

Response to invitation for submissions on issues relevant to the proportionality of bulk powers

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Overview

1. This submission is made by Dr. Daragh Murray, Prof. Pete Fussey and Prof. Maurice Sunkin QC (Hon), members of the University of Essex Human Rights, Big Data & Technology Project based at the University of Essex Human Rights Centre. The authors appreciate this opportunity to engage with the Investigatory Powers Commissioner's Office regarding the proportionality of bulk powers, and express their willingness to engage further.
2. This submission will focus on a number of issues relevant to the use of bulk powers, and on measures to ensure effective oversight of these powers. Specifically, this submission will address: the 'strict necessity' test established under the case law of the European Court of Human Rights and the Court of Justice of the European Union,¹ the range of rights to be included in any assessment of harm, the proposed margin of judgement to be granted to the Secretary of State in determining national security priorities, and factors relevant to ensuring effective oversight in practice.

The 'strict necessity' test

3. The proportionality test cannot be addressed without first addressing the issue of necessity.
4. Both the European Court of Human Rights,² and the Court of Justice of the European Union,³ have clearly established that the lawfulness of secret surveillance measures is subject to a test of 'strict necessity'. It is this test that must be used to assess the lawfulness of bulk powers, and it is this test that should be applied by the Judicial Commissioners in deciding whether to approve a warrant.⁴

¹ Elements of this component are drawn from an academic paper currently under review for publication: Daragh Murray & Pete Fussey, 'Bulk Surveillance in the digital age: Rethinking the human rights law approach to bulk monitoring of communications data'.

² See, for instance, *Klass and Others v. Germany*, Judgment, European Court of Human Rights, Application No. 5029/71, 6 September 1978, para. 42.

³ See, for instance, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v. Watson and others*, Judgment, Grand Chamber, European Court of Justice, Cases C-203/15, C-698/15, 21 December 2016, paras. 108, 110, 116.

⁴ As required, for example, by s.23 of the Investigatory Powers Act. There are different formulations of the proportionality test. The test considered herein is that adopted by the European Court of Human Rights in the context of secret surveillance, as it is ultimately against this standard that the actions under the Investigatory Powers Act will be tested.

5. This test has been set out most clearly in *Szabo and Vissy*:

A measure of secret surveillance can be found as being in compliance with the Convention only if it is strictly necessary, as a general consideration, for [...] safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation.⁵

6. Two core requirements emerge from this ruling. First, the use of bulk techniques is only permissible when strictly necessary to safeguard the democratic institutions/democratic society. This indicates that powers may only be used in relation to certain categories of serious crime.⁶ Second, if such powers are permissible as a general consideration, then the strict necessity test further requires that, at an operational level, powers must be 'vital' to an individual operation. These requirements will be discussed in turn.
7. The first requirement demands that the use of bulk powers be restricted to only the most significant and exceptional threats. As David Anderson QC stressed, the use of bulk powers may have serious adverse human rights implications: such powers 'involve potential access by the state to the data of large numbers of people whom there is not the slightest reason to suspect of threatening national security or engaging in serious crime [...] any abuse of those powers could thus have particularly wide ranging effects on the innocent [...] even the perception that abuse is possible, and that it could go undetected, can generate corrosive mistrust'.⁷ While certain human rights-based harms associated with bulk powers are often difficult to quantify, such harm may nonetheless undermine the effective functioning of democratic society; the example of the 'chilling effect' is discussed further below.⁸ For this reason the use of bulk powers is only justified where such powers are necessary to counter threats to democratic society.
8. Uncertainty currently exists as to the type of crimes that may be defined as 'serious' for these purposes. For instance, the Court of Justice of the European Union has referred to threats to national security and activities that will affect the monetary stability of the State,⁹ while the Investigatory Powers Act currently

⁵ *Szabo and Vissy v. Hungary*, Judgment, European Court of Human Rights, Application No. 37138/14, 12 January 2016., para. 73.

⁶ *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v. Watson and others*, Judgment, Grand Chamber, European Court of Justice, Cases C-203/15, C-698/15, 21 December 2016, para. 102.

⁷ Report of the Bulk Powers Review, David Anderson QC August 2016, 9.6.

⁸ See, for example, *Klass and Others v. Germany*, Judgment, European Court of Human Rights, Application No. 5029/71, 6 September 1978, para. 49.

⁹ See, *Rechnungshof v. Osterreichischer Rundfunk and Others*, Judgment, European Court of Justice, Joined Cases C-465/00, C-138/01 and C-139/01, 20 May 2003, para. 71.

defines serious crime as that which will result in a three year or longer custodial sentence.¹⁰ This is a significant disparity.

9. Clarity regarding those crimes, or categories of crime, to which bulk powers may be applied is essential. It should be based upon determining those crimes that constitute a genuine threat to democratic institutions/society, for which extensive and exceptional powers are justified. It should not be based on a general understanding as to what constitutes 'serious' crime.
10. The human rights law test points to a high threshold of seriousness. At issue, therefore, is crime that is defined as actively threatening the functioning of democratic society – for instance through attacks on or interference with democratic institutions and processes – and crime that affects the functioning of society itself, for instance through large-scale interference with the ability to live a normal life. In this regard, serious threats to critical national infrastructure, serious threats posed by organised terrorism (such as that previously posed by the Provisional IRA), or foreign espionage, may satisfy the threshold. Other activities threatening national security should also be addressed. However, caution is required in this regard. National security is a broad concept, open to abuse. Rather than being regarded as a catch-all category justifying bulk powers, only those specific national security threats rising to the threshold elaborated above should be considered.¹¹
11. Equally, the human rights law threshold means that other crimes, although 'serious' in terms of their gravity and impact on affected individuals, will not satisfy the required threshold. For instance, murder is unquestionably a serious crime that will result in a significant custodial sentence, while instances of sexual abuse and exploitation are rightly regarded as particularly grave. However, neither are of a nature to threaten the functioning of democratic society. To emphasise, this does not suggest that those crimes that fall below the initial strict necessity threshold are not grave, or do not warrant full and effective investigation. Rather, it is a clear acknowledgement that bulk powers are particularly invasive and pose harms that may undermine or impair the functioning of democratic society. Only threats to democratic society itself can justify such measures.
12. The second requirement of the 'strict necessity' test requires that measures be 'vital' to a specific operation. This is a difficult test to apply to bulk powers, as a 'mosaic'¹² of different approaches are used to develop intelligence or investigative profiles. The Judicial Commissioners should accordingly develop an appropriately

¹⁰ UK Investigatory Powers Act 2016, section 263.

¹¹ This issue is returned to below, in relation to the margin of judgment granted to the Secretary of State.

¹² David Anderson, Independent Reviewer of Terrorism Legislation, 'Report of the Bulk Powers Review', August 2016, para. 4.12.

nuanced approached. In this regard, although it may be impossible to make a bright line distinction as to whether or not bulk powers are vital in a specific operation, utility exists across a spectrum, and the nature of the role bulk powers play may be evaluated in the light of alternative techniques. Essentially, this requires determining whether other (non-bulk) techniques exist, and distinguishing between those situations in which bulk powers are useful and those situations where they are 'vital'; i.e. the operation cannot proceed without bulk powers. For example, traditional or targeted techniques are arguably sufficient to murder investigations, or efforts to uncover hierarchies within domestic drug or organised crime organisations. In these cases, although bulk techniques may be useful, proven alternative techniques exist and may be deployed. Bulk techniques may play a much more significant role in other operations, such as in relation to certain cyber security threats, or foreign-based terrorist organisations. In such cases it is for the State to demonstrate the necessity of such powers, and to detail why traditional, or more targeted, alternatives are not sufficient. In doing so, State agencies could develop a methodology for ascertaining the degree of indispensability of bulk powers in any given application. The existence, operation and credibility of this methodology could be a key focal point for the Investigatory Powers Commissioner's Office.

13. Given the potential harm associated with bulk powers, resource or efficiency savings cannot provide justification, in and of themselves. Any assessment must also take operational realities into account. For instance, bulk powers may enable the identification of targets without the need for prior intelligence, with clear operational benefits. However, this necessarily requires the collection of data on large numbers of people who are wholly innocent, and therefore has particular bearing on issues of proportionality. Accordingly, robust assessment and oversight of the claimed utility of the bulk powers is required. The Judicial Commissioners can play a key role in this regard, and can provide independent review of intelligence and security agencies' assessments.¹³ This review should include an assessment of options that may question the necessity of the bulk powers and whether, once exercised, these powers do in fact enable more targeted forms of surveillance. This means that to facilitate an effective and robust proportionality assessment, robust consideration needs to be given to the aims to be achieved and the actual outcomes.
14. It must also be emphasised that in situations where bulk powers do not satisfy the above enumerated tests, targeted surveillance measures may be initiated, on the basis of reasonable suspicion.

Proportionality and the range of rights to be included in an assessment of harm

¹³ Related issues are discussed further below, in 'The margin of judgement granted to the Secretary of State'.

15. In conducting the 'strict necessity' test, the proportionality requirement is key. Having first established strict necessity, proportionality then requires evaluating the utility of bulk powers in light of the potential human rights-based harm. It is essential that this evaluation of harm includes consideration of the right to privacy, but also extends beyond this to address the impact on other human rights. For example, a key harm associated with the use of bulk powers, and surveillance generally, is a phenomenon referred to as the 'chilling effect'. A chilling effect occurs when individuals and groups refrain from engaging in certain activities, as they are afraid of the potential consequences. Given the scope of surveillance measures incorporated under bulk powers, and the extent of activities and communications subject to monitoring, the impact of any resultant chilling effect can be significant. It can, for example, affect an individual's ability to develop their personality and identity, by interfering with their ability to engage in experimental learning, to conduct research, discover or test ideas over the Internet, to enter into discussions with particular individuals or groups, or to attend meetings. This directly brings into play not only the right to privacy, but also the rights to freedom of opinion, of expression, of association, and of assembly. Moreover, academic evidence from medical sociology establishes the existence of deleterious mental health consequences among groups and individuals who suspect they are placed under surveillance, bringing into play the right to health.¹⁴ Several knock-on effects are also significant. A participatory democracy is dependent upon an engaged and active citizenry. If individuals cannot develop their personality at an individual level, they cannot contribute to the functioning of democracy at a societal level. This has further human rights implications, including with respect to the rights to freedom of expression, and freedom of assembly.
16. The chilling effect is a key focus of human rights law analysis,¹⁵ and a number of recent studies have linked bulk powers to wide-ranging chilling effects.¹⁶ To-date, however, the existence of chilling effects has been notoriously difficult to demonstrate. The Human Rights, Big Data & Technology project is currently pursuing further in-depth research in this area. Existing research does, however, indicate that chilling effects are both real – if difficult to quantify – and most

¹⁴ A. Sewell and K. Jefferson, 'Collateral Damage: The Health Effects of Invasive Police Encounters in New York City', 93 *Journal of Urban Health: Bulletin of the New York Academy of Medicine*, (2016) 42.; A. Sewell, K. Jefferson and H. Lee, 'Living under surveillance: Gender, psychological distress, and stop- question-and-frisk policing in New York City', 156 *Social Science & Medicine* (2015) 1.

¹⁵ FN: See, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin', UN Doc. A/HRC/D/13/37, 28 December 2009, para. 33; *Digital Rights Ireland*, Judgment, European Court of Justice, Cases C-293/12 & C-594/12, 8 April 2014, para. 28; *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v. Watson and others*, Judgment, Grand Chamber, European Court of Justice, Cases C-203/15, C-698/15, 21 December 2016, para. 92. Also, although a chilling effect is not directly discussed see, *Szabo and Vissy v. Hungary*, Judgment, European Court of Human Rights, Application No. 37138/14, 12 January 2016, para. 68.

¹⁶ I. Brown (2014) 'Social Media Surveillance', in R. Mansell et al., *The International Encyclopedia of Digital Communication and Society* (2015) 1.

acutely felt beyond the mainstream, impacting upon individuals and groups who exist outside, or who challenge, the status quo. This point is pertinent, given the implications for individual development and democratic participation. These factors should be taken into account by Judicial Commissioners when conducting a proportionality analysis.

The margin of judgement granted to the Secretary of State

17. Advisory Notice 1/2018 on 'Approval of Warrants, Authorisations and Notices by Judicial Commissioners' states that '...Judicial Commissioners will afford a very wide margin of judgment to the Secretary of State' in determining what counts as legitimate ways to achieve foreign policy or national security priorities.¹⁷
18. Certain issues relevant to the determination of foreign policy or national security priorities are appropriately within the Secretary of State's remit. However, in exercising their authorisation and oversight functions, Judicial Commissioners 'must review' the Secretary of State's conclusions on the matters mentioned in S140(1) a)-d). This mandatory duty is central to the oversight regime established by Parliament. While the Judicial Commissioners may well 'afford a very wide margin of judgment to the Secretary State' in determining how to achieve foreign policy or national security priorities, the scope of this margin is not delineated by the legislation and will be a matter for the Judicial Commissioners. As the Advisory Note stresses full consideration must be given to each application.
19. It is essential that Judicial Commissioners do not provide a margin of judgment to the Secretary of State with respect to, for example, the identification of threats to national security that justify the use of bulk powers. In this regard, the Judicial Commissioners should conduct their evaluation on the basis of human rights law's 'strict necessity' test, as elaborated above.
20. Judicial Commissioners should analyse each warrant, etc., in light of the specific legal requirements established by the 'strict necessity' test, as discussed above, and should only provide approval if that test is satisfied. If the Advisory Notice is interpreted as requiring Judicial Commissioners not to perform this role, this will undermine their essential independent authorisation and oversight functions, and potentially result in a failure to comply with human rights law requirements.
21. In this regard it is noted that, in relation to secret surveillance, the case law of the European Court of Human Rights clearly establishes that authorisation procedures must establish 'adequate and effective guarantees against abuse.'¹⁸ In assessing

¹⁷ Investigatory Powers Commissioners' Office, Advisory Notice 1/2018, para. 25.

¹⁸ *Zakharov v. Russia*, Judgment, European Court of Human Rights, Application No. 47173/06, 4 December 2015, para. 232.

domestic systems against this requirement, the European Court ‘has to determine whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the “interference” to what is “necessary in a democratic society”.’¹⁹ In this regard, the European Court of Human Rights has stated that ‘it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure’.²⁰ The Judicial Commissioners are well suited to fulfil this essential role.

Factors relevant to ensuring effective oversight in practice

22. Whilst it is important to recognise and avoid potential problems caused by approvals processes slowing down and undermining fast-moving investigations, it is equally important that effective oversight incorporates visible adversarial features or points of challenge. This will enable a range of opinions to be brought into the process while potentially conferring benefits, including increased public confidence in the programme.
23. In pursuing this approach, a bright line distinction could be drawn between Judicial Commissioner’s approval and investigative roles.
24. In conducting an approval, the strict necessity test should be applied. If there is doubt, the burden lies with the requesting authority to clarify any uncertainty. It should not be the case that Judicial Commissioners approve requests in the grey area, in the knowledge that they may then investigate how these measures are applied, in order to ensure compliance. Such an approach would effectively lower the strict threshold associated with the use of bulk powers, and undermine effective oversight.
25. It is possible that points of challenge could draw on opinion from outside the oversight and approvals process. Various mechanisms could be developed to allow for amicus involvement in relation to considerations of proportionality. For example, specific themes could be distilled from the annual reporting process and then invitations offered for opinion from wider, possibly public, audiences.
26. Insofar as permissible, areas of challenge could include scrutiny over whether individuals are subjects of warrants enabled through other legislation and of which Judicial Commissioners may not have knowledge of. This would allow a full assessment of the level of intrusion and therefore influence calculations concerning proportionality.

¹⁹ *Zakharov v. Russia*, Judgment, European Court of Human Rights, Application No. 47173/06, 4 December 2015, para. 232.

²⁰ *Zakharov v. Russia*, Judgment, European Court of Human Rights, Application No. 47173/06, 4 December 2015, para. 233.