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HOUSE OF COMMONS
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Public Bill Committee

INVESTIGATORY POWERS BILL

Ninth Sitting

Thursday 21 April 2016

(Morning)

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Monday 25 April 2016

The Committee consisted of the following Members:

Chairs: Nadine Dorries, † Albert Owen

† 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

Thursday 21 April 2016

(Morning)

[Albert Owen *in the Chair*]

Investigatory Powers Bill

11.30 am

The Chair: Good morning and welcome to the Committee. We all have a good reason not to be in the Chamber this morning but I am sure you will all join me in wishing Her Majesty a happy 90th birthday.

Hon. Members: Hear, hear!

Clause 91

Power to issue warrants to intelligence services: the Secretary of State

Joanna Cherry (Edinburgh South West) (SNP): I beg to move amendment 405, in clause 91, page 70, line 8, after "crime", insert

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

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

Amendment 406, in clause 91, page 70, line 9, leave out paragraph (c).

Amendment 436, in clause 96, page 74, line 16, leave out subsections (12) and (13).

Amendment 464, in clause 91, page 70, line 25, at end insert—

'(10) A warrant may only authorise targeted equipment interference or targeted examination as far as the conduct authorised relates—

(a) to the offence as specified under subsection (5)(b), or

(b) to some other indictable offence which is connected with or similar to the offence as specified under subsection (5)(b)".

Joanna Cherry: The amendments, which were tabled by the Scottish National party and the Labour party, are part of the broad objective of altering clause 91 so that authorisation of warrants is carried out by judicial commissioners rather than the Secretary of State. There has already been quite lengthy argument about the general principle so I will not go into that in great detail. The amendments also deal with the grounds and circumstances in which warrants may be issued and attempt to tighten the safeguards in the clause.

Amendment 405 would amend the grounds on which warrants may be issued, adding at the end of subsection (5)(b) a reference to reasonable suspicion of serious crime taking place. That pertains to an argument I made in relation to part 2 of the Bill, which is that the grounds for issuance of a warrant should require reasonable suspicion. It will also be recalled that I argued that the economic wellbeing grounds should be removed from the Bill in relation to part 2, and I renew that argument in relation to this clause for the same reasons. There seems to be some tautology. As either the Joint Committee on the draft Bill or the Intelligence and Security Committee commented, it is difficult to see how

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

can really mean anything above and beyond the interests of national security. Amendment 406 would therefore remove subsection (5)(c).

Amendment 463 would remove subsection (6), while amendment 465 would include a requirement of proportionality and a technical assessment in the consideration that is given to the issuance of a warrant. Amendment 465 would require that less intrusive methods have been used or considered and a technical assessment of proportionality accounting for the risks of the conduct proposed. Those requirements would apply when applications from the intelligence service, the Chief of Defence Intelligence and law enforcement are considered. In order to consider whether a warrant is necessary and proportionate, not only the intrusion but the methods will need to be assessed. The amendment would require the judicial commissioner, supported by independent technical expertise, to assess the proportionality of the conduct proposed in targeted equipment interference applications.

There is good reason behind the amendment. Again, I hark back to some of the more general concerns that were expressed by myself and the hon. and learned Member for Holborn and St Pancras. When malware is deployed there is often a risk of contagion, at home as well as overseas. We have had a recent and dramatic demonstration of that: the Stuxnet virus was believed to be an American-Israeli cyber-weapon intended to hack a single Iranian uranium enrichment facility. What happened instead was that it infected Chevron, the energy giant, and many other companies, as well as Microsoft PCs around the world.

That is a good illustration of how hacks intended for what we might call "good purposes"—to protect the public—can have unintended consequences. I believe that the phrase used by those in the know is the risk of hacks spreading into the wild. Technical experts have explained to me that the risk of hacks spreading into the wild cannot be overstated. In fact, a professor of security engineering at Cambridge University, Ross Anderson, wrote to the Science and Technology Committee about this very issue, saying—he did not mince his words— that

"It is only a matter of time before interference with a safety-critical system kills someone".

The amendment would address these serious issues by making sure that we do not take the potentially dangerous and counterproductive step of hacking where other less intrusive and safer methods have been used, and that a technical assessment of proportionality accounting for the risks of the hack being proposed is carried out in advance.

The practice of equipment interference leads to the stockpiling of software vulnerabilities, which in turn puts millions of users of software at risk, and those millions of users of software are our constituents, the citizens of the United Kingdom, people who use these sorts of devices day in and day out for all sorts of

aspects of their personal and professional lives. These hacks, if not used only where strictly necessary, and if there is not a proper technical assessment in advance, risk opening up the equipment of ordinary members of the public to criminals and fraudsters rather than just the intelligence agencies. Underlying the amendment is the idea that it is vital that when deciding whether to grant a warrant, the judicial commissioner should understand and account for the proportionality of the proposed interference methods before authorising them.

There is also the risk that hacks can malfunction, with severe consequences for critical infrastructures and even international relations. Whatever one thinks of Edward Snowden's revelations and the propriety of them, the fact is that he put a lot of material into the public domain and we would be remiss if we did not consider that. He has revealed that malfunctions of hacking by the National Security Agency in America were responsible for the outage of the entire internet in Syria in 2012, which may have caused simultaneous flight-tracking issues and led Government and opposition forces erroneously to blame each other for the incident. That sort of thing could be a danger to our forces.

I went to a fascinating briefing yesterday morning about photonics. Before I went into the briefing, I did not really know what photonics was, because I am not a scientist by background, but I went along because there is a lot of research into photonics development going on in Scotland, particularly at Heriot-Watt University, which is in my constituency. One of the fascinating things that I learned at this briefing on photonics from a speaker from BAE Systems was how photonics—in layperson's terms, laser technology—can now "zap" on to the visor of fighter pilots the information they need vis-à-vis radar and the like, so that they do not have to look down at a screen when they are looking for a target. If hacking goes wrong, those sophisticated technologies, which are needed for the defence of this country, may themselves go wrong and that may lead to the deaths of innocent civilians, which we all, regardless of which side we took in the vote last December, want to avoid in any bombing in Syria.

There is a high degree of public interest in the proportionality of hacking methods, and the security of data and the safety of citizens both at home and abroad are very real issues. The debate surrounding the Apple against the FBI case in America centred on whether the methods required to hack one particular device were proportionate, given the security consequences for all owners of iPhones. In the United States, the decision in that case was rightly entrusted to an independent judge.

Amendment 465 is crucial because of the potential damage to computer security and the corresponding vulnerability to criminal elements that results from hacking, as well as the potential dangers for our forces fighting abroad and for civilians. The use of various hacking technologies poses clear risks to those they are used against and to the wider public, which requires the addition of a technical proportionality test. I hope the Government are prepared to consider the amendment seriously.

Keir Starmer (Holborn and St Pancras) (Lab): It is a pleasure to continue to serve under your chairmanship, Mr Owen. I echo your sentiments in relation to Her Majesty the Queen. [Hon. Members: "Hear, hear!"]

I have little to add to the hon. and learned Lady's comments in support of the amendments, other then to outline why they were tabled. Clause 91(1) sets out the power to issue warrants, and paragraphs (a) and (b) outline the familiar necessity and proportionality tests, which bite on the very wide provisions of subsection (5). The Secretary of State therefore has to consider whether issuing a warrant is necessary for one of those broad purposes—

"national security…preventing or detecting serious crime, or…in the interests of the economic well-being of the United Kingdom".

That is obviously a broad necessity test, and proportionality is assessed by reference to the same grounds. The provision is over-broad, which matters because the double lock works only if a judicial commissioner has scrutiny of the Secretary of State's decision. If the Secretary of State's decision is so wide, the judicial commissioner's scrutiny will be correspondingly wide. That matters particularly in relation to the targeted examination warrants, which will be used where a wider bulk power has been exercised in the first place. The amendments would tighten the necessity and proportionality tests, giving them real practicality and effect.

The Minister for Security (Mr John Hayes): It is a pleasure to serve under your chairmanship once again, Mr Owen, particularly on the auspicious occasion of Her Majesty's birthday. The Solicitor General and I are members of a diminishing group who still hold to the spirit, and perhaps even the actuality, of the divine right of kings.

Chivalry forbids me from paying but scant attention to the fact that the hon. and learned Member for Edinburgh South West spoke to amendments not in this group. I will not spend too much time responding to what she said, but I might be able to respond to her a little when we come to the next group.

Joanna Cherry: I realised that I had done that inadvertently, for which I apologise. I will not add insult to injury by repeating my submission when we get to the next group. I look forward to hearing what the Minister has to say.

The Chair: There will be a lot of that today, because we have addressed many of these issues in greater detail previously and we will be moving on. Hopefully that will help, rather than hinder, proceedings.

Mr Hayes: That brings me to the amendments before the Committee. It is important at the outset to re-emphasise that these powers are essential to protect against cyber-attacks by serious criminals and hostile states, and it is because GCHQ and others have such powers that our data and cyber-security is safer. That is not merely my estimation; it is the estimation of a number of major businesses that are susceptible to such attacks. In the past two years, the security and intelligence agencies have disclosed vulnerabilities in every major mobile and desktop platform, including in some of the biggest businesses and organisations in this country.

It is sometimes said that although crime is declining, it is also changing—I think that has been said by right hon. and hon. Members in all parts of the House. That is certainly true, and the additional vulnerabilities as a

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result of technological change are something that Government must be conscious of and respond to with appropriate flexibility.

11.45 am

Some of the vendors who have been protected by the actions I have described have publicly credited UK intelligence agencies with finding such weaknesses. For example, in September last year Apple credited the information assurance arm of GCHQ with the detection of a vulnerability in its iOS operating system for iPhones and iPads, which could have been exploited to allow the unauthorised modification of software to extract information from devices or to disrupt their operation. For the record, that vulnerability has now been patched. It is important to understand that the powers exercised under the clause are an appropriate defence against the change I have described in the character of crime.

Clause 91 sets out the grounds on which the Secretary of State may issue a targeted equipment interference or examination warrant to the agencies: to detect serious crime, in the interests of national security, or in the interest of economic wellbeing, about which we had quite a long discussion. I do not want to rehearse all of that debate, but I want to reiterate, because I feel so strongly about it, that that provision is not about partisan, party political pursuit of particular groups. I know that there has been concern among trade unions and others that Ministers should give that assurance, but also that it should be reinforced in the Bill. We will continue to discuss that, I suspect, but I have made it clear previously and repeat now that that is neither our intention nor the purpose of the powers, and we will do all that is necessary to make that clear.

Joanna Cherry: The Minister is generous in giving way. I fully accept his good faith in saying that that is not the intention or purpose, but he cannot bind future Governments. In saying that it is not the intention or purpose, he clearly recognises that there is a weakness and that the provision could be interpreted in the way that has been suggested. That is our concern: we are putting on the statute book a measure that might be exploited by a less scrupulous Government.

Mr Hayes: I am happy to draw to the attention of any future Investigatory Powers Commissioner the fact that that is not the case and will not be under the Bill. Of course the hon. and learned Lady is right: whether this is a good or a bad thing I leave it to others to judge, but I cannot bind future Governments. However, we can certainly consider and reconsider ways in which the message can be reinforced during the passage of the Bill. I do not want to go too much further, but I think that the signal I am sending will have been seen by people on this Committee and elsewhere.

Keir Starmer: I am grateful to the Minister for putting that on the record, because there is concern. If the intention or purpose is not as has been suggested, will he give consideration to how that fact can find form in the Bill and be clear for all to see, just as the record will be clear?

Mr Hayes: Yes. It would absolutely not be permitted under the Bill. I do not want to go over it exhaustively, but that reinforces a series of pieces of legislation that deal with the question, many of which have been passed since the talisman case of the Shrewsbury 24, which has been raised in the House a number of times in different ways. However, I take the hon. and learned Gentleman's point that there is a compelling case to be made for further consideration and assure him that we are engaged in that. I will not say more at this stage, but a signal has been broadcast to this Committee and elsewhere. My prejudices on these matters as a trade unionist are well known, although it is not my prejudices that shape legislation—heaven forbid.

To return to the amendment, it would restrict equipment interference warrants under clause 91 in circumstances

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

Again, I do not want to go over this exhaustively, but the problem with that is the character of investigations, which are by their nature dynamic; it is not always possible to anticipate the direction they might take or the material they might uncover. Not every individual involved in an investigation would themselves be suspected of committing a serious criminal offence, but their relationship with wider associates and potential facilitators of a crime might be crucial to identifying the extent of the organised crime gang and its international links and bringing the ringleaders to justice.

Restricting equipment interference warrants to where there is a serious criminal offence would be a significant reduction in the security and intelligence agencies' current powers. I repeat: current powers. They are not new. We know how they are used and the effect of their use, but the amendment would restrict their ability to protect the national interest. Do not forget—not that you would, Mr Owen—the necessity and proportionality tests in the Bill that limit the circumstances in which the powers can be used, alongside the double lock.

My straightforward case is this: the powers are vital, to curtail them would damage our interests, and they are not here for any of the unintended consequences that people are understandably concerned about. I am prepared to look at how we can reinforce that. I invite the hon. and learned Lady to withdraw the amendment.

Joanna Cherry: Before I make my position on the amendments clear, it was remiss of me not to add the sincere good wishes of the Scottish National party to Her Majesty the Queen on the auspicious occasion of her 90th birthday.

When we looked at similar issues under part 2, we did not push the matter to a vote, and that is the course of action I wish to follow at this stage. I will withdraw the amendment now, but no doubt the whole issue of judicial warrantry will be revisited on the Floor of the House. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Keir Starmer: I beg to move amendment 465, in clause 91, page 70, line 18, leave out from "include" to end of line 19 and insert—

"(a) the requirement that other proportionate methods of obtaining the material have been tried without success or have not been tried because they were assessed to be bound to fail, and

(b) the requirement that a risk assessment has been conducted by the Investigatory Powers Commissioner's technical advisors with regard to the specific equipment interference proposed, accounting for—

(i) the risk of collateral interference and intrusion, and

(ii) the risk to the integrity of communications systems and computer networks, and

(iii) the risk to public cybersecurity."

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

Amendment 415, in clause 93, page 71, line 35, leave out from "include" to end of line 36 and insert—

"(a) the requirement that other proportionate methods of obtaining the material have been tried without success or have not been tried because they were assessed to be bound to fail, and

(b) the requirement that a risk assessment has been conducted by the Investigatory Powers Commissioner's technical advisors with regard to the specific equipment interference proposed, accounting for—

(i) the risk of collateral interference and intrusion, and

(ii) the risk to the integrity of communications systems and computer networks, and

(iii) the risk to public cybersecurity."

Amendment 435, in clause 96, page 74, line 13, leave out

"whether what is sought to be achieved by the warrant could reasonably be achieved by other means"

and insert—

"(a) the requirement that other proportionate methods of obtaining the material have been tried without success or have not been tried because they were assessed to be bound to fail, and

(b) the requirement that a risk assessment has been conducted by the Investigatory Powers Commissioner's technical advisors with regard to the specific equipment interference proposed, accounting for—

(i) the risk of collateral interference and intrusion, and

(ii) the risk to the integrity of communications systems and computer networks, and

(iii) the risk to public cybersecurity."

Keir Starmer: One of the advantages of us all—me included—straying beyond the strict limits of the previous set of amendments is that there is nothing I can meaningfully or helpfully add on amendment 465, which would tighten the necessity and proportionality test for the reasons already articulated. I will say no more other than to indicate that I do not intend to press the amendment to a vote.

Mr Hayes: As the hon. and learned Gentleman says, we have covered the ground pretty exhaustively. Essentially, the amendments would change the language of the safeguard, requiring that alternatives must either be tried or be discounted because they were "bound to fail". In the end, "bound to fail" is clearly too high a hurdle. Investigating agencies would have to waste time and resources, and interfere unnecessarily with people's equipment trying out alternative ways to gather intelligence that they thought were likely to be successful and not bound to fail.

The amendments would require that in deciding to issue an order the Secretary of State or law enforcement chief must take into account the technical cyber risk assessment by the Investigatory Powers Commissioner. Given GCHQ's track record of dealing with cyber-vulnerabilities of the kind that I described earlier—I will not go into further detail about that—and given that the code of practice requires that

"Any application for an equipment interference warrant should contain an assessment of any risk to the security or integrity of systems or networks that the proposed activity may involve including the steps taken to appropriately minimise such risk",

and that

"The issuing authority should consider any such assessment when considering whether the proposed activity is proportionate",

I believe that these amendments are unnecessary. Accordingly, I invite the hon. and leaned Gentleman to withdraw them.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Joanna Cherry: I beg to move amendment 408, in clause 91, page 70, line 25, at end insert—

'(10) Targeted equipment interference is only lawful if authorised under this Act."

The amendment would require that targeted equipment interference cease to be conducted under the Intelligence Services Act 1994, the Police Act 1997 or indeed any other prior legislation, and instead be conducted under the provisions of the Bill. The Bill is a consolidated piece of legislation, and we tabled this amendment in the spirit of the Government's laudable attempt to consolidate the legislation in this area. The amendment would ensure that equipment interference always benefits from the safeguards and oversight in the Bill. As we just set out, the Opposition parties want the safeguards to go further, but even if they remain as they are we would like them to apply to all targeted equipment interference. That would improve public accountability and clarify the state's powers.

The Intelligence and Security Committee's report on the draft Bill expressed concern about the fact that agencies conduct several forms of equipment interference that are not provided for in the Bill, so it is not just Opposition Members who are concerned. The ISC said that

"certain IT operations will require a different standard of authorisation…than Computer Network Exploitation and that similar activities undertaken by the Agencies will be authorised under different pieces of legislation."

It concluded that, if that remains the case, the Bill will have failed to achieve transparency; operations will remain secret and thus not be subject to clear safeguards. It recommended that

"all IT operations are brought under the provisions of the new legislation…with the same authorisation process and the same safeguards."

The amendment reflects the Intelligence and Security Committee's recommendation that all types of equipment interference should be governed under one clear piece of legislation. I will be grateful if the Government take it on board in the spirit in which it is intended.

Mr Hayes: I will deal with this very briefly. The hon. and learned Lady is right that the amendment is neither invidious nor unhelpful; however, it is unnecessary because

[Mr John Hayes]

there is already a broad prohibition of unlawful interference with equipment in the Computer Misuse Act 1990. That means that any activity that fits within the definition of equipment interference provided in the Bill may constitute an offence unless it is lawfully authorised under part 6 of the Bill, where that authorisation is detailed, or under other relevant legislation.

On the hon. and learned Lady's point about activities outside the United Kingdom—a prevailing theme of her concerns, understandably—the Bill sets out the circumstances in which it is mandatory for the agencies to obtain a warrant. That does not include cases in which the conduct takes place wholly overseas. The reality of operating outside our jurisdiction, as she knows, is quite different from operations conducted within or from the British islands. It is not our intention to introduce clauses that inhibit the agencies' ability to act with agility or flexibility. I think that the amendment certainly does not assist in that regard, and is unnecessary. I hope she will withdraw it on that basis.

Joanna Cherry: Like the ISC, I am not wholly convinced by the Minister's argument, but I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

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

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

New clause 8—*Equipment interference: risk assessment*—

"A person making an application for a warrant involving equipment interference must make a detailed assessment of—

(a) the risk to the security or integrity of systems or networks that the proposed activity may involve;

(b) the risk to the privacy of those not being specifically targeted;

(c) the steps they propose to take to minimise the risks in subsection (a) and (b).

New clause 9—*Critical national infrastructure: risk assessment*—

"The person making an application for a warrant under this part must make a detailed assessment of the risks of the proposed activity to any critical national infrastructure."

Joanna Cherry: The new clauses were tabled by the Scottish National party and reflect the arguments I made in support of amendment 465 on the necessity of carrying out risk assessments in advance of issuing a warrant. They are very much a corollary of that, and as that amendment has been withdrawn, I will not press the new clauses for the time being.

Question put and agreed to.

Clause 91 accordingly ordered to stand part of the Bill.

Clause 92 ordered to stand part of the Bill.

Clause 93

POWER TO ISSUE WARRANTS TO THE CHIEF OF DEFENCE INTELLIGENCE

12 noon

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

Keir Starmer: Clause 93 is similar in many respects to clause 91, but obviously relates to the Chief of Defence Intelligence and is therefore shorter. It follows that the concerns that have been expressed by the Labour party, which I suspect the Scottish National party share, apply equally to the relevant parts of clause 93. I make that clear for the record, but it will not assist anyone to repeat them under the guise of clause 93.

Mr Hayes: I have nothing to add to what I said on clause 91.

Question put and agreed to.

Clause 93 accordingly ordered to stand part of the Bill.

Clause 94

MEMBERS OF PARLIAMENT ETC.

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

The Chair: With this it will be convenient to consider new clause 11—*Confidential and privileged material*—

'(1) Where any conduct under this Part will cover or is likely to cover special procedure material, or relates to individuals handling special procedure material, the application must contain—

(a) a statement that the conduct will cover or is likely to cover special procedure material, or relates to individuals handling special procedure material, and

(b) an assessment of how likely it is that the material is likely to cover special procedure material.

(2) Where any conduct under this Part is likely to cover excluded procedure material, or relates to individuals handling excluded procedure material, the application must contain—

(a) a statement that the conduct will cover or is likely to cover excluded procedure material, or relates to individuals handling excluded procedure material, and

(b) an assessment of how likely it is that the material is likely to cover excluded procedure material.

(3) Where a warrant issued under this Part will cover or is likely to cover special procedure material, or relates to individuals handling special procedure material, the procedure set out at section 5 below must be followed.

(4) Where a warrant issued under this Part will cover or is likely to cover excluded procedure material, or relates to individuals handling excluded procedure material, the procedure set out at section 6 below must be followed.

(5) Further to the requirements set out elsewhere in this part, the Judicial Commissioner may only issue a warrant if—

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

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

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

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

(i) the public interest in the protection of privacy and the integrity of personal data, and

(ii) the public interest in the integrity of communications systems and computer networks, and

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

(iv) the democratic interest in the confidentiality of correspondence with members of a relevant legislature; or

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

(6) Further to the requirements set out elsewhere in this part, the Judicial Commissioner may only issue a warrant in accordance with provisions made in Schedule 1 of the Police and Criminal Evidence Act and Schedule 5 of the Terrorism Act.

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

(8) Special procedure material means—

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

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

(9) Excluded material procedure has the same meaning as in section 11 of the Police and Criminal Evidence Act 1984.

(10) A warrant under this Part may not authorise any conduct undertaken for the purpose of accessing any material relating to matters subject to legal privilege.

(11) For the purposes of subsection (10), "legal privilege" means—

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

(b) communications between a professional legal adviser and their client or any person representing their 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.

(12) Where the purpose of the warrant is to conduct interference to obtain material that would normally be subject to legal privilege but that falls within subsection (11)(d), the interference and examination conduct authorised must relate—

(a) to the offence as specified under subsection (5)(a), or

(b) to some other indictable offence which is connected with or similar to the offence as specified under subsection (5)(a)."

Keir Starmer: I want to make some observations about this clause. I know that the Minister is looking at the way Members of Parliament are dealt with, but I want to put on the record what I see as the major limitations. The clause is intended to be additional protection when the purpose of a warrant for equipment interference is to obtain a communication sent by or intended for a member of a relevant legislature—so all our communication.

The first concern is that a warrant for equipment interference permits the obtaining of communications equipment data and other information, so the first observation about the clause is that there is no special provision for a warrant to interfere with an MP's laptop to get secondary data or any other information. That applies to all of us. If a warrant were issued that touched on my equipment, as long as it dealt with equipment data and other information, there would be no need to consult the Prime Minister. I am not sure whether colleagues have appreciated that they could effectively be hacked without additional safeguard.

The second concern is that the added safeguard is when the purpose of the warrant is to obtain a communication. That is because communications are especially protected, but I remind colleagues that secondary data and equipment data may include the details of who has contacted whom, so if someone contacts an MP, the fact that they made that contact and who did so would not be protected. Here, the purpose is just to get a communication.

If the purpose was to achieve some other objective, but it was inevitable that communications between an MP and a constituent would be affected, clause 94 would not apply. I just wonder whether that needs a little further consideration because the protection for MPs' communications ought to cover deliberate attempts to intercept a communication and also when it is likely to happen although the purpose is perhaps to intercept the communication of someone else. Those are real issues that I want to put on the record.

The other issue, which may be straightforward, is that clause 94 comes after the two powers we have seen in clauses 91 and 93, which deal with the Secretary of State's warrants. It makes sense in that context, because it is the Secretary of State who consults the Prime Minister before acting. We will come on to equipment interference warrants that can be authorised by law enforcement officers. Those warrants will not go through the Secretary of State. It may be that clause 94 applies equally to those, and I suspect that it is intended to, because otherwise there would be another type of warrant that could touch on an MP's unprotected correspondence; I cannot see that that is the intention.

If there is an easy an answer to this, I am happy to sit down and be corrected, but it seems that there are a number of ways in which the clause could be toughened up to achieve its desired objective.

Mr Hayes: The hon. and learned Gentleman does a service to the Committee by raising this, because it is a matter of continuing discussion. I think the Committee recognises that there are particular groups of people—lawyers, journalists, Members—who, because of the character, particularity and importance of the work that they do, need to be dealt with in an appropriate and sensitive way. We are talking not only about those people but about the people who are in contact with them. In a journalist's case it would be sources; in a Member's case it would be constituents and others. He is right, too, to suggest that we need to ensure that we have a consistent approach across the Bill.

It is true that there is a level of intrusion associated with content that is not shared in other areas. Equipment data are less intrusive than content, and we have already considered why they are necessarily subject to less stringent safeguards. Nevertheless, I think that the hon. and learned Gentleman is right that close examination of consistency in the Bill, in terms of how we deal with Members, is important. To that end, I hear what he says and will look at this again.

The conversation on this, in the Committee and more widely, needs to take full account of the proper assumption on the part of those who contact their Member of

[Mr John Hayes]

Parliament that any material they provide will be handled with appropriate confidentiality and sensitivity. The hon. and learned Gentleman makes that point well. It is a point that I have heard and will consider further.

Keir Starmer: I intervene to make sure that I have been clear enough on the second point, which is when law enforcement officers are issuing targeted equipment interference warrants. On my reading, the safeguard is the judicial commissioner, which is understandable. Clause 94 makes it clear that:

"Before deciding whether to issue the warrant, the Secretary of State must consult the Prime Minister."

It is the consultation of the Prime Minister that is the added safeguard; I understand that. The problem with a clause 96 warrant is that it is not required to go to the Secretary of State. In other words, it goes from the law enforcement officer to the judicial commissioner, not via the Secretary of State.

One reading of clause 94 may be that it applies only to a clause 91 or clause 93 warrant. If that is right, there is no provision for consulting the Prime Minister if a clause 96 warrant is intended to obtain the communications of a Member of Parliament. There may be a simple explanation, but on the face of it that is a warrant that does not go via the Secretary of State, so clause 94 cannot operate in its intended way.

Mr Hayes: One of the most important things about the function of a Committee such as this is that we deal with minutiae, and rightly so. A bonus for this Committee is that, as its members know, I never feel entirely constrained by my notes. To that end, I want to emphasise that the Wilson doctrine of course applies to warrants issued by the Secretary of State. The hon. and learned Gentleman may well come back to me and say that greater clarity about the application of the Wilson doctrine in relation to the Bill is an important part of his argument, so for the record, and to make progress, I repeat that these are matters of ongoing consideration. I want to make absolutely sure that we get consistency, because the important thing about delivering certainty—I have argued throughout our proceedings that the Bill is about clarity and certainty—is that it is underpinned by consistency. In terms of the Wilson doctrine and the role of the Prime Minister in all these matters, I want to be absolutely confident that the measure can be and is applied to all the provisions we are considering.

Question put and agreed to.

Clause 94 accordingly ordered to stand part of the Bill.

Clause 95

DECISION TO ISSUE WARRANTS UNDER SECTIONS 91 TO 93 TO BE TAKEN PERSONALLY BY MINISTERS

Amendment made: 257, in clause 95, page 72, line 33, leave out "the Scottish Ministers have" and insert

"a member of the Scottish Government has".—*(Mr John Hayes.)*

Clause 95(2) provides that a decision to issue a warrant under Clause 92 must be taken personally by a member of the Scottish Government. This amendment corrects Clause 95(5)(b) so that it also refers to a member of the Scottish Government.

Clause 95, as amended, ordered to stand part of the Bill.

Clause 96

POWER TO ISSUE WARRANTS TO LAW ENFORCEMENT OFFICERS

Keir Starmer: I beg to move amendment 419, in clause 96, page 72, line 36, leave out

"law enforcement chief described in Part 1 or 2 of the table in Schedule 6"

and insert "Judicial Commissioner".

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

Amendment 420, in clause 96, page 72, line 37, leave out

"person who is an appropriate law enforcement officer in relation to the chief"

and insert

"law enforcement chief described in Part 1 of the table in Schedule 6".

Amendment 421, in clause 96, page 72, line 40, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 422, in clause 96, page 72, line 42, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 423, in clause 96, page 73, line 1, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 424, in clause 96, page 73, line 4, leave out paragraph (d).

Amendment 425, in clause 96, page 73, line 7, leave out

"law enforcement chief described in Part 1 of the table in Schedule 6"

and insert "Judicial Commissioner".

Amendment 426, in clause 96, page 73, line 8, leave out

"person who is an appropriate law enforcement officer in relation to the chief"

and insert

"law enforcement chief described in Part 1 of the table in Schedule 6".

Amendment 427, in clause 96, page 73, line 10, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 428, in clause 96, page 73, line 14, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 429, in clause 96, page 73, line 17, leave out "law enforcement chief" and insert "Judicial Commissioner".

Amendment 430, in clause 96, page 73, line 20, leave out paragraph (d).

Amendment 431, in clause 96, page 73, line 23, leave out subsection (3).

Amendment 432, in clause 96, page 73, line 29, leave out paragraphs (b) and (c).

Amendment 433, in clause 96, page 73, line 35, after "Where", insert

"an application for an equipment interference warrant is made by a law enforcement chief and".

Amendment 434, in clause 96, page 73, line 39, leave out subsections (6) to (10).

Amendment 436, in clause 96, page 74, line 16, leave out subsections (12) and (13).

Amendment 437, in schedule 6, page 213, line 15, leave out Part 2.

Amendment 460, in clause 101, page 78, line 2, after "service", insert

"or to a law enforcement chief".

Amendment 461, in clause 101, page 78, line 6, leave out subsection (2)(c)

Keir Starmer: The clause contains a power for law enforcement officers to authorise equipment interference warrants. That would be a significant power for the law enforcement chief and those officers to exercise. I have two observations to start with. First, the law enforcement chief authorises the warrant on an application from a person

"who is an appropriate law enforcement officer in relation to the chief".

That is all set out in schedule 6, to which we will come shortly.

There is a big distinction between clause 96(1) and (2). Subsection (1) states:

"A law enforcement chief described in Part 1 or 2 of the table in Schedule 6 may…issue a targeted equipment interference warrant"

in the circumstances set out in the subsection relating to a serious crime. Subsection (2) applies to a law enforcement chief described in part 1 of the table in schedule 6, and provides for a targeted equipment interference warrant to be authorised if it is

"necessary for the purpose of preventing death or any injury or damage to a person's physical or mental health".

We have rehearsed some of this before, in the sense of whether there should be a threshold higher than simply "any" injury or damage, because that is on the face of it a very low threshold, given, on this occasion, to law enforcement officers. That is a real cause for concern.

12.15 pm

There is a second issue. One of the safeguards in clause 96 is that if warrants are issued under this clause by law enforcement officers, the decision to issue must go to a judicial commissioner, so there is a different form of the double lock, but in this case the argument that it should go straight to a judicial commissioner is so much more powerful.

On the first day—a Tuesday, I think—of our line-by-line consideration of the Bill, the Minister made the point that for the kind of warrants that we have hitherto been discussing, where there is a double lock, the special role of the Secretary of State as an elected Member of this House made it appropriate and right that she should consider the warrant; it should not go straight to a judicial commissioner. That is a very difficult argument to make when the double lock is being applied to a process that involves first a law enforcement officer and/or law enforcement chief and then the judicial commissioner. I do not think it is possible to mount an argument that the law enforcement chief has any of the characteristics attributed to the Secretary of State in support of the argument that the double lock should ensure that she takes the decision first, so there is a powerful argument for saying that in these cases the warrants ought to go straight to a judicial commissioner.

Joanna Cherry: The bulk of the amendments in this group are SNP-only amendments. I think I am right in saying that the Labour party probably supports them, but I will leave it to the Labour party to confirm that.

Put simply, the set of amendments proposed by the Scottish National party would remove the power to issue equipment interference warrants from law enforcement chiefs, immigration officers, officers of Revenue and Customs, customs officials, the chair of the Competition and Markets Authority and the Police Investigations and Review Commissioner, and instead judicial commissioners would be responsible for issuing warrants on application from law enforcement chiefs. It is a disturbing anomaly that the Bill proposes that authorisation for the most intrusive form of surveillance—hacking—should be self-issued by a range of public bodies. Could the Government clarify the reason for that anomaly?

This process would put a range of actors, from chief constables to immigration officers, in charge of issuing hacking warrants. The proposal would give these individuals greater powers of intrusion than the security services have under later parts of the legislation—they are at least required to seek the authorisation of the Secretary of State for hacking activities. It is in my argument self-evident that the process should be for law enforcement officials to make an application for a judicial commissioner to decide the application.

I mentioned immigration officers. The Immigration Law Practitioners' Association has produced a briefing for members of the Committee, and it has drawn to our attention the fact that under clause 96 persons appointed as immigration officers under paragraph 1 of schedule 2 to the Immigration Act 1971 are among those who can apply for these warrants for a serious crime that is

"an immigration or nationality offence"

as defined, or where the warrant is considered

"necessary for the purpose of preventing death or any injury or damage to a person's physical or mental health or of mitigating any injury or damage to a person's physical or mental health".

The Immigration Law Practitioners' Association has a long history of briefing, with some distinction, hon. Members on immigration matters. The issue that it identifies is that the wording of the clause does not identify which immigration offences are considered to be serious crimes or, indeed, whether they are all considered to be serious crimes, so there is a lack of transparency in the legislation.

I should address one other amendment, which is on a slightly different point. SNP amendment 435 is an attempt to import into clause 96 the proportionality and technical assessment requirements that I addressed in some detail in my argument in support of amendment 465 to clause 91. I will not rehearse that again.

The Chair: To help the Minister, we have already dealt with amendment 435.

Mr Hayes: Thank you, Mr Owen. A number of points have been raised. Clearly, law enforcement agencies use equipment interference to stop serious crime, but it

[Mr John Hayes]

is important to add that they also use it to help people at risk of serious harm. That might include locating missing people or helping vulnerable children; there is a whole range of preventive measures that anticipate harm. The Bill brings into a single place the powers that are already used in those ways; there are no additional powers here.

It is also important to point out that these matters were looked at, as were all matters, during the extensive scrutiny that the Bill enjoyed before it came to the Committee. None of the reports of the three Committees of the House, for example, recommended changing the current arrangements for the way in which these kinds of warrants are authorised and used. We have modelled the arrangements in the Bill on the current system under the Police Act 1997, which authorises property interference. That is how this activity is currently dealt with.

Joanna Cherry: I hear what the Minister is saying, but does he not accept the force of the argument that it is anomalous that the security services at least have to go to the Secretary of State, whereas law enforcement chiefs will be able to issue such warrants themselves?

Mr Hayes: I was coming to that argument, which was also made by the hon. and learned Member for Holborn and St Pancras. I simply say that the character of the warrants we are speaking about, which law enforcement chiefs apply for, is central to much of what happens now in the investigatory process. It is based on those chiefs' special understanding of such investigations. They are clearly answerable for the effective policing of their area, and they certainly have the experience and expertise to make the right decisions on what equipment interference is necessary in an investigation of a serious crime. The status quo suggests that the system works and the powers that we are describing have real value in dealing with crime and in anticipating the other kinds of harm that I have described.

In drawing up a Bill, as I have argued previously, one looks to cement existing powers, but of course one also scrutinises what is not working. If we had thought that the current system was not working, we would certainly have looked to change it. The Bill is consistent with other powers in the 1997 Act, as I have described, such as property interference. It would arguably be anomalous to separate what the police do in respect of property from what they do in respect of technology. It might well, in the hon. and learned Lady's eyes, deal with one anomaly only to create another.

Joanna Cherry *rose—*

Mr Hayes: The hon. and learned Lady is no doubt about to lecture me on anomalies.

Joanna Cherry: Does the Minister agree that there is another anomaly? To search someone's house, north and south of the border, one has to have a warrant issued by a judge. The clause will allow people to hack into equipment, with all the information that it contains in this modern world, without a judge-issued warrant.

Mr Hayes: The hon. and learned Lady is right that these things need to be consistent, as I said in the previous discussion, but we have been arguing in favour of the double-lock throughout this consideration. I am not sure it would be sensible for us to use the Bill to change existing legislation that is doing its job. That was not the view of law enforcement itself; of David Anderson, when he looked at these matters; or of the Joint Committee when it considered them. It would be curious—I put it no more strongly than that—if we were suddenly to focus on this and make a considerable change to existing practice.

The use of covert human intelligence sources under the Regulation of Investigatory Powers Act 2000 is also well established. The current practice is subject to the chief surveillance commissioner, who has publicly affirmed that law enforcement chiefs apply themselves with due care and attention to ensure they are compliant with the law and acting in good faith. Not only has the scrutiny of the Committees I have described not made the point that the hon. and learned Lady makes, but it seems that my defence of the status quo is supported by the evidence of the commissioner.

Equipment interference warrants must be approved by the judicial commissioner, so the hon. and learned Lady's argument that a judge deals with the search of a property, and my argument that a judicial commissioner will approve the kinds of warrant we are debating now, seem to be equivalent. Perhaps she thinks a judicial commissioner is not the best person to do that.

Joanna Cherry: The position that has consistently been put forward by the Scottish National party is that the judicial commissioner should not be in a double-lock system. He or she should be looking from the outset at the merits of necessity and proportionality. That has been our consistent position in relation to all provisions related to warrantry in the Bill.

Mr Hayes: The hon. and learned Lady, with due respect, is shifting the ground. On the one hand, she says that she compares the arrangements for searching a house, the warrant for which is approved by a judge, with this system, on the grounds that there should be judicial involvement in both. On the other, when I said that there will be judicial involvement in both, she returned to the argument that the Secretary of State should be involved. I think she needs to know what she wants.

Joanna Cherry: With all due respect, I have been crystal clear about this from the beginning. "Judicial involvement" is a very loose term. Judicial involvement, in which the judge is bound by the rules of judicial review, is a considerably lesser involvement than if he or she is able to look at matters purely on their merits, as in a system of pure judicial warrantry, advocated by the Scottish National party.

Mr Hayes: There were many other opportunities to consider the judicial review point that the hon. and learned Lady makes. In fairness, she has been consistent in having doubts about whether those are the appropriate terms on which a judicial commissioner should consider these matters. There has been much discussion about that, including in some of the Committees that I referred to earlier. Regardless of the terms—you will not allow

us to explore those in any great detail, Mr Owen, because they are not strictly pertinent to the clause or the amendment—the process whereby a law enforcement chief, supported by a judicial commissioner, obtains a warrant is, in my judgment, sufficient to guarantee proper practice. It is certainly in line with what we know currently works. I would have to be pretty convinced at this juncture to make such a radical change to the Bill, and frankly, I am not.

Keir Starmer: I am grateful to the Minister. I do not intend to vote against the clause, but I have a nagging concern, which I will try to articulate. A communication in the course of its transmission is highly protected—the Secretary of State must sign off a warrant. The Secretary of State individually considers those warrants and we know the numbers. That is an understandably high level of protection for a communication in the course of its transmission.

12.30 pm

We are now talking about where equipment is interfered with to get a communication. It is true to say that if a communication is in the course of its transmission, an equipment interference warrant would not allow the protection in the first part of the Bill to be bypassed. That makes perfect sense. But my nagging concern, I suppose, is that it is the communication itself that ought to be protected; all that is protected at the moment is the fact that it is in the course of its transmission. I accept that that is the current regime and I am not challenging it, but that is my nagging concern.

Mr Hayes: The hon. and learned Gentleman has offered an interesting observation. My counter-observation—perhaps it is a little more than that; it is more of a considered assertion—is that the kind of investigation I have described needs to happen with speed, and certainly with expertise. I think we agree that that is supported by the evidence I have provided and the evidence that has been made available to the commissioner. There needs to be flexibility in the system, and I think that is provided for. He is right that there should also be a legal test and a legal check on that test, which we have also provided for in the Bill. My assertion is that the amendments would provide a single lock, but we are providing a double lock. What's not to like? On that basis, I ask the hon. and learned Member for Edinburgh South West not to press her amendment.

Joanna Cherry: As the Minister will no doubt have gathered from the last few days in Committee, it is my opinion that there is a lot not to like in this Bill, but I am prepared to withdraw my amendment at this stage. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 96 ordered to stand part of the Bill.

Schedule 6 agreed to.

Clause 97

Approval of warrants by Judicial Commissioners

Mr Hayes: I beg to move amendment 258, in clause 97, page 75, line 4, leave out from "a" to "under" and insert

"decision to issue a warrant".

This amendment, and amendments 259 to 262, each make a minor drafting change to take account of the fact that clause 97 may also apply in a case where a warrant has already been issued (see Clause 98).

The Chair: With this it will be convenient to discuss Government amendments 259 to 262.

Mr Hayes: These are fairly straightforward amendments. Like all the Government amendments so far considered, they are minor and technical. They do not serve to change the scope of the warrant approval process, but make clear that judicial commissioner approval will apply to all equipment interference warrants—in that sense, they are relevant to the debate we have just been having. They replace the phrase "warrant to be issued" in subsection (3) with "decision to issue a warrant", to reflect more clearly that in urgent cases the warrant would already have been issued by the Secretary of State or a law enforcement chief.

Amendment 258 agreed to.

Amendments made: 259, in clause 97, page 75, line 6, leave out from "a" to "under" and insert

"decision to issue a warrant".

See the note to amendment 258.

Amendment 260, in clause 97, page 75, line 8, leave out from "a" to "under" and insert

"decision to issue a warrant".

See the note to amendment 258.

Amendment 261, in clause 97, page 75, line 10, leave out from "a" to "under" and insert

"decision to issue a warrant".

See the note to amendment 258.

Amendment 262, in clause 97, page 75, line 12, leave out from "a" to "under" and insert

"decision to issue a warrant".—*(Mr John Hayes.)*

See the note to amendment 258.

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

Keir Starmer: We have been over the territory of the judicial test, and I do not intend to rehearse the arguments again, other than to say that in circumstances where an equipment interference warrant has been issued by a law enforcement chief—it has not gone through the Secretary of State—it is particularly important for the review by the judicial commissioner to be tight. All the arguments made earlier about the test are reinforced in cases that do not go to the level of the Secretary of State. Any arguments about deference are unpersuasive. There is a particularly powerful argument for tightening up the judicial test throughout the Bill, and I have raised that topic on a number of occasions. There is a particular need for that where a warrant has come about by a different route, without receiving the scrutiny that a warrant signed by the Secretary of State would have.

The Solicitor General (Robert Buckland): I am grateful to the hon. and learned Gentleman. We need not rehearse the arguments that we looked at in some detail a few days ago, but I will say what I said then: although the Bill covers those points, there is merit in considering the matter carefully, and I shall continue to give it anxious consideration.

[The Solicitor General]

The sliding scale approach, to coin a phrase, is clearly relevant. We must remember that the absence of the Secretary of State in the case of the other agencies is not a problem, because we want them to have integrity and operational independence. We must always remember that underlying principle. I am not criticising anyone, but that sometimes gets a bit lost in the debate.

Having said that, the hon. and learned Gentleman's point is well made about the different considerations that would present themselves to the mind of a commissioner, bearing in mind that the Secretary of State and national security and all those factors are not involved. I need not, perhaps, add more to the debate on that; I simply commend yet another clause that covers the double-lock authorisation process and applies it for the first time to the area of warrantry in question.

Joanna Cherry: I have very little to say, other than that I support the thrust of the argument made by the hon. and learned Member for Holborn and St Pancras; but I also note what the Solicitor General said about giving the matter anxious consideration. I am grateful to him for that, because it is a central concern.

The Solicitor General: I have nothing further to add.

Question put and agreed to.

Clause 97, as amended, accordingly ordered to stand part of the Bill.

Clause 98

Approval of warrants issued in urgent cases

Joanna Cherry: I beg to move amendment 439, in clause 98, page 75, line 25, leave out "considered" and insert

"had reasonable grounds for believing there was an emergency situation posing immediate danger of death or serious physical injury or that the physical security or integrity of the nation was endangered".

The Chair: With this it will be convenient to discuss amendment 440, in clause 98, page 75, line 27, after "must", insert "immediately"

Joanna Cherry: Amendment 439 pertains to the approval of warrants issued in urgent cases. Simply, the amendment would provide that an urgent warrant can be issued only where there is a reasonable belief that it is necessary to do so for the purpose of protecting life or preventing serious injury. That is a recurrent theme, which I have addressed previously, and I will not repeat the arguments.

Keir Starmer: Our amendment 440 is modest and would insert the word "immediately". I need say no more than that.

The Solicitor General: May I deal with the amendments in reverse order? On amendment 440, I am happy to consider amending the relevant draft codes to make it clear that the notification of judicial commissioners should happen as soon as is reasonably practical. That wording is more appropriate than "immediately", given that it may take some small period of time to draw together the materials that the commissioner would want to review when considering whether to approve the issue of a warrant. On the basis that we might return to this issue at a future date, I invite the hon. and learned Gentleman not to press his amendment.

The amendment tabled by the hon. and learned Member for Edinburgh South West, to which she spoke with admirable brevity, is well understood by the Government, and the arguments remain as they did in our debate on clause 22. We want to create a workable framework, and if we limit the grounds, my concern is that the scenarios and case studies I set out in that debate—the drugs case and the Daesh case—would not be caught. We have a clear definition of "urgency" in paragraphs 41 to 44 of the draft code. The draft code also has a helpful flowchart that clearly sets out the parameters within which those seeking such warrants should operate. For those reasons, I respectfully urge her to withdraw her amendment.

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

Amendment, by leave, withdrawn.

Clause 98 ordered to stand part of the Bill.

Clause 99

Failure to approve warrant issued in urgent case

Keir Starmer: I beg to move amendment 441, in clause 99, page 76, line 10, leave out paragraph (b).

The Chair: With this it will be convenient to discuss amendment 442, in clause 99, page 76, line 12, leave out subsection (4) and insert—

'(4A) Where the judicial commissioner refuses to approve an urgent warrant, they must direct that all of the material obtained under the warrant is destroyed, unless there are exceptional circumstances.".

Keir Starmer: The amendment is minor, in keeping with the amendments that we have already debated on material obtained under warrants that are later cancelled or not authorised. The amendment would tighten the requirements in cases where a judicial commissioner refuses to approve a warrant; the reason for that is self-evident. We have rehearsed this territory to some extent.

The Solicitor General: I resist the amendment. The hon. and learned Gentleman is right that we have considered similar amendments in relation to clause 23 in part 2 of the Bill. With respect, it is not right to fetter the discretion of the judicial commissioners, who are experienced and senior members of the judiciary. They should be allowed to decide such matters on a case-by-case basis. The amendment prompts the questions of what might be meant by "exceptional circumstances" and of who would determine whether the threshold had been met in a given instance. I worry that that would just complicate the process. We are all agreed that commissioners will give each case proper consideration, and the

commissioners will seek to serve the clear public interest in ensuring that material that should not be retained is destroyed. Well intentioned though this amendment is, it would add undue complication, and we oppose it for that reason.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 99 ordered to stand part of the Bill.

Clause 100

ITEMS SUBJECT TO LEGAL PRIVILEGE

Keir Starmer: I beg to move amendment 499, in clause 100, page 77, line 3, after "items", insert "presumptively".

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

Amendment 500, in clause 100, page 77, line 8, after "items", insert "presumptively".

Amendment 501, in clause 100, page 77, line 13, leave out paragraph (a) and insert—

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

Keir Starmer: We again return to familiar territory. The amendment would provide an additional safeguard in relation to items subject to legal privilege. The structure of clause 100 is precisely the same as the structure of similar clauses addressing legal privilege that we have debated at some length. As I indicated last time we spoke on this subject, amendments 499 to 501 are those that the Bar Council suggests are appropriate to align the safeguard with its understanding of legal professional privilege. We have gone over this ground already. The clause and amendments have the same structure as earlier ones, and I do not think I will assist by repeating what I have said. I stand by the remarks that I made earlier.

12.45 pm

The Solicitor General: Again, I am grateful to the hon. and learned Gentleman. He is right to say that this is a repeat of arguments we had on another part of the Bill. As he has laid out his arguments by adopting his previous submissions, I do likewise on behalf of the Government. Recalling those briefly, my concerns about the dangers of over-definition remain. However, I do not want material that should not be caught by the Bill to be caught by it in any inadvertent way. We are talking about cases where the purpose of a targeted equipment interference or examination warrant is to acquire or examine items that are subject to legal professional privilege. We have additional protections that are a sufficient safeguard and strike that essential balance. For all the reasons I advanced previously, I urge the hon. and learned Gentleman to withdraw the amendment at this stage.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 100 ordered to stand part of the Bill.

Clause 101

REQUIREMENTS WHICH MUST BE MET BY WARRANTS

Joanna Cherry: I beg to move amendment 275, in clause 101, page 79, line 19, leave out "describe" and insert "specify".

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

Amendment 452, in clause 101, page 79, line 21, leave out paragraph (b) and insert—

> "(b) precisely and explicitly the method and extent of the proposed intrusion and the measures taken to minimise access to irrelevant and immaterial information".

Amendment 453, in clause 101, page 79, line 22, at end insert—

> "(c) the basis for the suspicion that the target is connected to a serious crime or a specific threat to national security;
>
> (d) in a declaration with supporting evidence—
>
> (i) the high probability that evidence of the serious crime or specific threat to national security will be obtained by the operation authorised, and
>
> (ii) how all less intrusive methods of obtaining the information sought have been exhausted or would be futile, and
>
> (e) in a separate "Cyber-Security Impact Assessment" all potential risks and damage to the security of the device targeted and communications systems more generally and how those risks and/or damage will be eliminated or corrected.".

Joanna Cherry: Amendment 275 is a simple amendment to subsection (4), which sets out the matters that a targeted equipment interference warrant must "describe". The amendment would change that word and require more specificity.

The Solicitor General: I am not sure whether that will make any practical difference, but I am happy to consider the hon. and learned Lady's amendment.

Joanna Cherry: I am very grateful to the Solicitor General. I leave the other two amendments to the hon. and learned Member for Holborn and St Pancras.

Keir Starmer: Amendments 452 and 453 speak for themselves. Concern has already been expressed about the general nature of the requirements that must be met by warrants; this is a further example under the head of equipment interference warrants. Clause 101(3) sets out in some detail what is required, and the amendments would tighten that up by requiring more precision and

[Keir Starmer]

more matters to be explicitly stated. They are a version of other amendments tabled to corresponding provisions for other warrants.

The Solicitor General: To deal with the thrust of the hon. and learned Gentleman's argument, we would say that the amendments are unnecessary because the draft statutory code of practice already requires an application for a targeted warrant to set out what the conduct is and how collateral intrusion is being managed, which is the really important public interest here. That should rightly be in the warrant application itself, and the detailed requirements should be in the statutory code; that was recommendation 5 in the report by David Anderson QC, so we are faithfully following his recommendation.

On the code of practice, the hon. and learned Gentleman will find the requirements under the heading "Necessity and proportionality", particularly in paragraphs 3.26, 3.27 and 4.10, which deals with collateral intrusion.

I note that amendment 453 is part of this group, so I will speak briefly to that. We have concerns that I have expressed before in other contexts about the problem of the police being asked to exhaust alternative methods even where there is unlikely to be any effect. That is not only wasteful and costly, but could unintentionally lead to further undue intrusion into people's privacy. For those reasons, I have grave concerns about that amendment.

Byron Davies (Gower) (Con): Will the Solicitor General accept our plea—I speak as someone who has operated this in a practical situation—that what is being asked in this amendment is completely impossible?

The Solicitor General: I am grateful to my hon. Friend, who speaks with many years of operational experience in the Metropolitan police. When he was a senior officer in that force, he had responsibility for investigations and took his responsibilities extremely seriously. I am grateful to him for his contribution. We have to balance any concerns about a jump to these powers with real-world responsibilities. I want clarity, but also an element of flexibility for those who investigate crime, so that they can get on with the job in an effective way and catch criminals. That is what we all want. I am worried that the amendment, well intentioned though it is, would complicate the process. For those reasons, I urge the hon. and learned Member for Holborn and St Pancras not to press the amendment to a vote.

Joanna Cherry: I beg to ask leave to withdraw the amendment for the time being.

Amendment, by leave, withdrawn.

Clause 101 ordered to stand part of the Bill.

Clause 102

Duration of warrants

Keir Starmer: I beg to move amendment 635, in clause 102, page 80, line 21, leave out

"ending with the fifth working day after the day on which"

and insert "of 48 hours after".

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

Amendment 636, in clause 102, page 80, line 21, leave out

"ending with the fifth working day after the day on which"

and insert "of 24 hours after".

Amendment 281, in clause 102, page 80, line 21, leave out "fifth working day" and insert "twenty four hours".

Amendment 282, in clause 102, page 80, line 23, leave out "6" and insert "1".

Keir Starmer: The clause deals with the duration of warrants, and amendment 635 deals with subsection (2), which is concerned with urgent equipment interference warrants that, because they are urgent, have not been through a judicial commissioner. Under the subsection, warrants cease to have effect at the end of five working days after the day on which they are issued. I have a number of observations on that. We touched on the urgent provision. Up until now in the Bill, the provision has been for urgent warrants to remain valid for three working days. For equipment interference, we leap to five. I would certainly like an explanation why. A warrant that allows interference with computers and laptops for obtaining communications and other information suddenly moves from three days to five—not just five days, but five working days. That means that on occasion it could be seven days, and with a bank holiday it could be eight days, so we are moving well beyond the realms of an urgent warrant.

This amendment is similar to one relating to other urgent provisions that aimed to bring the duration down to 24 hours. There is a real concern about urgent warrants and how long they last. Very strong justification is required for allowing an urgent warrant that has not gone through the double lock to continue for between five and eight days. If the Minister is not about to provide that, I hope he will accept the amendment.

Mr Hayes: Let me make a general point about something that has punctuated our discussions; it may to some degree satisfy the hon. and learned Gentleman. The codes of practice are, of course, vitally important. They have metamorphosed over time and continue to do so, partly as a result of the scrutiny the Bill went through before it came to the House. The codes of practice are extremely detailed in respect of interference, as he will know, and on page 21 they deal with the relationship between equipment interference and privacy:

"Equipment interference agencies must not intrude into privacy any more than is necessary to carry out their functions or enable others to do so."

The process by which an equipment interference warrant is authorised, and the subsequent use of that warrant, are properly constrained by those necessary requirements around intrusion and privacy. Notwithstanding that general point, the purpose of the amendments is twofold. As the hon. and learned Gentleman said, the first deals with the time before the judicial commissioner examines an urgent warrant. The second deals with the length of a warrant per se. Let me, for the sake of excitement, deal with them in reverse order.

The length of time that the initial warrant pertains was not challenged by any of the Committees that looked at the Bill, and there has been no great clamour

or call about it, not least because of an understanding that these investigations or cases, as I said in an earlier debate, are often complex and dynamic; as they change rapidly, they require powers to pertain and continue over time. I will deal fairly dismissively—I do not mean that with undue contumely—with the second part of this short discussion.

Joanna Cherry: The Joint Committee and the Intelligence and Security Committee did deal with interception warrants and recommended 24 hours and 48 hours respectively. Given that hacking is potentially more significant and intrusive, would it not be logical to have a similar reduction in relation to hacking?

Mr Hayes: I think the hon. and learned Lady is probably considering a different matter from the one I am talking about. I may have been insufficiently clear, so let me briefly make my case again. I am speaking about the second aspect of the amendments, which is to change the length of time for which a warrant lasts. She will know that, on that issue of duration, David Anderson argued that a serious crime warrant should be extended to last for six months rather than three months, bringing it into line with national security warrants. He explained that, when a warrant lasts only three months, it is often necessary to start preparing a renewal application without a full understanding of the impact of the original warrant. It is important to point out in that respect that equipment interference is not necessarily more intrusive than other techniques. The amendment is out of line with David Anderson's view in that it seeks to curtail duration of a warrant.

That brings me to the first part. I think I may have confused the hon. and learned Lady by dealing with the points in reverse order, but I come now to the first part of what the amendments will do, which is the matter to which she refers—the five days or three. She will know that there was considerable discussion about that in the earlier stages of scrutiny in the Joint Committee.

1 pm

The hon. and learned Member for Holborn and St Pancras queried whether it is reasonable for a warrant to be sought, granted and actioned for a longer period before the judicial commissioner looks at it—he mentioned weekends and bank holidays. That has been the subject of considerable debate, but my view is that there has to be sufficient time to put a warrant application to the Secretary of State and in turn to the judicial commissioner. The same individuals in the law enforcement and intelligence agencies who investigated the urgent threat will of course be producing the case for the renewal application. This is really about practical and operational issues, and our judgment is that on that practical and operational basis, we have got the time right.

Keir Starmer: I am curious. I understand that material has to be got together and the application made, but for other warrants it is three working days and for these warrants it is five working days. What is it about these warrants that requires the additional two days, which are not needed for other warrants where there is an urgent procedure? I am genuinely curious, because somebody drafted this deliberately.

Mr Hayes: Clause 102, on the duration of the equipment interference warrants, is the same as clause 28, on the duration of interception warrants. Urgent warrants must be approved by the judicial commissioner after three working days. The urgent warrant lasts for five working days, at which point it must be renewed or it will expire. My point is that is about practicality, rather than there being anything philosophical about it. It is purely an operational matter.

David Anderson, in his report, to which I drew attention and which am now struggling to find, although the Solicitor General is as ever at my service—*[Interruption.]* That comes as good news to him. In his report, David Anderson deals particularly with these matters on page 275, paragraph 14.69. Earlier I mentioned recommendation 37, that

"to the effect that serious crime warrants should have the same 6-month duration as national security warrants, responds to the recent comment of the IOCC that 'there remains a strong practical case for increasing the validity period for serious crime warrants to six months'".

That is the second of the two points that the hon. and learned Member for Edinburgh South West wanted me to address.

My view is that on duration we are in line with both sensible practice and the recommendations of the independent reviewer. On the time between the application and the engagement, we are simply dealing with practicalities.

Keir Starmer: I wish to help the Minister. One of the points I was making does not withstand scrutiny and I will not pursue it or press the amendment. I accept what is being said.

Mr Hayes: Good. On that basis I will stop.

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

Amendment, by leave, withdrawn.

Clause 102 ordered to stand part of the Bill.

Clause 103 ordered to stand part of the Bill.

Clause 104

MODIFICATION OF WARRANTS ISSUED BY THE SECRETARY OF STATE OR SCOTTISH MINISTERS

Keir Starmer: I beg to move amendment 638, in clause 104, page 83, line 17, at end insert—

"(8A) Section 97 (approval of warrants by Judicial Commissioners) applies in relation to a decision to make a modification of a warrant issued under section 96 as it applies in relation to a decision to issue such a warrant, but as if—

(a) the references in subsection (1)(a) and (b) of that section to the warrant were references to the warrant as modified, and

(b) any reference to the person who decided to issue the warrant were a reference to the person who decided to make the modification."

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

Amendment 639, in clause 104, page 83, line 18, leave out "Sections 94" and insert

"Section [NC11 Confidential and privileged material]".

[The Chair]

Amendment 502, in clause 104, page 83, line 22, at end insert—

"( ) Where section 100 (items subject to legal privilege) applies in relation to a decision to make a modification of a warrant as mentioned in subsection (2)(a), (c) or (d), other than a decision to which subsection (7) applies, section 97 (approval of warrants by Judicial Commissioners) applies to the decision as it applies in relation to a decision to issue such a warrant (and accordingly any reference in that section to the person who decided to issue the warrant is to be read as a reference to the person who decided to renew it)."

Amendment 640, in clause 104, page 83, line 23, leave out "Section 100" and insert

"Section [NC2 Items subject to legal privilege]".

Amendment 641, in clause 104, page 83, line 35, at end insert—

"(14) Any modification which constitutes the adding or varying any matter must be approved by a Judicial Commissioner in accordance with section 97."

Amendment 642, in clause 105, page 84, line 4, leave out from "period" to "which" in line 5 and insert "48 hours after".

Amendment 643, in clause 105, page 84, line 4, leave out from "period" to "which" in line 5 and insert "24 hours after".

Amendment 644, in clause 105, page 84, line 26, at end insert—

"(8A) Section 97 (approval of warrants by Judicial Commissioners) applies in relation to a decision to make a modification of a warrant issued under section 96 as it applies in relation to a decision to issue such a warrant, but as if—

(a) the references in subsection (1)(a) and (b) of that section to the warrant were references to the warrant as modified, and

(b) any reference to the person who decided to issue the warrant were a reference to the person who decided to make the modification."

Amendment 503, in clause 105, page 84, line 33, at end insert—

"( ) Where, by virtue of section 104(10), section 100 (items subject to legal privilege) applies in relation to the making of a modification of a warrant pursuant to section 104(7), this section applies as if each reference in subsections (2) and (5) to (8) to a designated senior official were a reference to a Judicial Commissioner."

Keir Starmer: The amendment relates to modification provisions similar to those in clause 30, which we discussed at some length last week. I will not go over the territory again, but all the arguments I made in relation to modifications under clause 30 apply equally to modifications under clause 105 and I will not take time by going through all the similar points. It is worth observing, however, that clause 104(2) lists in paragraph (a) to (f),

"'The only modifications which may be made under this section",

which cover practically all the matters that appear on the requirements of warrants, so it is an interesting use of the word "only".

There is a substantive issue on which I would like an answer. When we were debating clause 30, I made the point that the test for a modification set out in clause 30(9) is a test of necessity and proportionality that only applies to major modifications, not minor ones. We have dealt with that and I will not go over it again, but it seems to me that the test for a major modification is, quite sensibly, whether it is necessary and whether the conduct authorised by it is proportionate. I was expecting to see in clause 104(4) a version of clause 30(9) and I did not. Perhaps the Solicitor General will explain why.

The Solicitor General: In this context, all modifications are considered major; that is the difference. I hope that helps.

Keir Starmer: Well, no. *[Laughter.]* I do not mean that disrespectfully, but the test in clause 30(9), which is in relation to major modifications, is whether the modification is necessary and whether it is proportionate. That is a sensible test. I accept that the test in clause 104(4) is in relation to all modifications, but one would expect to see the words "that the modification is necessary", not

"that the warrant as modified continues to be necessary".

The Solicitor General: In the context of EI, we are not making the distinction between major and minor, so the effect is that all modifications will be major. If there is a discrepancy, I am happy to look at the language again to make it absolutely clear. I hope that assists the hon. and learned Gentleman.

Keir Starmer: I am grateful for that indication. Otherwise, in relation to modifications, my points are essentially the same as I made on clause 30. I know the Solicitor General has agreed to look at and deal with at least some of the points I made last time; I ask him to take this modifications clause under the same umbrella when he looks at the modification provisions.

The Solicitor General: I will try to deal with this in short order. I am grateful to the hon. and learned Gentleman for the way in which he advanced his argument. It is in that spirit that I adopt the arguments I made previously. I simply make the point that under this clause we are dealing with safeguards that in my view do not undermine the important double lock standard.

I have some concerns about the amendments that relate to the judicial commissioner having to approve the decision to make modifications to EI warrants. The decision will already have been subject to the safeguard, so to require the judicial commissioner to authorise tactical operation day by day—indeed, minute by minute—is not necessary; in fact, it could be operationally damaging. The Government believe that the code makes clear, on the basis of the arguments we had before, the way in which the scope of the warrant needs to be addressed. Reading across, I would say that the safeguards in the code are helpful and clear.

Keir Starmer: One concern is that under subsections (9) and (10) as they stand there is no requirement for modification that touches on MPs or legal privilege to go to a judicial commissioner, which is at variance with the point that the Solicitor General just made.

The Solicitor General: The hon. and learned Gentleman anticipates the point that I was about to make. I am happy to consider whether subsections (9) and (10) need to be strengthened to put it beyond doubt that the

double lock will apply in those contexts. I hope that that helps him. I have already made similar points on the thrust of these amendments and there is nothing more that I need to add at this stage other than to respectfully invite him to withdraw his amendment.

Keir Starmer: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 104 ordered to stand part of the Bill.

Clauses 105 to 108 ordered to stand part of the Bill.

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

1.12 pm

Adjourned till this day at Two o'clock.