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Memorandum on surveillance and oversight mechanisms in the United Kingdom

Introduction

1. The present memorandum follows up on the Commissioner's visit to the United Kingdom from 17 to 22 January 2016. During his visit the Commissioner met with, amongst others, Sir Michael Burton, President of the Investigatory Powers Tribunal, David Anderson QC, Independent Reviewer of Terrorism Legislation, and the Rt. Hon Dominic Grieve QC, Chairman of the Intelligence and Security Committee of Parliament. In addition, the Commissioner met with a number of non-governmental organisations and lawyers who specialise in this area (hereinafter "surveillance experts").
2. This memorandum looks at the current legislative framework on surveillance by the intelligence and security agencies, at some of the oversight mechanisms which are now in place and the plans to reform the legislative framework by way of the Investigatory Powers Bill ("the IP Bill"), as well as the government's 'Prevent' Programme. Conclusions on the UK's oversight system will be drawn in light of Council of Europe standards together with the recommendations made in an [Issue Paper](#) which the Commissioner published in May 2015 entitled "Democratic and effective oversight of national security services" ("2015 Issue Paper on Democratic Oversight").

1. The current legislative framework on communications interception and the overwhelming case for change

3. Part of the legal framework governing the powers of the intelligence and law enforcement agencies to intercept communications may currently be found in the Regulation of Investigatory Powers Act 2000 ("RIPA"). However, a number of other Acts also allow for the interception of communications and provide for the acquisition of communications data.¹ Indeed the legal framework for this area spans some 65 Acts of Parliament and is generally agreed to be extremely complicated.
4. Following the *Digital Rights Ireland* case² where the Court of Justice of the European Union (CJEU) declared the EU Data Retention Directive invalid because it infringed privacy and data protection rights, the UK Government quickly passed the Data Retention and Investigatory Powers Act 2014 ("DRIPA"). DRIPA is due to expire at the end of 2016 as it includes a 'sunset clause' to allow for new legislation to be put in place. A subsequent judicial review of DRIPA was brought by the MPs David Davis and Tom Watson, which found that section 1 was incompatible with EU law, as interpreted by the CJEU. Section 1 allows the Home Secretary to issue a retention notice to a service provider requiring them to retain communications data where the requirement is necessary and proportionate for a purpose falling under RIPA. The effect of the judgment, which would be to invalidate the provision in question, was suspended by the High Court until March 2016 in order to give the government the opportunity to put alternative measures in place. The Court of Appeal reversed this decision but referred questions to the CJEU, which heard the case on 12 April 2016.

¹ Such as the Telecommunications Act 1984, the Police and Criminal Evidence Act 1984, the Intelligence Services Act 1994, the Terrorism Act 2000 and the Wireless Telegraphy Act 2006.

² Digital Rights Ireland C-293/12.

5. Three reports were published in 2015 which reviewed the state of play of investigatory powers in the UK. These were: "*Privacy and Security: a modern and transparent legal framework*" produced by Parliament's Intelligence and Security Committee,³ "*A Question of Trust*" the result of a review commissioned pursuant to DRIPA 2014 s7 by the Independent Reviewer of Terrorism Legislation, David Anderson QC⁴ ("the Anderson report") and "*A Democratic Licence to Operate*" a review commissioned by a diverse panel under the auspices of the Royal United Services Institute ("RUSI").⁵ All three reports concluded that the current framework was outdated, unworkable and in need of reform, even if they differed on much of the detail and some recommendations. The reports highlighted the need for greater transparency, more stringent safeguards and better oversight. Notably, the Anderson report called for the creation of a new oversight body to replace the existing and separate Commissioners. The ISC report paid particular attention to the agencies' use of bulk powers. The RUSI report considered that the approach concerning warrants should depend on the purpose for which they are sought, for example, if they relate to national security they should be subject to judicial review after ministerial authorisation. NGOs also called for RIPA to be replaced by a modern legal framework for surveillance.
6. The urgent need for a new legislative framework was stressed to the Commissioner during his meetings with David Anderson QC and the Rt. Hon Dominic Grieve QC as well as the surveillance experts he met. The Commissioner commends the UK government for its attempt to overhaul the investigatory powers legislative framework and to provide world-leading oversight arrangements by providing for the IP Bill.

2. Some of the existing oversight mechanisms in the UK

7. A range of surveillance oversight mechanisms exist in the UK which ensure that public authorities act in ways that are compatible with the Human Rights Act 1998. As far as independent oversight institutions are concerned there exist three relevant Commissioners: the Interception of Communications Commissioner, the Surveillance Commissioner and the Intelligence Services Commissioner. As for parliamentary oversight, the Intelligence and Security Committee ("ISC") provides oversight of the use of investigatory powers by the security and intelligence services. As for a judicial body, the Investigatory Powers Tribunal ("IPT") hears complaints about conduct in connection with the interception of communications and gathering of communications data by all authorities.
8. Dominic Grieve QC has headed the ISC since September 2015. The ISC was first established by the Intelligence Services Act 1994 to examine the policy, administration and expenditure of MI5, the Security Service, and MI6, the Secret Intelligence Service, and the Government Communications Headquarters ("GCHQ"). The Justice and Security Act 2013 reformed the ISC making it a Committee of Parliament, providing greater powers and increasing its remit (including oversight of operational activity and the wider intelligence and security activities of government). Other than the three intelligence and security Agencies, the ISC examines the intelligence-related work of the Cabinet Office including the Joint Intelligence Committee, the Assessment Staff and the National Security Secretariat. The Committee also provides oversight of the Defence Intelligence in the Ministry of Defence and the Office for Security and Counter-Terrorism in the Home Office.
9. The Commissioner was struck by the fact that this important Committee only has six permanent staff members. Oversight committees, such as the ISC, need to have sufficient resources, technical expertise and legal means, as well as access to relevant documents. The Commissioner calls for adequate financial and human resources to be given to the ISC. This is in line with recommendation 19 of the 2015 Issue Paper on Democratic Oversight which underlines the importance of oversight institutions having the necessary human and financial resources to fulfil their mandates.
10. Surveillance experts highlighted a structural problem with the make-up of the Committee where the Prime Minister has a veto on the Committee's membership and on its reports. Indeed, the Prime Minister may redact any matters he considers should not be published. The Commissioner is

³ Published on 12 March 2015.

⁴ Published on 11 June 2015.

⁵ Published on 14 July 2015.

concerned that the executive control of this Committee may be too strong, although the new ability of the ISC to elect its own Chair is potentially significant, and the ISC's critical report of the IP Bill in February 2016 demonstrates its independence. Nevertheless, and in line with recommendation 13 of the 2015 Issue Paper on Democratic Oversight, the Commissioner recommends that the members of the ISC are appointed by Parliament as is the case with other Parliamentary Select Committees and that the Committee has the final say on what is published.

11. The IPT was established in October 2000 under section 65(1) RIPA. The IPT hears allegations of wrongful interference with communications as a result of conduct covered by RIPA. The Tribunal provides a right of redress for anyone who believes they have been a victim of unlawful action under RIPA or wider human rights infringements. It has extremely broad standing requirements which enable it to proceed on the basis of assumed facts, which the government may refuse to confirm or deny.
12. The number of cases judged by the Tribunal to be 'frivolous or vexatious' has remained high since it began its work in late 2000. Up until 2013, the IPT had only upheld 10 complaints out of the 1,673 it had received and none of them against the security and intelligence agencies.⁶ As for the 2015 statistics: 47% of complaints were ruled as 'frivolous or vexatious' and 30% received a 'no determination' outcome; another 17% were ruled out of jurisdiction, withdrawn or not valid; and 3% were ruled out of time.⁷
13. However, in 2015 the IPT delivered three judgments identifying a breach of rights of the European Convention on Human Rights ("ECHR").⁸ The Commissioner shares the view of the surveillance experts that these cases show the importance of notification of surveillance. Notification is a requirement that persons who have been subjected to surveillance are notified after the fact, and subject to standard caveats, for example, only if notification would not prejudice ongoing operations. Without the revelations of Edward Snowden as to the activities of the UK surveillance services, it is unlikely that these complaints would ever have been brought.
14. According to the rules of the Tribunal, proceedings, including any oral hearings, shall be conducted in private, although in certain cases open hearings can and do take place. The Commissioner heard complaints from the surveillance experts, some of whom had brought litigation to the IPT, that the proceedings were opaque and secret. He therefore welcomes the fact that in 2015 the Tribunal sat on 15 occasions in open court, relating to 20 complaints.
15. Another issue which was raised by the surveillance experts was the "Neither Confirm Nor Deny" (NCND) policy of government. According to this policy the government neither confirm nor deny whether they are monitoring the activities of a particular group or individual, or have had contact with a particular individual. Similarly, the long-standing policy of the UK government is to neither confirm nor deny the truth of claims about the operational activities of the Intelligence Services, including their intelligence-gathering capabilities and techniques. Accordingly, it is not within the remit of the Tribunal to confirm or deny whether or not a warrant or authorisation has been issued against a member of the public, unless it is subsequently found to be unlawful. The Commissioner finds the "NCND" policy problematic in that it prevents a person from ever knowing if he/she has been the target of surveillance. Improvements to notification requirements could help alleviate this problem. At the same time, NCND shields surveillance decisions from effective scrutiny. The Commissioner welcomes the recent efforts of the IPT towards increased transparency of its procedures and encourages it to make further efforts towards this goal.
16. There is currently no avenue of appeal in respect of decisions taken by the Tribunal. The Commissioner welcomes the fact that the IP Bill will now include a domestic route of appeal from the Tribunal on a point of law against a final determination, although this does not provide for appeal in respect of interim legal findings during the conduct of the proceedings. The Commissioner

⁶ "A Question of Trust", A report by David Anderson Q.C., Independent Reviewer of Terrorism Legislation, June 2015.

⁷ Investigatory Powers Tribunal Report, 2011-2015, 20 April 2016.

⁸ *Liberty and others v GCHQ and others (No. 2)* [2015] UKIPTrib 13_77-H, 6 February 2015, *Belhaj and others v Security Service and others* [2015] UKIPTrib 13_132-H, 13 March 2015, and *Liberty and others v GCHQ and others (No. 3)* [2015] UKIPTrib 13_77-H-2, 22 June 2016.

supports the recommendation made⁹ for changes to enable the IPT to make declarations of incompatibility pursuant to Section 4 of the HRA 1998, which would improve effective access to justice.

17. The Commissioner recommends increasing the transparency of the proceedings, which promote public knowledge and confidence in the oversight procedures. This should include increasing the adversarial testing of relevant evidence by way of the appointment of a Special Advocate. This would contribute to increasing the credibility of the IPT as an effective oversight mechanism. According to the Anderson report a security-cleared counsel to the tribunal may actually be more influential.

3. Changes to the current system of surveillance and oversight

18. The UK is currently changing its investigatory powers law and oversight regime. A draft IP Bill was issued for pre-legislative scrutiny on 4 November 2015. The Bill is meant to consolidate UK powers governing surveillance (replacing DRIPA and also repealing and replacing part 1 of RIPA). It was introduced to Parliament on 1 March 2016 and had its second reading in the House of Commons on 15 March 2016. Parliament has until the end of 2016 (when DRIPA 2014 expires) to debate the Bill and pass it into law.
19. The IP Bill aims to provide a framework for the use of investigatory powers by law enforcement and security and intelligence agencies, as well as other public authorities. The Bill includes provisions for the targeted interception of communications, the retention and acquisition of communications data, the use of equipment interference, and the acquisition of bulk data for analysis. The Bill will create a single body of Judicial Commissioners led by the Investigatory Powers Commissioner, replacing the existing three Commissioners.
20. Three parliamentary committees have conducted pre-legislative scrutiny and published reports on the draft Bill in February 2016.¹⁰ The Commissioner commends the work of these Committees and the fact they produced 198 recommendations in the three months or so in which they had to work. However, the Commissioner has concerns with the compressed timeline for the IP Bill, which has meant that the pre-legislative scrutiny has been put under pressure.
21. The UK authorities have maintained that many powers in the IP Bill are already authorised by existing legislation; for example, the practice of wide-spread use of equipment interference by security agencies and the police was avowed in February 2015. However, some of the powers in the Bill are new, such as the provision for the retention of Internet Connection Records or for the creation of filtering arrangements.

4. Major human rights concerns over the Investigatory Powers Bill

22. The following aspects of the IP Bill, in its current form, cause concern to the Commissioner in light of Council of Europe standards in this area, including the recommendations made in his 2015 Issue Paper on Democratic Oversight:

- a. *Creation of a single oversight Commissioner*

23. The Commissioner welcomes the creation of one Investigatory Powers Commissioner who will replace the current work of three Commissioners. However, he considers that an Investigatory Powers Commission should be set up with the Investigatory Powers Commissioner as its head. Expert oversight bodies are well placed to undertake the ongoing, detailed and politically neutral scrutiny that human rights protection requires. In addition, the Commission needs to be adequately funded, with a role for Parliament given in determining that budget. Indeed, the importance of

⁹ See the Anderson Report and also Justice's Written Evidence to the Joint Committee on the Draft Investigatory Powers Bill, December 2015.

¹⁰ These are: The Science and Technology Committee: "Investigatory Powers Bill: technology issues", the Intelligence and Security Committee "Report on the Draft Investigatory Powers Bill" and the Joint Committee on the Draft Investigatory Powers Bill: "Report- Draft Investigatory Powers Bill".

strengthening the overall link between expert oversight bodies and Parliament is emphasized in recommendation 13 of the 2015 Issue Paper on Democratic Oversight. This extends to giving a designated parliamentary committee a role in the appointment of members, empowering parliament to task expert bodies to investigate particular matters and require expert bodies to report and take part in parliamentary committee hearings. The staff of the Investigatory Powers Commissioner also needs the relevant technical expertise.

24. Another issue raised by the surveillance experts was the fact that authorizing warrants and ex post-facto oversight of surveillance will be the task of the same institution. It may be preferable that these two functions should be performed by separate bodies within an Investigatory Powers Commission¹¹ as recommendation 9 of the 2015 Issue Paper on Democratic Oversight suggests.
25. The Commissioner is in favour of a system of notification when a person has been the subject of surveillance. As the European Court of Human Rights has reaffirmed in the case of *Szabó and Vissy v Hungary* (2016), “As soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should be provided to the persons concerned”. Accordingly, he is pleased to see that Clause 198 of the revised IP Bill has been amended to allow the Investigatory Powers Commissioner to inform individuals of any serious errors which have caused significant prejudice or harm to the person concerned *without* having to seek agreement from IPT. Clause 199 now makes clear that the Judicial Commissioners can communicate with the IPT without consulting the Secretary of State. However, the system of error reporting could be improved; in particular the Commissioner supports the desirability of better defining the categories of relevant error and the criteria for seriousness of error in clause 198.
26. As regards the appointment of the Judicial Commissioners, the Commissioner shares the views expressed¹² that they should be appointed by a body which is independent of the executive, such as the Judicial Appointments Commission, or parliamentary committee. Having the Prime Minister appoint the Judicial Commissioners may compromise their independence and impartiality. The fact that the revised Bill provides for the Lord Chief Justice and others to be consulted on the appointment of the Judicial Commissioners is a positive step although it could go further. According to recommendation 13 of the 2015 Issue Paper on Democratic Oversight strengthening the link between expert oversight bodies and parliament increases their independence and democratic legitimacy.

b. Prior independent judicial authorisation

27. The IP Bill will create a ‘double-lock’ for some surveillance decisions, so that, following the decision of the Secretary of State, warrants cannot come into force until they have been approved by a Judicial Commissioner. This procedure applies to warrants for targeted interception, targeted equipment interference and all forms of bulk warrants. The Judicial Commissioner must consider the necessity and proportionality test applied by the Secretary of State applying the same principles as would be applied by the court on an application for judicial review. This introduces, for the first time, an ex-ante judicial involvement in the process of authorising surveillance by security and intelligence services, which the Commissioner commends. A two-level authorisation process combining authorisation by a judicial body with that of a minister may offer the most robust model of *ex-ante* scrutiny which is needed. Judicial involvement is necessary to promote public confidence and improve standards of decision-making.
28. As the Venice Commission has stated in their Report on Democratic Oversight (2007)¹³ there is an obvious advantage of requiring prior judicial authorisation for special investigative techniques, namely that the security agency has to go “outside of itself” and convince an independent person of the need for a particular measure. It subordinates security concerns to the law, and as such it

¹¹ See, for example, the model proposed in Annex 18 of the Anderson Report.

¹² See the concerns expressed by the Interception of Communications Commissioner’s Office, the Intelligence Services Commissioner and the UN Special Rapporteurs in the report of the Joint Committee on the Draft Investigatory Powers Bill, HL Paper 93, February 2016, § 581.

¹³ See also the [updated report](#) from 2015 on Signals Intelligence Agencies, CDL-AD(2015)006.

serves to institutionalize respect for the law. If it works properly, judicial authorisation will have a preventive effect, deterring unmeritorious applications and/or cutting down the duration of a special investigative measure.

29. The Commissioner notes, however, that prior judicial authorisation is not required for a range of powers in the IP Bill that will interfere with the right to privacy. For example, there is no judicial authorisation for obtaining communications data, including privileged and confidential communications. The Commissioner recommends that judicial warranting should be the default mechanism for the authorisation of most surveillance, with only a limited number of cases which would be subject to the certification of the Secretary of State. There is growing support for the view that external authorisation should extend to untargeted bulk collection of information as well as the collection and access to communications data. However, as David Anderson QC has stated¹⁴ it is possible to envisage prior authorisation that is not undertaken by a judge (for example the role of the National Anti-Fraud Network) on the condition that the body in question is independent of the executive, has the relevant competence and resources to do the job.
30. Another question which has been raised with the Commissioner is the extent of the judicial scrutiny which the Judicial Commissioners will exercise. The IP Bill specifies that when making the authorisation decision “the Judicial Commissioner must apply the same principles as would be applied by a court on an application for judicial review.” Surveillance experts who met with the Commissioner in London expressed their concerns that limiting Judicial Commissioners to considering warrants on judicial review principles may mean that they are only able to overrule the Home Secretary if he or she is deemed to have acted unreasonably. According to this view, the ‘double-lock’ system is not truly judicial authorization, but rather executive authorization with approval then being given by a Judicial Commissioner. Experts expressed the view that while the flexible nature of judicial review principles means that in theory a full merits review could take place, the Judicial Commissioners may feel bound to follow the Secretary of State’s view on what is necessary for the purposes of national security. While the ‘double-lock’ on the most intrusive warrants is an improvement on the current position, the Commissioner is concerned that the proposed system of judicial approval is not compliant with the independent authorization suggested in recommendation 6 of the 2015 Issue Paper on Democratic Oversight.
31. Another issue which the surveillance experts raised with the Commissioner was the importance of an adversarial process. The judicial authorisation would be decided on an *ex parte* basis where the Judicial Commissioner would not have the opportunity of representations by lawyers acting for the person who is the subject of the surveillance measure. The Commissioner considers that introduction of security-vetted special advocates to represent the legal interests of the targets of surveillance could help to reduce the risk that approval processes simply become rubber stamping exercises. Anonymised judgments on issues of principle could also be considered.
32. The Commissioner considers that Judicial Commissioners should also be able to refer matters directly to the IPT for consideration where they have identified unlawful conduct following an inspection, audit, investigation or complaint.¹⁵ This could be particularly useful where an issue affects a group or class of individuals who are unlikely to pursue an individual claim before the Tribunal.

c. Requirement of reasonable suspicion

33. There is no explicit requirement in the IP Bill that the Secretary of State or a Judicial Commissioner consider the existence of a reasonable suspicion against any person prior to approving or authorising the surveillance measure. The Commissioner finds that this is problematic in light of the judgment of the Grand Chamber of the European Court of Human Rights in the case of *Roman Zakharov v. Russia* (2015), “Turning now to the authorisation authority’s scope of review, the Court reiterates that it must be capable of verifying the existence of a reasonable suspicion against the

¹⁴ See the Anderson Report 2015.

¹⁵ This recommendation was raised by the RUSI report, as well as the Interception of Communications Commissioner’s Office. See the summary of contributions on this point at § 641 of the Joint Committee on the Draft Investigatory Powers Bill Report, HL Paper 93, February 2016.

person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security.” This is the case, even following the more nuanced approach in the later Chamber judgment of *Szabó and Vissy v Hungary* (2016).

d. Bulk and indiscriminate measures

34. Part 6 and 7 of the IP Bill deal with a range of bulk warrants. These include bulk interception warrants related to communications sent or received by individuals outside the UK; bulk acquisition warrants, related to the acquisition of communication data; bulk equipment interference warrants; and bulk personal dataset warrants.
35. The Commissioner notes the concerns made by the three UN Special Rapporteurs in their written evidence¹⁶ to the Joint Committee on the Draft Investigatory Powers Bill who found that the provisions on the bulk interception warrants are vague and not tied to specific offences. Surveillance experts also highlighted their concerns about the human rights implications of bulk collection.
36. Recent case law of the European Court of Human Rights is instructive in relation to bulk surveillance powers. In *Zakharov v Russia* (2015) the Grand Chamber held that interceptions “*must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which authorisation is ordered. Such information may be made by names, addresses, telephone numbers or other relevant information*”. Surveillance experts suggested to the Commissioner that the sheer breadth of a bulk warrant may have difficulties against that clear standard, since the bulk interception warrants, as set out, require no specific individuals to be mentioned or specific groups, no specific telephone numbers, nor specific premises. By their nature bulk warrants place large groups of people under the menace of surveillance without any suspicion on the part of the authorities that an individual has committed a criminal offence or is of national security interest.
37. Given that the legality of bulk surveillance models is subject to litigation in the UK and is pending before the European Court of Human Rights, the Commissioner considers it would be premature to determine whether the regime is proportionate for the purposes of Article 8 of the ECHR. The Commissioner notes the careful analysis of this issue by the ISC, the Interception of Communications Commissioner’s Office and the IPT, which laid out the full safeguards which operate to protect individual privacy. Nevertheless, the Commissioner has serious concerns as to whether generic interception of external communications is an inherently disproportionate interference with the private lives of a great number of persons.

e. Targeted Equipment Interference or “hacking”¹⁷

38. From a privacy point of view, equipment interference is very problematic. As one NGO has submitted, it represents, “The modern equivalent of entering someone’s house, searching through his filing cabinets, diaries and correspondence, and planting devices to permit constant surveillance in the future, and, if mobile devices are involved, obtaining historical information including every location he visited in the past year ... if a mobile device has been infected, the ongoing surveillance will capture affected individuals wherever they are.”¹⁸
39. The IP Bill provides for law enforcement and the security and intelligence agencies to undertake targeted equipment interference. Equipment could include personal computers, mobile phones and tablets as well as large systems owned by organisations. The Commissioner welcomes the fact that this practice, which previously took place without a detailed legal framework, is now addressed in the IP Bill.

¹⁶ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/written/26353.html>.

¹⁷ This is referred to as ‘computer network exploitation’ in the 2015 Issue Paper on Democratic Oversight

¹⁸ Privacy International (2014), Statement of Grounds submitted to the Investigatory Powers Tribunal, 8 May 2014 (§§ 2-4, 11-18).

40. However, he has serious concerns over the broad wording of the clause governing equipment interference. He considers that if equipment interference is used at all it must only be allowed in the most narrowly defined circumstances, when necessary and proportionate, and with the strictest safeguards. Moreover, and in line with recommendation 7 of the 2015 Issue Paper on Democratic Oversight, these activities must be subject to the same level of external oversight as is required for surveillance measures that have equivalent human rights implications.

f. Internet connection records

41. The only new capability provided for by the Bill would appear to be the storage of everyone's Internet connection records, a kind of communications data that reveals the websites an individual has visited.¹⁹ According to the Home Secretary, this is the equivalent of "an itemised phone bill", although a number of the Commissioner's interlocutors disagreed with this statement.²⁰

g. National security purposes

42. National security is given as a test of the necessity of an action for a number of powers in the IP Bill. However, the term national security is not defined in the Bill. The Commissioner is of the view that a definition of national security would be helpful in ensuring legal certainty. A lack of a clear definition allows for arbitrariness and abuse of rights.

h. Privileged communications

43. Surveillance experts raised the issue of legal professional privilege and journalistic privilege with the Commissioner in the context of the IP Bill. The Commissioner commends the fact that there has been some progress made on both of these fronts in the period between the draft Bill and current Bill; however professionals in this field continue to highlight their concerns.

44. As regards legal professional privilege, the Commissioner is concerned that powers in the IP Bill enable certain security and other agencies deliberately to target legally privileged communications. The Commissioner encourages the authorities to consult further with the Law Societies and others providing protection for Legal Professional Privilege on the face of the Bill.

45. The Commissioner also shares concerns that journalists and their sources are not adequately protected and supports the call for scrutiny before access is made to journalistic material. The protection of journalistic sources needs to be fully enshrined in the IP Bill to protect the whistleblowers and the journalists who report on their stories. The Commissioner recalls the Council of Europe standards on whistleblowers, such as the Committee of Ministers, of Recommendation CM/Rec(2014)7 on the protection of whistleblowers, which calls on member States to create an appropriate normative, judicial and institutional framework for the protection of whistleblowers, and the Council of Europe Parliamentary Assembly (PACE) [Resolution 2060 \(2015\)](#) on improving the protection of whistleblowers.

5. The 'Prevent' Programme and Strategy

46. 'Prevent' is a programme developed as part of the UK's response to terrorism, designed to prevent children and young people from being drawn into terrorism. A revised 'Prevent' strategy was presented by the current government in June 2011.

47. Since the 2011 revised 'Prevent' strategy, the government has defined extremism as: 'the vocal or active opposition to fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs, as well as calls for the death of UK

¹⁹ Investigatory Powers Bill, House of Commons Library Briefing Paper number 7518, 2016.

²⁰ See also Joint Committee on the Draft Investigatory Powers Bill Report, HL Paper 93, 11 February 2016.

armed forces at home or abroad.²¹ 'Prevent' in its current formulation extends to non-violent as well as violent extremism.²²

48. The Counter-Terrorism and Security Act 2015 s26 imposes on specified authorities including local authorities, schools, nurseries and social services departments a duty to have due regard in the exercise of their functions to the need to prevent people from being drawn to terrorism. These bodies must refer those they believe to be vulnerable to the police, who decide whether to refer them to a panel to prepare support packages to reduce their vulnerability. This duty came into force in July 2015.
49. Reportedly around 900 children were referred to 'Channel', the Government's anti-radicalisation programme, in the three years April 2012-April 2015. In the three months June-August 2015, 312 children were referred (of 796 referrals in total).²³
50. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his recent report to the Human Rights Council²⁴ was of the opinion that, 'effective strategies should not be based on pre- or mis-conceptions about the groups that are most susceptible to radicalisation or violent extremism, but should be developed in reliance on evidence to ensure a proper understanding of the national and local issues that impact on the radicalisation process. This will not only ensure that all at-risk communities are adequately engaged with, but also that entire communities, ethnic or religious groups are not stigmatised.'²⁵ Certain groups of persons, namely Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to those groups have become particularly vulnerable to racism and/or racial discrimination across many fields of public life as a result of the fight against terrorism.²⁶ The Commissioner stresses the responsibility of all member States of the Council of Europe to ensure that the fight against terrorism does not have a negative impact on any minority group.
51. The Commissioner supports the fact that concrete measures should be taken to prevent and fight radicalisation, in particular in schools, disadvantaged neighbourhoods, prisons and on the Internet and social media, in line with PACE [Resolution 2031 \(2015\)](#) .
52. However, the Commissioner shares concerns that the 'Prevent' programme runs the risk of isolating the very communities whose cooperation is most needed to fight violent extremism. Reinforcing community support and gaining the confidence of communities should be the government's priority. This may be done by promoting intercultural dialogue in schools; taking measures to combat marginalisation, social exclusion, discrimination and segregation, especially among young people in disadvantaged neighbourhoods; and through supporting families in their role of educating their children to respect the values of democracy and tolerance.²⁷
53. Moreover, NGOs, as well as David Anderson QC, question the impact on children's rights, including freedom of speech, of the 'Prevent' programme duty in schools.²⁸ A number of academics expressed their fear by way of an open letter in the press that the statutory implementation of the strategy through the Counter-Terrorism and Security Act 2015 would have a chilling effect on open debate, free speech and political debate.²⁹ The Commissioner recalls that the response to the

²¹ Tackling Extremism in the UK, Report from the Prime Minister's Task Force on Tackling Radicalisation and Extremism, December 2013.

²² Report on the Terrorism Acts in 2014 by David Anderson QC, September 2015.

²³ [The Guardian](#), 8 October 2015.

²⁴ 22 February 2016, A/HRC/31/65.

²⁵ Ibid.

²⁶ See, *inter alia*, ECRI [General Policy Recommendation No. 8](#) on combating racism while fighting terrorism, adopted on 17 March 2004.

²⁷ See PACE Resolution 2031 (2015).

²⁸ Institute for Race Relations, "Prevent and the Children's Rights Convention", January 2016.

²⁹ <http://www.independent.co.uk/voices/letters/prevent-will-have-a-chilling-effect-on-open-debate-free-speech-and-political-dissent-10381491.html>

threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice and the rule of law.³⁰

54. In this context, the Commissioner reiterates that anti-terrorism policies and legislation which run counter to European democratic values and human rights are not only contradictory to Council of Europe member states' international obligations, but are also counterproductive and contribute to the spread of extremism. All European states need to adopt national preventive, but not repressive, policies in the course of their counter-terrorism efforts. Among these policies figure those that should promote tolerance by encouraging inter-religious and cross-cultural dialogue, involving NGOs, with a view to preventing tensions capable of contributing to the commission of terrorist offences. Such policies should also provide for the effective elimination of discrimination, especially on ethnic or religious grounds, in law and practice, and for everyone's access to inclusive, quality education.³¹

Conclusions and Recommendations

55. Oversight is a means of ensuring public accountability for the decisions and actions of intelligence services. Oversight helps to avoid the abuse of power and, as is the case in the UK, should be a combination of executive control, parliamentary oversight, expert bodies and judicial review. Oversight helps to foster a culture of democratic transparency and respect for human rights and the rule of law within the security services. Democratic oversight is fundamental to ensuring that security services and law enforcement agencies both protect the populations they serve and respect the rule of law and human rights in undertaking this task. However, the revelations of Edward Snowden in 2013 about the retention of data sent by UK citizens using overseas providers, the involvement of some European security services in the secret detention and extraordinary rendition of terrorist suspects, and allegations about unlawful security activity in various Council of Europe member states have cast significant doubt on the capacity of national oversight systems to perform this role. The case for better democratic oversight security agencies has certainly been made.
56. Reconciling the right to respect for privacy and security interests is the current task of every member state of the Council of Europe and the Commissioner does not underestimate the scale of this challenge. Indeed, he recognizes that surveillance is a necessary activity in the fight against terrorism and other serious crime. Nevertheless, he calls on the authorities to refrain from indiscriminate mass surveillance which has proven to be ineffective for the prevention of terrorism and therefore is not only dangerous for the respect of human rights but also a waste of resources.³²
57. As to the current oversight mechanisms in place, the Commissioner calls for adequate financial and human resources to be given to the ISC and that it remains fully independent of the executive through appointment of its members.
58. In respect of the IPT, the Commissioner encourages further efforts to ensure transparency of proceedings and to increase adversarial testing of relevant evidence. He welcomes the new right of appeal from decisions of the IPT and considers that the IPT should be enabled to make declarations of incompatibility pursuant to Section 4 of the HRA 1998.
59. The Commissioner agrees with all of his interlocutors that a new Act of Parliament is needed to replace the current legislative framework and commends the UK government's efforts to put surveillance powers on a new statutory footing through the IP Bill.
60. The Commissioner welcomes the thorough parliamentary scrutiny of this IP Bill through numerous Committee reports. This type of parliamentary scrutiny provides a welcome example to other Council of Europe member states. However, he joins the concerns expressed by certain

³⁰ ECRI General Policy Recommendation No. 8 on combating racism while fighting terrorism, adopted on 17 March 2004.

³¹ See the Commissioner's [Positions on Counter-Terrorism and Human Rights Protection](#), 2015, and relevant [thematic webpage](#).

³² See PACE Resolution 2031 (2015).

commentators that the review process has proceeded rather quickly given the compressed timeline of the Bill's passage through Parliament.

61. The Commissioner commends the creation of a single unified Investigatory Powers Commissioner with responsibility for surveillance oversight. He firmly supports others' calls for setting up an Investigatory Powers Commission and that that body be afforded requisite funding and technical expertise, with a strong link to Parliament in terms of appointment of its members and reporting.
62. The Commissioner commends the introduction of a judicial element to the authorisation process for certain types of warrants. However, to be fully in line with recommendation 6 of the 2015 Issue Paper on Democratic Oversight, authorisation should be by a Judicial Commissioner on the application of the relevant service, with the test being necessity and proportionality.
63. The Commissioner expresses concern as to whether the bulk interception and equipment interference powers would comply with the requirements of Article 8 of the European Court of Human Rights. Surveillance should, where possible, target a named individual on the basis of reasonable suspicion.
64. With respect to legal professional privilege, the Commissioner supports greater protection for legal professional privilege and for communications of politicians and journalists.
65. Oversight bodies and systems should be periodically evaluated to assess whether or not they possess the necessary attributes to be effective. Oversight should not be limited to the work of security services nationally but also their international cooperation. The Commissioner welcomes the decision to include a provision for the Secretary of State to prepare a report within six years on the operation of the Act, which is in line with recommendation 23 of the 2015 Issue Paper on Democratic Oversight.
66. In relation to the Prevent Strategy, the Commissioner urges the authorities to involve the Muslim communities further in community dialogue and development of programmes such as 'Prevent'.