority cease to have a requirement to make those acquisitions. That is a very important check and balance.

To fill in some more detail in respect of the question the hon. and learned Member for Holborn and St Pancras asked about the detailed justification for each public authority, each authority has been required to provide evidence of utility and the need to acquire communications data. That included detailed consideration of the level of authorising officers, so that we got the balance right in terms of appropriateness.

Joanna Cherry: I note that the Solicitor General spoke of details of the "utility", but the Digital Rights Ireland case sets out that states must limit the number of persons authorised to access and use this sort of data to what is "strictly necessary". Does he agree that a long list of authorities, many of whose primary functions are wholly unrelated to law enforcement in the context of serious crime, is inconsistent with the requirement of strict necessity laid down in the Digital Rights case?

The Solicitor General: I am grateful to the hon. and learned Lady and can correct the record in this way. I should have used the phrase "utility and need". I think that important word, to which she quite rightly draws my attention, answers the point. In one of the examples I have given, where a need was not demonstrated by the PRU, the power was removed entirely.

Among the bodies that the amendment seeks to remove are Her Majesty's Revenue and Customs and the Ministry of Defence. I am afraid that both bodies are intercepting agencies, and communications data are part of their work in targeting interception so that the powers which we all accept are intrusive are used in as tightly constrained circumstances as possible. My worry is that the amendment, however well intentioned, might well have the contrary effect on that important targeted work and the need for those organisations to target their activities.

I remind the Committee that David Anderson QC concluded in his report:

"It should not be assumed that the public interest is served by reducing the number of bodies with such powers, unless there are bodies which have no use for them."

The Joint Committee on the Draft Investigatory Powers Bill also recognised communications data as

"an important tool for law enforcement and other public bodies."

For those reasons, I urge the hon. and learned Gentleman to withdraw the amendment.

Keir Starmer: I am grateful to the Solicitor General. There is obviously concern about the threshold and safeguards for accessing communications data. That is what the Digital Rights case is all about; it is what the Tom Watson and David Davis case will test. To some extent, until that case is concluded, we will not know in specific terms what the safeguards are, although, as I foreshadowed last week, my view is that the requirements for safeguards will tighten as time goes by. It may not be exactly as the divisional court set out.

The Solicitor General has indicated that he will point me to the material that at least summarises why it was thought that each body should be on list. I am grateful for that and will consider it carefully. Will he also, either in a letter or some other appropriate form, set out the test that was applied in clear terms, so that it can be contrasted with the Digital Rights case and any outcome of the David Davis case in due course? I acknowledge that the hon. and learned Gentleman makes a powerful point about Her Majesty's Revenue and Customs and, on that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

The Chair: We come to the question that clause 61 stand part of the Bill.

Joanna Cherry: According to the list I have, Ms Dorries, amendment 236 is also to be dealt with. As I explained, there are small differences between amendments 135 and 236.

The Chair: Amendments 135 and 236 were grouped together.

Joanna Cherry: I realise that, but I have not been asked whether I want to put amendment 236 to a vote.

The Chair: Amendment 236 is not formally before the Committee. As I said in the opening notes at the beginning of the Committee, if you wanted to put it to a vote, you had to make me aware of that at the beginning.

Joanna Cherry: For the assistance of the Committee, I and Mr Starmer have spent a long time discussing who would lead on which clause, in order to speed matters up. I wish to put amendment 236 to a vote, although I did not speak to it. I would like that to be recorded in the minutes. If I am to be prevented from doing so, so be it.

The Chair: Although this is unusual, as we have not actually moved on we can vote on amendment 236 so that the matter is transparent, with the leave of the Committee.

Hon. Members: Aye.

The Chair: Ms Cherry, would you like to speak to your amendment before the Committee votes?

Joanna Cherry: I have nothing to add to what Mr Starmer said and the points that I made in my intervention.

Simon Hoare (North Dorset) (Con): On a point of order, Ms Dorries. It may be that I am in error, and if I am I apologise and will take your chastisement. I thought I was correct in believing that when we are in a Public Bill Committee, it is as if we are having a debate on the Floor of the House and we are therefore referred to as the hon. Member or hon. Gentleman or whatever, rather than using Christian or first name and surname. Can you confirm that? I know some people get frightfully anxious about all the traditions of the House, but I just wanted to make sure that my understanding is correct.

The Chair: On that point, Ms Cherry and I had an informal discussion outside the Committee earlier this morning.

Amendment proposed: 236, in clause 61, page 49, line 34, leave out subsection (2) and insert—

"(2) For the purposes of this Part, a relevant public authority is—

(a) a police force maintained under section 2 of the Police Act 1996,

(b) the Metropolitan Police Force,

(c) the City of London Police Force,

(d) the Police Service of Scotland,

(e) the Police Service of Northern Ireland,

(f) the British Transport Police Force,

(g) the Ministry of Defence Police,

(h) the Royal Navy Police,

(i) the Royal Military Police,

(j) the Royal Air Force Police,

(k) the Security Service,

(l) the Secret Intelligence Service,

(m) the GCHQ,

(n) the National Crime Agency,

(o) the Criminal Cases Review Commission, or

(p) the Scottish Criminal Cases Review Commission.

(2A) For the purposes of authorisations sought pursuant to 53(7)(g), a relevant public authority also includes—

(a) a National Health Service Trust established under section 5 of the National Health Service and Community Care Act 1990 whose functions include the provision of emergency ambulance service,

(b) a fire and rescue authority under the Fire and Rescue Services Act 2004,

(c) the Northern Ireland Ambulance Service Health and Social Care trust,

(d) the Northern Ireland Fire and Rescue Service Board,

(e) the Scottish Ambulance Service Board, and

(f) the Welsh Ambulance Services National Health Service Trust.

(2B) For the purposes of authorisations sought pursuant to Section 57(3)(h), a relevant public authority also includes—

(a) the Criminal Cases Review Commission and

(b) the Scottish Criminal Cases Review Commission."—*(Joanna Cherry.)*

This amendment ensures that only police forces and security agencies may request a communications data warrant, except where the warrant is issued for the purpose of preventing death, in which circumstances emergency and rescue services also fall within the definition.

Question put, That the amendment be made.

The Committee divided: Ayes 2, Noes 9.

Division No. 11]

AYES

Cherry, Joanna
Newlands, Gavin

NOES

Atkins, Victoria
Buckland, Robert
Davies, Byron
Fernandes, Suella
Frazer, Lucy
Hayes, rh Mr John
Hoare, Simon
Kirby, Simon
Stephenson, Andrew

Question accordingly negatived.

9.45 am

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

The Committee divided: Ayes 9, Noes 2.

Division No. 12]

AYES

Atkins, Victoria
Buckland, Robert
Davies, Byron
Fernandes, Suella
Frazer, Lucy
Hayes, rh Mr John
Hoare, Simon
Kirby, Simon
Stephenson, Andrew

NOES

Cherry, Joanna
Newlands, Gavin

Question accordingly agreed to.

Clause 61 ordered to stand part of the Bill.

Schedule 4

RELEVANT PUBLIC AUTHORITIES AND DESIGNATED SENIOR OFFICERS

Mr Hayes: I beg to move amendment 105, in schedule 4, page 206, line 40, at end insert—

"An ambulance trust in England	Duty Manager of Ambulance Trust Control Rooms	All	(g)"

This amendment and amendments 106 and 108 replace the existing entry for ambulance trusts in England with a new entry containing a revised definition for such trusts and restricting the purposes for which data may be obtained.

The Chair: With this it will be convenient to discuss Government amendments 106 to 108.

Mr Hayes: Welcome to the Chair, Ms Dorries.

The amendments make minor changes to schedule 4. As has already been said, schedule 4 lists the public authorities that are able to acquire communications data, the types of communications that they are able to acquire and the statutory purposes for which they can do so. Amendment 105 adds a new entry for ambulance trusts in England, amendment 106 removes the existing entry and amendment 108 introduces the definition of an ambulance trust. The changes make the definition of ambulance trusts consistent with the definition in the Policing and Crime Bill.

The amendments also remove purpose (b) in clause 53(7) from the purposes for which ambulance trusts can acquire communications data, because ambulance trusts obviously do not need to acquire communications data for the purpose of the prevention or detection of crime. In the same vein, amendment 107 restricts the purposes that the Northern Ireland Fire and Rescue Service Board can use to acquire communications data, consistent with the purposes for English fire and rescue authorities. These are uncontentious amendments designed to make the Bill consistent and coherent.

Amendment 105 agreed to.

[Mr John Hayes]

Amendments made: 106, in schedule 4, page 207, leave out lines 24 to 35.

See the explanatory statement for amendment 105.

Amendment 107, in schedule 4, page 207, line 39, leave out—

"Group Manager (Control)	All	(b) and (d)"

This amendment prevents the Northern Ireland Fire and Rescue Service Board from obtaining data for the purpose of preventing or detecting crime or of preventing disorder, or in the interests of public safety.

Amendment 108, in schedule 4, page 208, line 10, after "Schedule" insert "—

"ambulance trust in England" means—

(a) an NHS trust all or most of whose hospitals, establishments and facilities are in England and which provides ambulance services, or

(b) an NHS foundation trust which provides such services,".*—(Mr Hayes.)*

See the explanatory statement for amendment 105.

Question put, That the schedule, as amended, be the Fourth schedule to the Bill.

The Committee divided: Ayes 9, Noes 2.

Division No. 13]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Schedule 4, as amended, agreed to.

Clause 62

POWER TO MODIFY SECTION 61 AND SCHEDULE 4

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

Keir Starmer: I rise to put on the record a concern about the clause and to remind the Committee that with the wide power of retention, the safeguards on access provisions are critical to the operation of the Bill as a whole. Broadly speaking, the safeguards are: who can authorise access, what the test is, the scope of the conduct authorised and such checks and limits as are otherwise put in the Bill. The clause covers who can authorise access, and my strong feeling is that that should be in the Bill rather than left to regulations, because it is a central safeguard. I will not vote against the clause, but I want to put on the record my view that a provision as important as who can access should be in the Bill and that amendments should be made to legislation rather than through regulation.

Mr Hayes: I know the hon. and learned Gentleman is probing. He is right that the clause sets out how the Secretary of State may, by regulation, add or remove public bodies listed in schedule 4 and make modifications accordingly, but it also sets out that the Secretary of State does so by means of regulations. He will have noted that in practice that means a statutory instrument, which is subject to the affirmative procedure, as is made clear in clause 63(3).

I understand the hon. and learned Gentleman's point, which is reasonable, but there are limits on what the Secretary of State can do in the sense that the affirmative procedure must be followed, which will give an opportunity for further consideration. I am happy to confirm that the intention in the Bill and the spirit in which it was constructed are very much along the lines he described.

Joanna Cherry: I wish to oppose this clause.

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

The Committee divided: Ayes 9, Noes 2.

Division No. 14]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kyle, Peter
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 62 ordered to stand part of the Bill.

Clause 63

CERTAIN REGULATIONS UNDER SECTION 62: SUPPLEMENTARY

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

The Committee divided: Ayes 9, Noes 2.

Division No. 15]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 63 ordered to stand part of the Bill.

Clause 64

LOCAL AUTHORITIES AS RELEVANT PUBLIC AUTHORITIES

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

The Committee divided: Ayes 9, Noes 2.

Division No. 16]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.
Clause 64 ordered to stand part of the Bill.

Clause 65

REQUIREMENT TO BE PARTY TO COLLABORATION AGREEMENT

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

The Committee divided: Ayes 9, Noes 2.

Division No. 17]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.
Clause 65 ordered to stand part of the Bill.

Clause 66

JUDICIAL APPROVAL FOR LOCAL AUTHORITY AUTHORISATIONS

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

Keir Starmer: I wish to raise two issues for the Committee's consideration. The first is that the test in subsection (5) for a judicial authority is very weak. We are talking about restrictions on local authorities and we have moved from a test of reviewing the decision, found in other parts of the clause, to a test whether the judicial authority, in this case a justice of the peace, considers that

"there are reasonable grounds for considering requirements of this Part would be satisfied".

The second is that the authority in this case is a JP. I accept that this a replication of another scheme in the same words, as the Solicitor General says. I will not oppose the clause, but in a Bill that is tightening safeguards, there is nothing to prevent that test being aligned with the other tests applied when judges, magistrates or other independent judicial figures oversee authorisations by bodies such as local authorities.

In fairness, I think these clauses were put in to tighten the controls on local authorities.

Mr Hayes: They were.

Keir Starmer: That is welcome and we support them for that reason. In tightening controls, there has been a failure, perhaps deliberate, not to align this with the test in other cases. The judicial authority would be able to say, "I would not in fact authorise, but there were reasonable grounds on which somebody else could have done so." I am making a probing point; no amendment was tabled. I support the further protection in relation to local authorities. I just wondered whether there was a deliberate intention not to align this provision with the other safeguard provisions in the Bill.

10 am

Mr Hayes: There are two things to say. First, the measure replicates the current position under the Regulation of Investigatory Powers Act 2000, so it is established practice. Secondly, as the hon. and learned Gentleman conceded, it is an attempt to add an additional safeguard, for the reasons he gave. It seemed important that this was not used permissively. The only other thing I would add, given that he is probing, is that all of this would have to pass the tests of proportionality and necessity; that is a given. I am happy to look at whether we need to reinforce that, in the code or perhaps elsewhere, because proportionality and necessity underpin all of this; that is not specified in this part, but it is a prevailing and underpinning assumption about authorisation. I understand that he is probing and also appreciate that he understands what we are trying to do.

Keir Starmer: I am grateful to the Minister for the spirit in which he is approaching this issue. I accept that necessity and proportionality are the key tests for the application in the first place. The question for the magistrate is then whether there are reasonable grounds for considering it to be necessary and proportionate. That leaves room for the magistrate to say, "I personally do not think it is necessary and proportionate but I accept that somebody else might think there are reasonable grounds." I do not want to take this too far because it is a relatively minor provision in the Bill and I accept that it is in the scheme of tightening the safeguards; however, I just wonder whether some thought can be given. When the other tests have been so carefully construed—and we will have further discussion on what those tests are—this is an outlier in the way that it is expressed. I accept that it reflects current practice, but I do not think that is necessarily a good reason for simply replicating that unless, on reflection, current practice is thought to be the right way forward from here.

Mr Hayes: I will test that. The hon. and learned Gentleman makes a reasonable point, so I will test our experience of current practice regarding this issue and I will also test and consider whether we need to provide further guidance. I would not want to go too far because, as he says, it is a minor matter, but he is right to say that it is important that it is consistent. I am more than happy to take a look at that, and on that basis I think we should move on.

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

The Committee divided: Ayes 9, Noes 2.

Division No. 18]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 66 ordered to stand part of the Bill.

Clause 67

USE OF A SINGLE POINT OF CONTACT

Joanna Cherry: I beg to move amendment 241, in clause 67, page 53, line 8, leave out subsections (4)(a) and (b) and insert—

"(a) is an officer appointed by the Investigatory Powers Commissioner;

(b) works subject to the supervision of the Investigatory Powers Commissioner; and is responsible for advising—

(i) officers of the relevant public authorities about applying for authorisations; or

(ii) designated senior officers of public authorities about granting authorisations."

The amendment provides for the SPoC scheme to be operated under the authority of the Investigatory Powers Commissioner.

The clause deals with the use of a single point of contact. The purpose of the amendment is to provide for the single point of contact scheme to be operated under the authority of the Investigatory Powers Commissioner. The Bill, as it currently stands, provides that authorisations shall be largely self-approved by officials and officers of public bodies, subject to the advice of a single point of contact. The single point of contact is within the organisation and is responsible for advising on the lawfulness of the authorisation. Local authorities, police forces and public bodies that are too small to have their own single point of contact are required by the Bill to enter into collaboration agreements with others and if the amendment is successful, it will necessitate leaving out clauses 69 to 71.

The Scottish National party's preferred model would be judicial authorisation for access to communications data, as addressed in the amendments to clause 53 that we discussed in Committee last week—I have no doubt that they will be revisited on Report. But if we are to be stuck with the current model, we in the SNP think it only fair and right that the Bill should provide for the single point of contact scheme to be operated under the authority of the Investigatory Powers Commissioner. In my submission, that would give the sort of oversight that we were promised in advance of the Bill but that is absent from the Bill itself.

It is my argument that it is completely unacceptable for a public authority to be able to authorise itself to have access to revealing personal data. In making this argument, I do not seek to impugn the integrity of public officials or, indeed, senior employees of our law enforcement agencies, but rather to point out the glaring reality that the primary concern of such persons will relate to the operational capacity of their agencies. That is simply a matter of organisational culture: it is perfectly understandable, but it militates in favour of independent third-party authorisation. If we are to have an Investigatory Powers Commissioner, why not give him or her that power, so that there will be meaningful oversight?

In my argument, the value and credibility of any single point of contact model would be enhanced by ensuring its independence from the public authority that seeks to use the intrusive powers given under this part of the Bill. That would also remove the need for collaboration agreements, because the single point of contact advisers would be centralised within the IPC framework. It would lift a great deal of bureaucracy out of the public organisations and law enforcement agencies by putting oversight in the hands of the Investigatory Powers Commissioner, who would then be able to encourage, across the board, a standardised approach to the advice given and, importantly, consistency in the application of the law.

The provisions currently in the Bill consolidate existing practice on the guidance issue for single points of contact and the self-authorisation regime, but the Joint Committee on the draft Communications Data Bill recommended consolidation under the leadership of police forces. However, I would argue that, while the single points of contact remain embedded within the same organisations that seek to access this intrusive material, they cannot be considered to be independent for the purposes of the role they play in the authorisation process. If they are not independent, we risk passing legislation that conflicts with European law, which, for the time being at least, applies in the United Kingdom.

The amendment would mean that the single point of contact framework, if continued, would operate as part of an overriding single oversight body, under the auspices of the Investigatory Powers Commissioner. As I said, that would create a single consistent body of staff, capable of providing help, assistance and guidance before the final determination of any application. To my mind, that is a highly sensible and appropriate approach; I would like to know why the Government are not prepared to support it.

The Solicitor General: I am grateful to the hon. and learned Lady for her amendment and her observations, because they give me an opportunity to remind the Committee how important the single point of contact system is, and how envied it is by other parts of the world. Those are not just my words; paragraph 9.93 of David Anderson's important report, "A Question of Trust" states:

"As to the authorisation of communications data requests, the police took a good deal of pride in the SPoC system, which was said to be 'the envy of many friendly countries'."

Mr Anderson makes a particularly important observation in paragraph 9.94, when he states:

"Within law enforcement generally, it was felt that SPoCs should have strong relationships with the investigators and this was more likely to happen where they were part of the same organisation, working to the same goal (albeit with distinct and independent responsibilities)."

I will finish the paragraph:

"Their effectiveness as a 'guardian and gatekeeper' could however diminish were they to become simply part of the investigation team".

Here the hon. and learned Lady's point is a strong one, but it has to be observed in the right context, which is that of the investigation. I absolutely agree with her about the importance of having an arm's length approach, which is why the designated senior officer who is allowed to authorise an application must not be part of that operation. The draft code of practice contains helpful guidance from paragraph 4.28 to paragraph 4.47, and paragraph 4.48 then deals with the question of the designation of a single responsible officer.

Therefore, in the light of all the careful consideration that has been given to this tried and tested system, I argue that the balance is being properly struck here. Indeed, the extensive benefit and the safeguarding mechanism which the SPOC role brings to this process has been recognised by the Interception of Communications Commissioner, who in his report of March 2015 described the SPOC role as "a stringent safeguard". These are people who are specially trained in the acquisition of communications data.

Suella Fernandes (Fareham) (Con): I reiterate that this point was made very clearly by Michael Atkinson of the National Police Council's Data Communications Group. He described the role of the SPOC as being "independent of the investigation" and subject to IOCCO inspections. They would also be regularly overseen, scrutinised and challenged on their work. So there is a very robust system of oversight and review, is there not?

The Solicitor General: My hon. Friend is absolutely right. It is that oversight which I argue establishes the essential checks and balances here, to prevent the sort of abuse about which all of us on the Committee would, rightly, be worried. These are sensitive matters.

Joanna Cherry: At the Scottish Bar we often use the phrase "nemo iudex in sua causa", which means "no man should be a judge in his own cause". I am sure that that is used at the English Bar as well. Will the Solicitor General tell me how he is able to elide this principle, as the SPOC comes from the same organisation as the initial authoriser?

The Solicitor General: I thought I had made it clear to the hon. and learned Lady that the key word here is investigation. Those officers who are responsible for the course of the investigation are not the SPOC. That person is independent and they are at arm's length. They are therefore able to exercise the objectivity and the sense of self-discipline that is essential if public authorities are to retain our confidence. It is all underpinned by the scrutiny of the IOCCO. In my submission, to move away from a tried and tested system that is internationally recognised would be, with regret, a mistake.

With respect to the hon. and learned Lady, I do not see how the process would be enhanced if it were to be done in the way that the amendment suggests. We already have oversight, as I have indicated. In fact, my concern is that the expertise within public authorities of how best to facilitate these sort of requests could be diminished, and there could be a detrimental impact on the relationships with both the service providers and the investigators. My worry is therefore that the understandable aims behind this amendment could be frustrated in a way that is perhaps not being properly foreseen.

Joanna Cherry: On a connected point, the evidence from Jo Cavan at IOCCO has expressed concern about the inclusion of subsection (3)(b), "the interests of national security". I would like to probe this. It has been suggested that the justification for deeming the interests of national security to be almost an exceptional circumstance is unclear. What is the justification?

The Solicitor General: In a nutshell, we are talking here about rare and exceptional circumstances where it might not be possible to consult an SPOC. Where we are talking about national security, I would envisage a risk to the nation that all of us would understand if we saw it—rather like an elephant in a room. As I have said, though, it is couched with particular regard to the governing part of that clause, which is exceptional circumstances. Therefore the hon. Lady can be reassured that this is not some sort of back door by which this power would be misused. For all the reasons I have advanced, I urge the hon. Lady to withdraw the amendment.

10.15 am

Joanna Cherry: I am not prepared to withdraw the amendment.

Question put, That the amendment be made.

The Committee divided: Ayes 2, Noes 9.

Division No. 19]

AYES

Cherry, Joanna	Newlands, Gavin

NOES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

Question accordingly negatived.

Keir Starmer: I beg to move amendment 138, in clause 67, page 53, line 26, at end insert—

'( ) the public interest in the protection of privacy and the integrity of personal data; and

( ) the public interest in the integrity of communications systems and computer networks."

The Chair: With this it will be convenient to discuss amendment 140, in clause 67, page 53, line 38, at end insert—

'( ) the public interest in the protection of privacy and the integrity of personal data; and

( ) the public interest in the integrity of communications systems and computer networks."

Keir Starmer: The two amendments can essentially be read together: they bite on clause 67(5) and (6) respectively. The purpose of this clause, as I understand it, is to

[Keir Starmer]

provide a mandatory consultation exercise for designated senior officers, with a single point of contact. That will be particularly important where the designated senior officer has little if any experience of authorising and will therefore be particular important in some of the smaller relevant public authorities, which may not exercise this power on a regular basis, although I realise it is mandatory in all cases. The point of amendments 138 and 140 is to put in the Bill a requirement that, in the course of that consultation exercise, the single point of contact advises not only on issues such as appropriate methods, costs, resource implications, unintended consequences and so on, but, as set out in amendment 138, on

"the public interest in the protection of privacy and the integrity of personal data; and…the public interest in the integrity of communications systems and computer networks."

Such an amendment is necessary because there is a lack of an overarching privacy provision that can be read into each of these clauses. When a designated senior officer is being advised, it would be prudent and sensible for them to be advised not only about costs and resources, but about privacy and integrity, which are critical to the operation of the Bill.

Joanna Cherry: The amendments are jointly supported by Labour and the Scottish National party.

Throughout this part of the Bill, public authorities and other decision makers are placed under a duty to consider a range of factors connected to the decision to access retained communications data. Those factors include cost and other resource implications and

"any issues as to the lawfulness of the proposed authorisation."

These amendments include a specific duty to consider the public interest and the protection of individual privacy—that is, the protection of the privacy of our constituents; and the security of communications systems and computer networks—that is, the security of our constituents' private data. Both David Anderson, in his independent review, and the Intelligence and Security Committee, in its report on the draft Bill, emphasise the importance of privacy principles and the need to make clear the legality of the use of surveillance powers in this new legislation.

Although we are focusing on a specific amendment to increase safeguards for individual privacy and security of data, we are concerned that throughout the Bill there appear to be statutory duties on public agencies, officials and agents and on judicial commissioners, to consider factors relevant to national security and the prevention and detection of crime, and the effectiveness of powers and resources expended, but there is no specific treatment of privacy standards and the public interest.

While the clauses that these amendments are attached to refer to

"any issues as to the lawfulness"

of the powers, the vagueness of this instruction is, in my submission, very contradictory. Surely it must be the first consideration of any individual considering the exercise of powers under the Bill that they should be legal. Legality should be a first consideration; treating it as just one at the end of a list of other factors to be considered seems entirely inappropriate. In this regard, it would be of huge assistance if the Minister could give us a fuller explanation of why statutory duties in the Bill have been approached in this way, with legality as a final duty; of the objectives of including the factors as provided in the manner in which they are drafted; and of why the protection of privacy and the public interest in the integrity of communications systems and computer networks will not be mentioned unless this amendment is made.

Mr Hayes: The hon. and learned Member for Holborn and St Pancras is right about the purpose of the clause, and I understand the reason for the amendments. The single point of contact may advise the applicant and designated senior officer of the cost and resource implications for the public authority, and the communications service provider of any unintended consequences of the proposed authorisation and any issues surrounding the lawfulness of the proposed authorisation—one of the points that the hon. and learned Member for Edinburgh South West raised.

The points about cost and lawfulness that the hon. and learned Lady raised are certainly part of the advice that the applicant should receive, as well as the appropriate methods to obtain the data they are seeking, while the designated senior officer will be advised on the practicality of obtaining the data sought. Bear in mind that the single point of contact can already advise on the lawfulness of proposed authorisations. For authorisation to be lawful, it has to be both necessary for one of the statutory purposes in the Bill, and proportionate in all circumstances.

The point the hon. and learned Lady made about privacy is a reprise of the debate we had at the very beginning of our consideration, when I argued—I thought pretty convincingly, but clearly not—that privacy is woven through the Bill. For the sake of emphasis, I say again that the protection of privacy and personal data must be a key consideration in gauging proportionality.

Joanna Cherry: I hear what the Minister is saying. As I understand it, he is saying that the issues highlighted by the amendments will be taken into account, so why not say so? What is the detriment in saying so and making it crystal clear? This is for the comfort of the many constituents and members of the public who are concerned about the privacy and integrity of their data, so why not say so in the Bill? What possible detriment could there be in following that course of action?

Mr Hayes: Let me rehearse the argument that I used originally, because despite what I described as its persuasiveness, it clearly was not sufficiently well articulated to convert the hon. and learned Lady to the cause of virtue. Let me rearticulate it: if privacy is separated out in the way that some argue we should have done and might do now, and it is identified in the desiccated way that those people suggest, its significance is curiously—one might even go so far as to say paradoxically—weakened as a defining characteristic of the purposes of the legislation. However, it is worth emphasising the point I made a few moments ago about the need to tie personal interests and the protection of private data in to the test of proportionality in the draft codes of practice.

I draw attention to the codes of practice at paragraph 3.18—the heading is "Further guidance on necessity and proportionality"—which says:

"An examination of the proportionality of the application should particularly include a consideration of the rights (particularly to privacy and, in relevant cases, freedom of expression) of the individual and a balancing of these rights against the benefit to the investigation."

That could not be plainer in doing precisely what I have described, which is to look at the right to privacy—I do not like to use the word "right"; I prefer to use "entitlement"—the entitlement to privacy with the functioning nature of an investigation into the effectiveness of the process.

Joanna Cherry: As I understand it, the Minister is saying that privacy is so important and so woven into the Bill that to single it out would weaken its importance. Surely lawfulness is equally important and that has been singled out by the draftsmen in subsection (6)(d).

Mr Hayes: I have already argued that lawfulness is, again, an underpinning requirement in these terms. Just to be absolutely categorical, the designated senior officer is the one who makes the final assessment of necessity and proportionality, as required by the code of practice. They must have a working knowledge of legislation, specifically that which relates to necessity and proportionality and the entitlements of individuals in those terms.

I just think that the combination of the Bill and the codes of practice render the amendment unnecessary. I emphasised previously that the codes of practice are drafts and the final code of practice will reflect some of this Committee's considerations. If I may turn my attention momentarily from the hon. and learned Lady, if the hon. and learned Member for Holborn and St Pancras feels that the code should be strengthened in that regard—I re-emphasise that I think they are pretty clear—I would of course be prepared to hear his argument. *[Interruption.]* Before I move on to the amendment about system integrity, I can see that he is champing at the bit, or maybe I am misinterpreting him.

Keir Starmer: I was going to cover this in my reply, but the argument the Minister is now putting is unpersuasive, and I am afraid I found it unpersuasive a week ago. In practical reality, when a senior designated officer gets to lawfulness, they will be thinking necessity and proportionality, and they are likely to be advised about that. That is the test for restricting privacy. What we do not see is the statement of privacy, either in this subsection or an overarching clause—I have been trying to articulate what is nagging away as to why the overarching clause is needed. In the end, real people, in real time, will find that lawfulness will mean going back to check necessity and proportionality. That is welcome and right, but they are not the definition of privacy; they are the permitted restrictions of it.

Mr Hayes: That is a fair argument and that is why it is necessary to supplement what the hon. and learned Gentleman describes with the code of practice in the way that I have described. My invitation to him was that if he accepts that, he might want to focus attention on the code of practice to see whether it is as good as it might be. I drew attention to the provision on the necessity and proportionality. It might be that the draft could be further improved. After all, nothing, at least on earth, is perfect, and certainly no Government would want to claim perfection—

Suella Fernandes *rose—*

Mr Hayes: I was about to say that perfection was an intellectual construct, but I am happy to give way on that note.

Suella Fernandes: Is it not impossible that privacy will not be considered as part of any application? Proportionality runs through the authorisation regime, and if a single point of contact has to apply a proportionality test, by definition and necessity, he will incorporate a wide-ranging consideration of the impact on privacy.

10.30 am

Mr Hayes: Yes, I agree. That is an elegant re-articulation of the point that I was imperfectly making about the intrinsic relationship between a consideration of personal interest and the test of proportionality. For the exercise of the power to be proportionate, it must take proper account of the balance that I described between personal interest and investigative effectiveness.

Keir Starmer: This is a relatively minor point, but it goes to the wider question of the overarching clause.

Mr Hayes: It does.

Keir Starmer: We have to look at this issue practically, through the eyes of the people who will operate such authorisations. I know how it will work: they will be directed to look at the necessity against clause 53(7) and they will go through a list. They will then be asked to look at the proportionality against the matters set out in clause 53. That does not point them to privacy. In the vast majority of cases—in good faith, I am sure—they will go through that clause, rather like a checklist. I do not mean to demean or undermine the exercise that they will go through, but I have seen the operation of such tests many times. Those people will ask themselves, "Is it in the interests of X, Y and Z? Is it proportionate to that?" I accept the point about the code of practice, but they will not necessarily ask themselves about privacy. That point is probably more about the overarching clause than about the specific amendment, but that is our nagging concern. One has to see this issue through the eyes of how in practice the process will work on the ground in real time.

Mr Hayes: The hon. and learned Gentleman describes the concerns and says that he knows them. Of course, he will also know that it is part of the requirements that those people undertake the right training and that they are expected to have competence, in particular an understanding of all the necessary legislation, including rights legislation. It is important to understand that those people will be making an assessment based on both evidence and comprehension. I re-emphasise that the code of practice is vital. I am trying to tip him

[Mr John Hayes]

off—perhaps I am being too subtle—that he may want to press me further on those very matters in terms of the draft code of practice, which is pretty good, but such drafts can always be improved.

Let me be even more generous. I am an Hegelian, as the hon. and learned Gentleman knows, and I believe that the truth lies in the whole, as Hegel said. The emphasis on privacy that underpins the whole Bill is fundamentally important, but in this regard I take his point that those missioned to do this job need to be very clear about that balance. To be still more generous, he is right in his strong implication that the training and guidance that those people receive about the interpretation of proportionality in this regard is important. That is the purpose of the code of practice, but we might want to go still further and I am happy to be tested further on that during the course of our consideration. I want to move on to the next group of amendments, because otherwise we will do this to death, but have I signalled clearly my direction of travel?

Keir Starmer: I am grateful to the Minister. I raised this issue of how we go through this exercise with the codes of practice, to which we cannot table amendments, a week ago today. I take his comments as an invitation to draft or suggest tightening amendments—not necessarily in Committee, but outside it—where we think they are appropriate. I take it that those will be taken into consideration in any possible re-drafting of the code. I am grateful for that and we will engage with that exercise.

Mr Hayes: Yes. I think we have settled that, then. I was trying to act as an old hand to a young blood, despite our appearances and demeanour. To that end, I think the hon. and learned Gentleman has got the point.

Simon Hoare: To my simple mind, I just wondered which was which.

Mr Hayes: I would like to think I was a young blood with an old head. That is how I would see it; let us leave it there and move on.

Let me turn to systems integrity. It is important to set out the process for obtaining communications data. A public authority must require a communications provider to disclose communication data or it may engage in activity to acquire the data directly from a telecommunications system. Where data are sought from a provider, they will mostly be data that the provider has for business purposes or data retained under a retention notice. To the extent that a provider has put in place any dedicated system to provide for the acquisition of communications data, that capability and the necessary security assurances will be provided for under a data retention notice or technical capability notice.

In relation to obtaining data directly from a telecommunications system, the communications data code of practice makes it clear that communications data authorisation cannot permit the undertaking of any technique that involves interference with those systems themselves. That is quite important because, as various Committee members will know, that is an important assurance for providers. Such techniques could be authorised only under an equipment interference warrant. We will discuss those matters in the next part of the Bill.

The processes of requiring a provider to disclose data or the obtaining of data directly from a network will not have any impact on the integrity of telecommunications systems or the computer networks concerned. Accordingly, this is not an area on which the applicant or designated person will require advice. In essence, with that absolute firm assurance, the amendment is unnecessary and I invite the hon. and learned Member for Holborn and St Pancras to withdraw it.

Keir Starmer: The more I have listened to the debate on the amendment, the more convinced I have become that there is a need for an overarching privacy clause, to which I will turn our attention at a later stage. It follows from that that I will focus my energies elsewhere, and therefore I beg to ask leave to withdraw the amendment.

Joanna Cherry: I hear what the Opposition spokesman says in this regard, and I have much sympathy with it. However, I wish to press the amendment, for the simple reason that if privacy and integrity are as important as the Minister acknowledges, why not have them in the Bill? That would cause no possible detriment; it can only do good. Therefore, I wish to press the amendment to a vote.

Question put, That the amendment be made:—

The Committee divided: Ayes 6, Noes 9.

Division No. 20]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	Stevens, Jo

NOES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

Question accordingly negatived.

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

The Committee divided: Ayes 9, Noes 2.

Division No. 21]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 67 ordered to stand part of the Bill.

Clause 68

COMMISSIONER APPROVAL FOR AUTHORISATIONS TO IDENTIFY OR CONFIRM JOURNALISTIC SOURCES

Keir Starmer: I beg to move amendment 141, in clause 68, page 54, leave out lines 3 to 13 and insert—

"( ) An application for an order shall be made on notice to the journalist or journalists affected unless the Judicial Commissioner determines that an application without such notice is required in order to avoid prejudice to the investigation.

( ) Paragraphs 7 – 9 of Schedule 1 to the Police and Criminal Evidence Act 1984 shall apply in relation to the service of a notice of application for an order under subsection (1) as if the application were for an order under Schedule 1 Police and Criminal Evidence Act 1984.

( ) Criminal Procedure Rules may make provision about proceedings under this section where the Judicial Commissioner determines that an application without such notice is required.

( ) A Judicial Commissioner may only make an order if the person making the application has convincingly established that—

(a) the order is directed to one or more of the legitimate aims specified in Article 10.2 of the Convention, and

(b) there is an overriding public interest necessitating the order, and

(c) reasonable alternative measures to the order do not exist or have been exhausted, and

(d) the order is proportionate to the legitimate aim or aims being pursued.

( ) The costs of any application and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the Judicial Commissioner".

How journalistic material and in particular journalists' sources are to be protected under part 3 of the Bill is a substantive issue of real importance in a modern democracy.

"Issues surrounding the infringement of the right to freedom of expression may arise where an application is made for the communications data of a journalist. There is a strong public interest in protecting a free press and freedom of expression in a democratic society, including the willingness of sources to provide information to journalists anonymously."

Those strong statements of principle that underpin our democracy are agreed across this House. I say that with confidence not only because of the strong public interest, but because they are written into the code of practice at paragraph 6.5. That suggests they are shared and important democratic principles. I argue that that expression of principle is not translated into reality in the provisions of the clause or through the Bill, and the clause is of considerable concern.

Let me give the background, as there is a chequered history. It is now clear that, in the case of Tom Newton Dunn, the police used the Regulation of Investigatory Powers Act 2000 to access his phone records in secret in 2014. They did not notify him that they had accessed his material or sources; the Metropolitan police obtained the phone records without notification or consent. In other RIPA cases, no journalists were informed in advance. The Interception of Communications Commissioner highlighted in a report in February 2015 that 19 police forces had accessed the communications data of 82 journalists using RIPA in that way. The point of real importance is that there is no fundamental difference between the authorities asking for a journalist's physical contact book and footage or for their telephone and communications records; the effect on journalists and sources is exactly the same and the same legal safeguards must apply to both.

The safeguards in the Police and Criminal Evidence Act 1984 set a higher standard than those in the Bill as it stands. Under PACE, journalists are notified when the authorities want to access their material and sources, and they have the ability to defend their sources. Neither RIPA nor the Bill apply the same protections and safeguards. The RIPA interim codes of practice, published in March 2015, stated that the authorities must use the PACE procedures to apply to the court for a production order to obtain data. The Bill fails to meet that test.

10.45 am

Let us consider clause 68 against that background. It applies if the purpose of the authorisation is

"identifying or confirming a source of journalistic information".

The clause applies where the purpose is to get at protected material. My first point is that there is no provision in the clause for protection when the purpose of the authorisation is not to identify or confirm a source but that may happen incidental to other authorisations or applications. That is a huge gap in the protection.

Secondly, under subsection (4),

"the applicant is not required to give notice of the application to...any person to whom the authorisation relates, or...that person's legal representatives."

So unlike the PACE provision, there is no notice provision.

Then, in subsection (5), although there is a requirement for a judicial commissioner to approve an authorisation, the test is very weak and low level. It is that

"the Judicial Commissioners considers that...at the time of the grant, there were reasonable grounds for considering that the requirements of this Part were satisfied in relation to the authorisation".

All the judicial commissioner is deciding when a journalist's source is being targeted is the requirement of this part of the Bill that there are reasonable grounds. On reasonable grounds, the judicial commissioner may think not that the requirements were satisfied, but that there were reasonable grounds for thinking so, and there is no test. There is no higher test for journalistic sources. All the judicial commissioner must satisfy himself or herself of is that the test that applies generally has been applied. It is difficult to see, unless I am reading this wrongly, what the test adds other than that the judicial commissioner looks at the matter, because all they have to look at is whether the other tests not relating to journalists have been satisfied. That is a good thing, but it is hardly a higher level of protection for journalists.

Going back to the code of practice, the last sentence of paragraph 6.5 is very powerful. It states:

"Where an application is intended to determine the source of journalistic information, there must therefore be an overriding requirement in the public interest".

That is a strong statement of principle that is not found in clause 68 or elsewhere in the Bill. If that is the test to be applied, it is the test that should be written into the Bill and applied by the designated senior officer, and it is the test that the judicial commissioner should be satisfied is passed. The commissioner does not have to

ask himself or herself that question. The provision is disguised as protection for journalists but does not provide them with any protection at all.

The code of practice deals with the situation when the application is for the communications data of a journalist generally but is not intended to determine the source. Again, there is nothing on that in the Bill. All the Bill does is to have a title suggesting protection for journalists and then a test that just ensures that the other provisions of the Bill that are not specific to journalists are applied. It leaves out the vital test in the code of practice and set out in case law, which is too great to start going through at this stage. The clause is fundamentally deficient when it comes to protection for journalists.

Lucy Frazer (South East Cambridgeshire) (Con): I am trying to think how this will work in practice. Under the usual rules for a non-notice application, to show that it will be without notice it would be necessary to highlight a number of factors of history as to why it should be without notice rather than on notice—for example, fraud or historical events. In this case, what would the circumstance be that would make it without notice rather than on notice? There would be a significant risk that any journalist would take action. What evidence could be put to the judicial commissioner to persuade them that this should be a without-notice application? There would be no history on the journalist himself.

Keir Starmer: I am grateful to the hon. and learned Lady for that intervention. As she will know, there is a 20 to 25-year history of the evolution of protections for journalists, from the point when they were not put on notice to the point when they are now routinely put on notice. There are exceptions that have been tested in the Court of Appeal, but journalists are pretty well always put on notice and on many occasions will go and argue their corner to protect their source. Over the years, the case law has determined what the proper test is; on some occasions it has protected the source and on others it has allowed access. Under the PACE regime, there is now a clearly established way to proceed in cases in which journalists' sources are an issue. It is well understood and it works well. It is significant that none of the law enforcement bodies to my knowledge are complaining that the on-notice PACE procedure for obtaining material that relates to journalists' sources is not working in practice. Having battled it out over 25 years, pretty well all the sides accept that the current arrangement represents and protects their interests.

The amendment would essentially apply the same regime to communications data where communications data has been retained and is now being accessed. In the modern world, as journalists have made absolutely clear, to say that authorities have to go via PACE when they want to get a physical address book with a source in it but not when they want the virtual version through comms data is to cut right through the protection that has been so carefully crafted over the last 20 to 25 years. That does not protect journalists' sources and is a cause of real concern.

Amendment 141 reflects current practice by providing for exceptional circumstances in which applications do not have to be on notice, whereas the Bill simply does not offer journalists any meaningful protection whatever. It is a carefully thought through, constructive amendment, intended to give journalists the protection they need without thwarting an investigation that needs to be protected. The test in paragraph (b) of the fourth subsection of the amendment puts the code of practice into the Bill. There is then a provision on costs.

The amendment is simple: it preserves PACE protections and extends them to communications data. It sets out the right test for the designated senior official and the judicial commissioner to apply. Nobody can quarrel with the test, because it is taken from the code of practice itself. It is all very well having warm words in the code of practice and warm words, which we have heard many times, about the protection of journalists' sources, but unless they are translated into something that has real bite and effect, they remain warm words. I do not say that to underplay what the Solicitor General will say. I know that he believes in the underpinning principles I have outlined, but history shows that unless protection for journalists is written into legislation in a meaningful and effective way, it will not apply in practice as it should.

The Solicitor General: I thank the hon. and learned Gentleman for clearly outlining the kernel of his concern about the way the clause is drafted. Although in the drafting of the clause we have tried, quite properly, to address what is a sensitive occupation—I hesitate to use the word "profession" because some journalists do not like to be described in that way—we are in danger of moving the focus away from the public interest that journalists serve, which is freedom of expression in a democratic society without fear of intrusion by the authorities and in a way in which sources, and the journalists themselves, can be protected. We have to draw a very important distinction. It is tempting to try to draft amendments dealing with journalists in an ad hominem, or group, way. However, we are not talking about that; we are talking about the source material. Therefore, in a nutshell, I am afraid that the amendment does not really deal with the essential public interest, and that is why I commend the Government's approach to the Committee.

I will say to the hon. and learned Gentleman, by way of reassurance, that if we can do better in the code of practice, we will. I am certainly open to active consideration of the ways in which we can improve the drafting to make the principles of freedom of expression, and the points that he and I agree on, even clearer to those applying these rules.

Keir Starmer: The Solicitor General is resisting this sensible and constructive amendment, which reflects the PACE approach, on the basis that one should not get too specific and one needs to understand the underlying public interest. He must accept that the points he makes apply equally to the PACE test. It does not matter whether someone is physically seizing a document that reveals a source or seizing something that serves virtually the same purpose. He must accept that the test is working well in practice and that all sides are pretty content with the way it works at the moment.

The Solicitor General: I am grateful to the hon. and learned Gentleman, but, tempting though it is to draw that comparison, I think that he is mistaken. The PACE

code of practice focuses on the person who, as it appears to the judge, is in possession of the material. That is not always the journalist; for example, a journalist's material in regards to comms data will be held by the communication service providers and not by the journalist. Under PACE, journalists are not notified in such cases.

Keir Starmer: Will the Solicitor General give way?

The Solicitor General: I will not give way at this stage because I want to explain the position. I have given way repeatedly and I want the chance to make my argument. I am sorry if people think, for some reason, that I am not listening or being reasonable. I need to explain the case because I do not think that it has been fully understood.

The hon. and learned Gentleman is right to talk about the position under PACE whereby journalists are asked to surrender data, such as in notebooks; however, under RIPA and the PACE procedures, applications are already being made to others in possession of material, journalists are not notified and the principles are very clear. I do not think it is right of him to draw such an easy comparison and to say, "It is working for PACE, therefore it should be read across the provisions of the Bill." That is comparing apples with pears—with respect to him.

Keir Starmer: I have obviously looked carefully at what the Government said in the past on this issue and what was said in response to the pre-legislative Committees. The point has been made that, on the one hand, it is seizing from the journalist themselves and on the other hand, it is seizing from the person who holds the data; that is a material difference and we cannot compare the two schemes. I wonder whether that withstands proper scrutiny. The whole point is to give a source confidence that they can come forward and tell a journalist something and they will be protected. Otherwise, all the case law recites the fact that sources will not come forward and wrongdoing will not be exposed, which is unhealthy for democracy.

The argument that, if you seize my name in physical form from a journalist, it is to be protected, but if my name is being held by a data holder it can be given up and does not require protection, defies common sense. For the source, the question is: what is the protection for me if I come forward and try to expose someone? The argument that you are fine if it is written in a notebook and held by the journalist, but you are not protected if it finds its way into a bit of data held by someone else does not hold up.

11 am

The Solicitor General: Yes, but with respect, the hon. and learned Gentleman is ignoring the function of this clause, which is that where you do have that list, we have a special procedure. The problem with that argument is that there is a sensitive issue here. Where someone—whether they are a journalist or not—is the subject of a legitimate investigation, that could undermine such an investigation. Getting the balance right is therefore very important—*[Interruption.]* I want to finish this point. That is why, both in the Bill and this clause, special procedures apply where the sort of mischief about a source being compromised is indeed a live issue.

Keir Starmer: In amendment 141, which the Solicitor General is resisting, we have deliberately and intentionally accommodated the test that notice need not be given where it is necessary

"in order to avoid prejudice to the investigation."

He has given a powerful example, but we have catered for that by saying that notice does not need to be given in that instance. The norm is that notice is given in the usual way, but the exception is where there is prejudice to the investigation. That absolutely meets his concerns; but it does meet my point that notice should otherwise be given.

The Solicitor General: I am glad we both note that we are trying to get to the same objective. I have already said to the hon. and learned Gentleman that the combination of legislation and the code of practice will be the way in which this framework is set out. I have indicated that if we can do better on the code of practice, we will; we will work with him on that. I also reiterate the amount of care that my right hon. Friend the Minister for Security and I are taking on this particular issue. We have met with leading representatives from journalism on three occasions to discuss the Bill. We have written to the National Union of Journalists and the News Media Association about the concerns they have raised. This is part of a dialogue that is very much ongoing about the protections afforded by the Bill to journalistic material. They rightly say to us that it is not about them but about the interests that they serve. I cannot reiterate enough that we must focus on that issue when drafting the legislation.

May I deal with other Members who have considered the issue? The Interception of Communications Commissioner carefully considered it last year. He made it clear in his recommendation that, where communications data are sought that do not relate to investigation to determine the source of journalistic information, then judicial authorisation is not necessary. I know that the hon. and learned Gentleman is trying in effect to replicate that carve-out. On the proposed restrictions on the circumstances in which a communications commissioner may approve the obtaining of communications data that are journalistic in nature, where the request is for one of the legitimate aims in article 10.2 of the convention, there is an overriding public interest necessitating the order and the order is proportionate to the legitimate aim or aims being pursued, we already have the concepts of necessity and proportionality under part 3 as spelt out in the draft code of practice—as indeed they are in the code of practice for existing legislation. We already have a tightly constrained framework here, which offers a high degree of reassurance to all of us who care passionately about these issues, as I do. The Investigatory Powers Tribunal has been clear in recent authority, such as the case of News Group Newspapers Ltd and others *v.* Metropolitan Police Commissioner in December last year, that the 2015 code of practice drafted under the current provisions and replicated in the regime in the Bill meets the standards on freedom of expression set out in article 10.

On the proposed requirement for a judicial commissioner to ensure that all reasonable alternative measures to such an authorisation have been exhausted, I am afraid that in my view, there are problems with its practicability. There are many reasons why a particular approach to

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an investigation might be selected and the use of a particular power might be called for. Judicial commissioners, with respect to them, are not the experts in this consideration and should not be expected to be. It is for those with expertise in the range of investigative options available in the particular circumstances of the case to decide that. Then, of course, the tests can be applied.

I do not want to take technical points. With regard to the technicalities of the amendment, there are some drafting issues that would need to be worked on, but I accept that it is really about principle and the approach to be taken. At this stage, although I disagree with the means by which the hon. and learned Gentleman seeks to make the change, continuing dialogue on the issue is meaningful. For those reasons and in that context, I respectfully ask him to withdraw the amendment.

Keir Starmer: I have listened carefully to the Solicitor General. In the end, it boils down to a matter of principle. I think that he accepts what amendment 141 says in proposed new subsections (a), (b), (c) and (d). He criticises (c), but I will not spend time on that. The most important thing is to establish that the order is directed to one or more of the legitimate aims in article 10.2 and that an overriding public interest makes it necessary. He says that that is the framework within which the decisions should be taken, so there is no disagreement between them.

The difference, then, appears to be simply that I say it should be on the face of the statute and clear to all, and he says, "No, it can be in a code without express reference in statute." There is a problem in principle with that. Protection of journalists' sources should be on the face of the Bill. That is important in a modern democracy. For the Bill to be silent about the test, and for only the code of practice to apply it, is wrong in principle.

Secondly, I am afraid that there is a test spelled out in the Bill, and it is inconsistent with that test. The test for the judicial commissioner in the Bill is simply to check that there were reasonable grounds for considering something, but that the other requirements in the provisions were complied with. As a matter of statutory construction, the judicial commissioner is bound to apply the test in the Bill and cannot apply any other test, so it is wrong in principle not to put it in the Bill. It is also problematic, because there is a test in the Bill and it is not a special test. Ultimately, it says that the judicial commissioner must ensure that the other provisions of the Act are complied with. We would expect that; it is hardly an enhanced test by anybody's standards.

In those circumstances, I am afraid that the Solicitor General's arguments are wholly unpersuasive. I will withdraw the amendment, partly because I think that there is room for improvement, on which I will certainly work with the Government. To be absolutely clear, partly because I want to reserve my position to propose the amendment at a later stage, as it is of such importance to the Bill, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Keir Starmer: I beg to move amendment 142, in clause 68, page 54, line 5, leave out from "data" to "and" on line 7 and insert "further to this Part".

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

Amendment 143, in clause 68, page 54, line 18, leave out "considers" and insert "determines".

Amendment 144, in clause 68, page 54, line 19, leave out subsections (5) (a) and (b) and insert—

'( ) that the conduct permitted by the authorisation is necessary for one or more of the purposes in section 53(7); and

( ) that the conduct permitted by the authorisation is proportionate to what is sought to be achieved by that conduct."

Amendment 145, in clause 68, page 54, line 29, leave out subsection (7) and insert—

'( ) The Investigatory Powers Commissioner may for the purposes of approving authorisations under this Section appoint Deputy Judicial Commissioners.

( ) A "Deputy Judicial Commissioner" must be—

(a) in relation to England and Wales, a justice of the peace,

(b) in relation to Scotland, a sheriff, and

(c) in relation to Northern Ireland, a district judge (magistrates' courts) in Northern Ireland.

( ) An authorisation under this Section may not grant authorisation in relation to the obtaining by a relevant public authority of communications data—

(a) 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.

( ) 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.

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

( ) A Judicial Commissioner may issue an authorisation sought under subsection (3), if satisfied that—

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

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

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

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

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

(i) the benefit likely to accrue to the investigation and prosecution if the data 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,

( ) 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.

( ) Where an authorisation issued under this Part would seek to authorise any activity which may involve access to special procedure material, the following subclauses apply.

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

(a) journalistic material other than material which a person holds in confidence and

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

( ) The special procedure authorisation may only be granted on application to a Judicial Commissioner.

( ) The Judicial Commissioner must be satisfied that there are reasonable grounds to believe 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—

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

(ii) the importance of the prosecution,

(iii) the importance of maintaining public confidence in the integrity of journalists' work product, and/or communications with members of relevant legislatures and

(iv) the public interest in the freedom of expression enjoyed by journalists and the members of the relevant legislatures, including as protected by Article 10 ECHR.

( ) Where data could reasonably be obtained by means of a search and seizure order pursuant to the Police and Criminal Evidence Act 1984, a warrant under this Part will not be in the public interest.

( ) An application for an authorisation concerning journalistic material held in confidence or information for the purpose of identifying or confirming a source of journalistic information, may only be considered by the Investigatory Powers Commissioner, who must be satisfied that there are reasonable grounds to believe—

(a) a criminal offence has been committed,

(b) the communications data 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 authorisation is granted, having regard to—

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

(ii) the importance of the prosecution;

(iii) the importance of maintaining public confidence in the integrity of journalists' work product and

(iv) the public interest in the freedom of expression enjoyed by journalists and the members of the relevant legislatures, including as protected by Article 10 ECHR.

( ) In considering an authorisation concerning journalistic material held in confidence, the Investigatory Powers Commissioner must give notice to the journalist concerned, unless it would not be in the public interest to do so.

( ) If an authorisation is considered without notice, the Investigatory Powers Commissioner must appoint a Special Advocate to represent the interests of the journalist and the person to whom confidence is owed, and the wider public interest in the integrity of journalists sources and freedom of expression, including as protected by Article 10 ECHR.

( ) Journalistic material is held in confidence for the purposes of this section if—

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

(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."

Amendment 242, in clause 68, page 54, line 29, leave out subsection (7) and insert—

'( ) The Investigatory Powers Commissioner may for the purposes of approving authorisations under this Section appoint Deputy Judicial Commissioners.

( ) A "Deputy Judicial Commissioner" must be—

(a) in relation to England and Wales, a justice of the peace,

(b) in relation to Scotland, a sheriff, and

(c) in relation to Northern Ireland, a district judge (magistrates' courts) in Northern Ireland.

( ) An authorisation under this Section may not grant authorisation in relation to the obtaining by a relevant public authority of communications data—

(a) 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.

( ) 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.

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

( ) A Judicial Commissioner may issue an authorisation sought under subsection (3), if satisfied that—

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

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

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

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

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

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

(ii) importance of the prosecution; and

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

( ) 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.

( ) Where an authorisation issued under this Part would seek to authorise any activity which may involve access to special procedure material, the following subclauses apply.

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

(a) journalistic material other than material which a person holds in confidence;

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

( ) The special procedure authorisation may only be granted on application to a Judicial Commissioner.

( ) The Judicial Commissioner must be satisfied that there are reasonable grounds to believe 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;

(iii) importance of maintaining public confidence in the integrity of journalists' work product; and

(iv) public interest in the freedom of expression enjoyed by journalists and the members of the relevant legislatures, including as protected by Article 10 ECHR.

( ) In considering an authorisation concerning journalistic material held in confidence, the Investigatory Powers Commissioner must give notice to the journalist concerned, unless it would not be in the public interest to do so.

( ) If an authorisation is considered without notice, the Investigatory Powers Commissioner must appoint a Special Advocate to represent the interests of the journalist and the person to whom confidence is owed, and the wider public interest in the integrity of journalists sources and freedom of expression, including as protected by Article 10 ECHR.

( ) Journalistic material is held 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 proposes special procedures for communications data, subject to legal professional privilege, and for the protection of journalistic material and the communications data of politicians. It also provides for the Investigatory Powers Commissioner to appoint Deputy Judicial Commissioners to consider applications for the authorisation of access to Communications Data.

New clause 14—*Authorisations in relation to items subject to legal privilege—*

'(1) Subsections (2) and (3) apply if—

(a) an application is made by or on behalf of a relevant public authority for authorisation under this Part, and

(b) the purpose, or one of the purposes, of the authorisation is to obtain communications data which contains, or might tend to reveal the content of, items presumptively subject to legal privilege.

(2) The application must contain a statement that the purpose, or one of the purposes, of the authorisation is to obtain communications data which contains, or might tend to reveal the content of, items presumptively subject to legal privilege.

(3) The person to whom the application is made may grant the authorisation only if the person considers—

(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 acquisition of the communications data in question, and

(b) that the relevant public authority has made arrangements of the kind described in section 46 (safeguards relating to retention and disclosure of intercepted material), including specific arrangements for the handling, retention, use and destruction of such items.

(4) Subsections (5) and (6) apply if—

(a) an application is made by or on behalf of a relevant public authority for authorisation under this Part,

(b) the relevant public authority considers that the relevant communications data is likely to include communications data which contains, or might tend to reveal the content of, items subject to legal privilege, and

(c) subsections (2) and (3) do not apply.

(5) The application must contain—

(a) a statement that the relevant public authority considers that the relevant communications data is likely to include communications data which contains, or might tend to reveal the content of, items subject to legal privilege, and

(b) an assessment of how likely it is that the relevant communications data will include communications data which contains, or might tend to reveal the content of, such items.

(6) The person to whom the application is made may grant the authorisation only if the person considers that the relevant public authority has made arrangements of the kind described in section 46 (safeguards relating to retention and disclosure of material), including specific arrangements for the handling, retention, use and destruction of any communications data which contains, or might tend to reveal the content of, items subject to legal privilege.

(7) Subsections (1) to (6) of section 68 (commissioner approval for authorisations in relation to journalistic sources) apply to an authorisation to which this section applies as they apply to an authorisation in relation to the obtaining by a relevant public authority of communications data for the purpose mentioned in subsection (1)(a) of that section.

(8) In this section "relevant communications data" means any communications data the obtaining of which is authorised by the authorisation."

Keir Starmer: Although there are numerous amendments, they will not take as long as the previous amendment, because to some extent they cover the same ground. Amendments 142 to 144 are intended to tighten up the test for journalistic material and apply a stricter test. Amendment 145 is an attempt comprehensively to redraft clause 68 to provide meaningful protection for journalist's material and the protection of journalist's sources. It is also an attempt to provide protection for other protected information, namely that which is subject to legal privilege and communications between MPs. This is a form that we have seen on previous occasions.

I invite interventions because I cannot now quite remember, but I do not think that in this part of the Bill there is a self-standing provision for MPs in relation to access to data. I will happily be intervened on if I am wrong, because then this would not apply. My concern when drafting this amendment was that, while in other parts of the Bill there is a specific provision—although we can argue about whether it is strong enough—for MPs' correspondence in relation to accessing the communications data of MPs, there is no provision at this point in the Bill. That should be a cause of concern to everyone on the Committee, and it will certainly be a cause of concern to others.

Joanna Cherry: I am grateful to the hon. and learned Gentleman for the typically clear and concise way in which he has approached these amendments to clause 68, on which I wholeheartedly support him. On the question of protection for parliamentarians, the wording that has been used is a "relevant" parliamentarian. That will cover Members of the Scottish Parliament and the devolved Assemblies as well.

Keir Starmer: I am grateful for that. On looking at it, it is clear that clause 94 applies generally across this—actually, I am not sure that it does. I am sorry to pause on this, Ms Dorries.

Joanna Cherry: Perhaps I could assist the hon. and learned Gentleman. The phraseology that is used is "a member of a relevant legislature", which is defined to include the Scottish Parliament and the devolved Assemblies.

Keir Starmer: I am grateful for that. The purpose of the amendment is really to cover all three protected areas—legal professional privilege, MPs' correspondence and journalism—and to set out a comprehensive test for all three. It is similar to a provision that we have already looked at in relation to other parts of the Bill. I commend it as a constructive way to protect the interests that ought properly to be protected on the face of the Bill.

The Solicitor General: I will not revisit the arguments except to say that there are important differences between the regime for communications data and that which is contained within clause 94, for example, which deals with equipment interference. We will come on to that in due course. I remind the hon. and learned Gentleman that paragraph 6.4 of the code of practice contains specific reference to a number of sensitive occupations, including,

"medical doctors, lawyers, journalists, Members of Parliament, or ministers of religion".

If there is any lack of clarity in the code as to whether this includes Members of the Scottish Parliament or indeed of other devolved institutions, I am sure that that could be cleared up, and it should be.

Joanna Cherry: My point is not about the definition of parliamentarians but on the question of legal professional privilege. I think I am right in saying that the Government do not currently recognise that comms data come within the definition of legally privileged material. Does he not agree with me that a phone call from or to a lawyer could, for example, identify a potential witness in a case, and therefore comms data should come within the definition of legal professional privilege?

The Solicitor General: I do not want to go back to arguments that we have already had on this or to anticipate any future arguments. With regards to legal professional privilege, sometimes it might be difficult to establish precisely what comes within and without that category. However, we are talking not about the content of what has been said or done but about the fact of a communication having been made, so communications data will rarely, if ever, attract legal professional privilege; it is difficult to think of an example when it would.

11.15 am

Keir Starmer: I think the guidance that we are given in declaring our interests to the House is that, for legal work, the identity of the person advised is not to be disclosed, because that comes within legal professional privilege. In other words, the fact that somebody has sought advice and who has sought advice are protected by legal professional privilege. I have never known there to be any doubt about that. This is an area where there is a need for special protection; that ought to be in the statute. I think that is common ground. That is how I have always understood it. I am not entitled to say who instructs me without the consent of the client, certainly before the matter comes to court.

The Solicitor General: While I agree with the hon. and learned Gentleman on the principle and the absolute nature of the privilege—subject to the iniquity exemption that we all know about and those of us who practise are familiar with—I am talking about a restricted area, in which we are looking at the threads of an investigation as opposed to the actual meat of the subject.

Lucy Frazer: Will the Solicitor General give way?

The Solicitor General: May I just deal with this matter? As I said, I am having difficulty identifying a circumstance in which communications data—material without context or wider information—would attract that protection. In what we call the David Davis and Tom Watson case, which has been referred by the Court

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of Appeal to the Court of Justice of the European Union, in its judgment the court of first instance, the divisional court, said:

"No doubt such an example of privilege would rarely arise."

I think it is important to note that, while I am not saying that it would never arise, I am having difficulty in imagining that the material itself would breach the dam, if you like, of the important safeguard of legal professional privilege.

Lucy Frazer: Just in response to the hon. and learned Gentleman's point about the identity of the person being subject to legal professional privilege: in litigation it is always known, because the solicitor is on the record as to who he acts for, and at a case management conference the barristers who are taking the matter forward will be identified.

The Solicitor General: I am grateful to my hon. and learned Friend. There might be an earlier stage, for example at a police station in a criminal investigation, when that might not be a matter that is automatically disclosed in that way.

Keir Starmer: I absolutely accept that, for litigation in open court, it is pretty clear who everybody is acting for. It is common practice in the commercial world for protection to be put around whether a client is seeking advice and from whom. That is jealously guarded by every law firm that I have ever had anything to do with, for very obvious reasons. People go to lawyers; they do not necessarily want the world at large to know that they have gone and to which lawyer they have gone. I cannot over-emphasise that, in the commercial reality of the real world, that is jealously guarded.

The Solicitor General: I am grateful to hon. Members for trying to sift their way through what appears to be something of a labyrinth at times. I do not want to overcomplicate the situation. The Government's view is that, combined with the code of practice, we have the necessary protections in the Bill that acknowledge that the degree and nature of the interference in an individual's rights and freedoms will of course be greater in these sort of circumstances, so considerations of the necessity and proportionality become highly germane because they draw attention to any such circumstances that might lead to an unusual degree of intrusion or infringement of rights and freedoms, in particular privacy.

Joanna Cherry: The Solicitor General is very generous in taking interventions. We currently have four silks arguing about whether LPP can apply to comms data. Too many lawyers spoil the broth perhaps, but is that not an indication that a code of practice is not going to be enough to resolve this issue? It should go before a judicial commissioner, as proposed by the amendment.

The Solicitor General: The hon. and learned Lady makes her point with force. Although the concerns she has about content and the issues that we have debated and will debate in part 5 are understandable, we are talking about a different nature of material and a different regime, where considerations can be distinct from those that apply in other parts of the Bill.

I will deal as quickly as I can with the points that have been made. I would argue that we have, in effect, a particular restriction that I would regard as not striking the right balance with respect to those who need it. We have to think in the context of the operational capability of our security and intelligence services in particular.

If there is a specific requirement for the use of PACE powers in these circumstances, I am worried that the requirements of clarity, consistency and transparency that we have to abide by will be undermined. The Interception of Communications Commissioners Office was clear in its rejection of the claim that public authorities had utilised RIPA to avoid the use of PACE. In fact, under this Bill part 3 authorisations for communications data to identify or confirm a journalistic source are subject to more stringent safeguards than under PACE, because the Bill replicates those procedures but at a higher level of authorisation, with a serving or former High Court judge, as opposed to a circuit judge, making the authorisation.

Making communications data accessible to those who have a lawful need for them at the right level of authorisation is a fine balance, but it is struck most effectively in the Bill as drafted. I am sure that Opposition Members do not intend us to reach a position where communications that have been made for the intent of furthering a criminal purpose are missed or are not accessible as they would want them to be. For those reasons, I urge the hon. and learned Member for Holborn and St Pancras to withdraw the amendment.

Keir Starmer: I am afraid I simply do not follow the argument that transparency and accountability are lost if the protection that should properly be accorded to lawyers, journalists and MPs is spelled out in the Bill, with clear guidance to those who operate the authorisations on how to apply them. As I have indicated, these are matters of real concern that go to important issues in the Bill. In order to reserve my rights at a later stage, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 68 ordered to stand part of the Bill.

Clause 69

COLLABORATION AGREEMENTS

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

The Committee divided: Ayes 9, Noes 2.

Division No. 22]

AYES

Atkins, Victoria	Hayes, rh Mr John
Buckland, Robert	Hoare, Simon
Davies, Byron	Kirby, Simon
Fernandes, Suella	Stephenson, Andrew
Frazer, Lucy	

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 69 ordered to stand part of the Bill.

11.25 am

The Chair adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till this day at Two o'clock.