



INTERCEPTION OF COMMUNICATIONS AND EQUIPMENT
INTERFERENCE: RESPONSE TO CONSULTATION ON
BEHALF OF
THE CRIMINAL BAR ASSOCIATION

Interception of communications – Updates the existing interception of communications code to include new case law and legislative developments – Gives additional information on the interception and handling of external communications under section 8(4) of RIPA – Provides further information on the protections given to legally privileged and other confidential material – Equipment interference: explains when security and intelligence agencies can lawfully interfere with electronic equipment and the rules and safeguards surrounding interference – Similarities in form to the existing Covert Surveillance and Property Interference Revised Code of Practice.

Introduction

The Criminal Bar Association represents approximately 4,000 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained

Remit of the consultation on two draft codes of practice

1. The Home Office has announced a consultation on two draft codes of practice, both proposed pursuant to section 71 of the Regulation of Investigatory Powers Act 2000 ('the RIPA'). This consultation runs for six weeks, from 6th February 2015 until 20th March 2015.

2. A summary of the two draft codes, as announced by the Home Office, is as follows [<https://www.gov.uk/government/consultations/interception-of-communications-and-equipment-interference-draft-codes-of-practice>]:

'This is a consultation on two draft codes of practice pursuant to section 71 of the Regulation of Investigatory Powers Act 2000 (RIPA).

The first is an updated interception of communications code of practice. This includes new details about the operation of the regime for the interception under RIPA of communications sent or received from outside the UK. It also includes further information about the safeguards for the interception of legally privileged communications and minor changes to reflect developments in the law since the code was first introduced in 2002.

The second is a new equipment interference code of practice. This explains the circumstances and procedures that must be followed before the Security and Intelligence Agencies can interfere with electronic equipment, such as computers, and the rules that must apply to the processing, retention, destruction and disclosure of any information obtained by means of the interference.'

3. In remarkably short form, the Home Office has stated why the two draft codes are needed. It amounts to no concrete or adequate explanation for why those codes are needed:

to make publicly available more information about the robust safeguards that apply to the police and the security and intelligence agencies in their use of investigatory powers.'

4. Our view is that (draft) codes of practice are a peculiarly indirect and circuitous means by which *'to make publicly available'* information. Why should the public not be referred to a host of other, existing information – such as the Explanatory Notes to the 2000 Act? We note that the draft codes are stated by the

Home Office to be part of the anti-terrorism crime and policing strategy and published policy. Why not refer interested persons to that policy? That policy was first published on 12th December 2012. It was last updated on 3rd September 2014. [See the updates to the published policy, ‘Protecting the UK against terrorism’, <https://www.gov.uk/government/policies/protecting-the-uk-against-terrorism>]

5. Against this lack of any useful information, the Home Office proposes, *‘The consultation seeks representations on the content of the draft codes of practice.’* This is notwithstanding that it is entirely unclear how or why these two draft codes are needed so as to lawfully and proportionately deploy the use of covert techniques by public authorities. When public authorities, such as the police or government departments, need to use covert techniques to obtain private information about someone, that must be done in a way that is necessary, proportionate, and compatible with human rights. There is no preface to the draft codes to explain how the Home Office proposes that the codes of practice are consistent with these legal requirements.
6. What meaningful representations can really be made in response to prevailing silence as to the case for why draft codes are needed? Essential to the remit of meaningful consultation is a preliminary question: Why is it necessary to change anything? The Home Office has not attempted to an answer to that basic, fundamental question. This consultation takes place against a dearth of evidence as to why change is needed and advisable. Thereafter, in the context of draft codes of practice, the next question is: Why introduce legal changes by way of the relatively unexamined means of draft codes of practice (and not table discussions for parliamentary amendments by the legislature)?
7. The Criminal Bar Association is particularly concerned that these two draft codes are proposed without any explanation for why the two are needed. Ours is a very specific concern. It is that the Home Office has failed to acknowledge – and has not heeded – the caution urged on it by a collective of the Law Society, the Bar Council, the British Association of Social Workers and the National Union of Journalists. That collective note of caution was urged on the government as recently as 20th January 2015. It was published in response to the government’s deadline for its consultation on two draft codes of practice. [Those (then draft)

codes of practice are both accessible at <https://www.gov.uk/government/consultations/communications-data-codes-of-practice-acquisition-disclosure-and-retention>]:

- i. Acquisition and disclosure of communications data: draft code of practice;
 - ii. Retention of communications data: draft code of practice.
8. Those codes of practice sought to create powers additional to those in the Regulation of Investigatory Powers Act (RIPA) – in common with the two newly proposed draft codes of practice *per* this latest consultation.
9. The full text of the collective press statement that was issued on 20th January 2015 is hosted by the Law Society at <http://www.lawsociety.org.uk/news/press-releases/call-to-protect-professional-communications/>. A copy of that press statement, in full, is set out at Annex One to this response by the Criminal Bar Association. This was the first time those organisations have formed an alliance on a policy issue and have agreed that joint statement. Together, the Law Society, the Bar Council, the British Association of Social Workers and the National Union of Journalists formed the Professionals for Information Privacy Coalition. The sole purpose for doing so was, in the words of the joint statement of the Coalition, ‘*to express a shared concern in response to the current proposals contained in the draft code of practice for RIPA.*’
10. The gist of the caution issued by those professional bodies in January 2014 was that those two draft codes should not confer on police and other investigative authorities the powers contained in them. The objection was a principled one. The Law Society and the Bar Council expressed their joint and common view that codes of practice are an inappropriate means to govern.
11. In that press statement of 20th January 2015, Alistair MacDonald Q.C., Chairman of the Bar Council, strongly made the case against the government relying on ‘mere’ codes of practice to change the law:

As a caring society, we cannot simply leave surveillance issues to senior officers of the police and the security services acting purportedly under mere codes of practice. What is surely needed more than ever before is a rigorous statutory framework under which

surveillance is authorised and conducted.

[...]

12. Those concerns against using the vehicle and guise of the two draft codes of practice were echoed by Andrew Caplen, the President of the Law Society. An extract from the text of the joint statement of the Coalition demonstrates why draft codes of practice should meet with skepticism:

We have seen a growing number of instances where data and surveillance powers have been seriously and repeatedly overused. [...]

The existing data and surveillance rules are complex and confusing and have been laid down in numerous, badly drafted pieces of legislation, codes and guidance. Too many laws have been rushed through parliament as emergency legislation – most recently the Data Retention and Investigatory Powers Act 2014 (DRIPA). This has undermined parliamentary scrutiny and democratic debate. [...]

[...] Using codes of practice – such as the draft code under RIPA – undermines the rule of law.

13. We note that the government continued to introduce, in full, unchanged, the proposed powers contained in those two codes of practice. We expressly disapprove of that course.
14. Enlarging and expanding the ambit of the RIPA by drafting codes of practice amounts to creating law enforcement powers in a way that lacks accountability, scrutiny, and adequate transparency. The Chairman of the Bar Council was right, in our view, to oust the proposed additions to the RIPA as ‘mere’ codes of practice. Codes of practice are – in reality – a convenient, largely unseen and unnoticed vehicle by which for the government to introduce ever more intrusive and coercive means of policing. That is consistent with observing that the primary legislation – here, the RIPA – empowers the Secretary of State to prepare and publish drafts of codes of practice (and to consider any representations on those drafts), pursuant to section 71 of that Act (*‘Issue and revision of codes of practice’*). That statutory provision is set out in full at Annex Two of this response. That the Secretary of State is so empowered in no way detracts from the force of the reservations expressed by the Chairman of the Bar Council. The point is the Secretary of State

should heed calls not to embrace codes of practice. The Secretary of State should decline to invoke and rely on legislating by way of codes of practice, in the interests of transparency and accountability. The speed and ease with which the Home Office reverts to codes of practice to expand powers of law enforcement is damaging to law-making itself.

15. Accordingly, the Criminal Bar Association maintains the same principled objection to legislating by means of codes of practice as was expressed by the Chairman of the Bar Council.
16. We note with concern that the Home Office has announced two separate consultations, both in respect of two draft codes of practice designed to enlarge the RIPA armoury, since November 2014.
17. We invite the Home Office not to implement these drafts codes of practice [i.e. the '*updated*' interception of communications code of practice and the new equipment interference code of practice].
18. If the Home Office intends to pursue the leverage in the codes of practice for which it contends, it should address why the leverage it seeks is both necessary and proportionate. When that is forthcoming, this consultation exercise should be started afresh. We invite the Home Office to publish for consultees, online, all non-sensitive [redacted] information that was made available to it by law enforcement agencies in the course of this consultation exercise. We note the Home Office states that it consulted what it termed 'the law enforcement and intelligence community', the Interception of Communications Commissioner (with oversight of Part 1 of the RIPA 2000) and the Intelligence Services Commissioner (with oversight of the Intelligence Services Act 1994, sections 5 to 7, inclusive).
19. We note the Home Office states, in the accompanying guidance to these two draft codes, it seeks to facilitate '*an informed and transparent debate*'.
20. In the spirit of engagement, in response to the draft codes as proposed – and the very limited information as to why the government is consulting – we raise the following concerns.

First draft code of practice: Interception of Communications

21. We note that this draft code purports to ‘*update*’ – *per* the language of the accompanying guidance – the Interception of Communications Code of Practice.
22. The guidance provides no assistance at all in respect of what in this draft code is offered by way of power(s) additional to that that already exists. That is a serious criticism of the presentation of this draft code. Meaningful consultation requires, at a minimum, clarity as to exactly what is newly or differently proposed to the status quo. This amply demonstrates the criticism of codes of practice in this context of law enforcement made by the joint Coalition in its statement. [*The existing data and surveillance rules are complex and confusing and have been laid down in numerous, badly drafted pieces of legislation, codes and guidance*’: see our paragraph 13, above, and, for the full text of the joint statement, see Annex One to this response.]
23. We remain of the view that draft codes of practice are not appropriate means by which to educate members of the public as to the existence of powers and safeguards. We are not reassured by the accompanying guidance to this code that its central concern is with publishing information and rehearsing existing safeguards:

This Government is committed to making publicly available significantly more information about the safeguards that underpin the interception of external communications under section 8(4) of RIPA. These are not new safeguards – the Security and Intelligence Agencies have always had robust internal arrangements, which are overseen by the Interception of Communications Commissioner – but we are now able to put more detail into the public domain than we ever have before.

24. We see no good reason whatsoever to achieve those two aims – clarity and reminder – by way of a code of practice.

Second draft code of practice: Equipment interference code of practice

25. The accompanying guidance states that this code constitutes publication of a new code. We are not persuaded that the Home Office has demonstrated the necessity of this code. On its own analysis, the Home Office has failed to show why the powers proposed in the code are truly necessary:

[T]he draft code is similar to the existing published guidance in the Covert Surveillance and Property Interference Revised Code of Practice regarding the process for authorizing equipment, record keeping, oversight and complaints. The draft Code also mirrors the handling safeguards for the intercepted material in the in the Interception Code of Practice and introduces guidance relating to the authorization of equipment interference outside the UK and under section 7 of the Intelligence Services Act 1994.

ANNEX ONE

Joint statement of the Professionals for Information Privacy Coalition

<http://www.lawsociety.org.uk/news/press-releases/call-to-protect-professional-communications/#sthash.JyMiBmU1.dpuf>

Today [20th January 2015] is the government's deadline for its consultation on 'Communications data codes of practice: acquisition, disclosure and retention' which looks at the [two draft] codes [of practice] running alongside the Regulation of Investigatory Powers Act (RIPA).

The Law Society, Bar Council, The British Association of Social Workers (BASW) and National Union of Journalists (NUJ) have come together as the Professionals for Information Privacy Coalition to express a shared concern in response to the current proposals contained in the draft code of practice for RIPA.

This is the first time the organisations have formed an alliance on a policy issue and have agreed a joint statement as follows:

Statement by Professionals for Information Privacy coalition

Privacy and trust is crucially important to the British public and our professions. We need to be assured that certain data will always remain confidential in all but exceptional and extreme circumstances.

Insufficient regard for professional confidentiality undermines the public's trust in our individual members, organisations and our public institutions.

We are united in our belief that the current system needs to be changed.

We have seen a growing number of instances where data and surveillance powers have been seriously and repeatedly overused. This has included police using secret methods to expose journalistic sources and to monitor journalists' activities and it has also been revealed that the intelligence agencies have been spying on conversations between lawyers and their clients.

The existing data and surveillance rules are complex and confusing and have been laid down in numerous, badly drafted pieces of legislation, codes and guidance. Too many laws have been rushed through parliament as emergency legislation - most recently the Data Retention and Investigatory Powers Act 2014 (DRIPA). This has undermined parliamentary scrutiny and democratic debate. So we have come together to call for the existing problems to be addressed in the various reviews still underway.

Our organisations agree that access to professional data should be protected in law and should be subject to independent, judicial oversight.

Using codes of practice - such as the draft code under RIPA - undermines the rule of law.

We are urging all parliamentarians and the government to support a new approach that includes bringing forward new primary legislation in order to clearly and transparently codify data and surveillance policy in the public interest.

[...]

The Bar Council represents barristers in England and Wales, the Law Society represents solicitors in England and Wales, the British Association of Social Workers is the largest professional association for social work in the UK and the NUJ is the voice for journalists and journalism in the UK and Ireland.

ANNEX TWO

Section 71, RIPA 2000: Issue and revision of codes of practice

- (1) The Secretary of State shall issue one or more codes of practice relating to the exercise and performance of the powers and duties mentioned in subsection (2).*

- (2) *Those powers and duties are those (excluding any power to make subordinate legislation) that are conferred or imposed otherwise than on the Surveillance Commissioners by or under—*
- (a) *Parts I to III of this Act;*
 - (b) *section 5 of the M1Intelligence Services Act 1994 (warrants for interference with property or wireless telegraphy for the purposes of the intelligence services); and*
 - (c) *Part III of the M2Police Act 1997 (authorisation by the police or [F1Her Majesty's Revenue and Customs]F1 of interference with property or wireless telegraphy).*
- (3) *Before issuing a code of practice under subsection (1), the Secretary of State shall—*
- (a) *prepare and publish a draft of that code; and*
 - (b) *consider any representations made to him about the draft; and the Secretary of State may incorporate in the code finally issued any modifications made by him to the draft after its publication.*
- (4) *The Secretary of State shall lay before both Houses of Parliament every draft code of practice prepared and published by him under this section.*
- (5) *A code of practice issued by the Secretary of State under this section shall not be brought into force except in accordance with an order made by the Secretary of State.*
- (6) *An order under subsection (5) may contain such transitional provisions and savings as appear to the Secretary of State to be necessary or expedient in connection with the bringing into force of the code brought into force by that order.*
- (7) *The Secretary of State may from time to time—*
- (a) *revise the whole or any part of a code issued under this section; and*
 - (b) *issue the revised code.*
- (8) *Subsections (3) to (6) shall apply (with appropriate modifications) in relation to the issue of any revised code under this section as they apply in relation to the first issue of such a code.*
- (9) *The Secretary of State shall not make an order containing provision for any of the purposes of this section unless a draft of the order has been laid before Parliament and approved by a resolution of each House.*