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Dear Jack,

Serious Crime Bill: Commons Report stage – Further Government amendments

I am writing to let you have details of the further Government amendments for Report stage of the Bill which I have tabled today.

Use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000 (RIPA) to identify journalistic sources (New clause "*Codes of practice about investigatory powers: journalistic sources*" and amendments to clauses 80 and 82, Schedule 4 and the long title)

On 4 February 2015, the Interception of Communications Commissioner (IOCC), Sir Anthony May, published the report of his inquiry into the police access to communications data of journalists. The report recommended that "judicial authorisation must be obtained in cases where communications data is sought to determine the source of journalistic information". The Government has accepted this (and the Commissioner's other) recommendation and has been considering carefully how best to give legal effect to it at the earliest opportunity.

Primary legislation is required to give full effect to the IOCC recommendation. The House Authorities have advised that an amendment to RIPA to implement the IOCC's recommendation in full would not be within scope of the Serious Crime Bill as the Bill, as its short title suggests, is about serious crime and not about crime at large. As such, it would not be possible to provide in this Bill for judicial authorisation for the acquisition of communications data for the purpose of determining the source of journalistic information in a non-serious crime case. Under RIPA, a serious crime is one for which an adult with no previous convictions could expect to receive a custodial sentence of three years or more. This would therefore rule out legislating in the Serious Crime Bill in respect of applications for communications data to identify a journalist's sources relating to investigations for relevant offences under, for example, the Official Secret Act 1989, the Data Protection Act 1998 and the Computer Misuse Act 1990 (see paragraph 7.3 of the IOCC report).

New clause 4, tabled by Julian Huppert and others, seeks to get around this difficulty by, in effect, restricting the circumstances in which communications data may be acquired for the purpose of determining the source of journalistic information only to cases relating to the prevention or detection of serious crime. However, such an approach does not faithfully implement the IOCC's recommendation and, as such, would not be a satisfactory solution.

There is no other suitable legislative vehicle to take this forward in the current Parliament. That being the case, we intend to put in place an interim solution pending legislation in the new Parliament.

Under the interim arrangements, law enforcement agencies (that is, the police, the National Crime Agency and HM Revenue and Customs) would be required to use production orders, which are judicially authorised, under the Police and Criminal Evidence Act 1984 (PACE) (or the equivalents in Scotland and Northern Ireland) for applications for communications data to determine journalistic sources until such time as the new primary legislation is in place.

We will shortly publish draft clauses that would form the basis of the legislation in the next Parliament. The legislation that will definitely be required early in the new Parliament to implement the recommendations of David Anderson's Investigatory Powers Review and to deal with the sunsetting of the Data Retention and Investigatory Powers Act 2014 will provide a suitable legislative vehicle.

There is, however, one legislative step we can take in this Bill. Julian Huppert has also tabled for Report stage new clause 5 which provides that any code of practice issued under section 71 of RIPA that deals with the use of RIPA powers in relation to the prevention or detection of serious crime should include provisions which protect the public interest in the confidentiality of journalists' sources, legal professional privilege and other confidential personal information. It requires the Secretary of State to consult IOCC and to have regard to any relevant reports which he has made.

The Government agrees that the RIPA code of practice should be strengthened to underscore the need to protect the public interest in the confidentiality of journalistic sources and supports an amendment to section 71 of RIPA to this end. Again, we believe that such an amendment should, so far as possible, reflect faithfully the ambit of the IOCC's recent inquiry and the recommendations in Sir Anthony May's report. New clause "*Codes of practice about investigatory powers: journalistic sources*" therefore focuses on the public interest in the confidentiality of journalistic sources. The revised Acquisition and Disclosure of Communications Data Code of Practice will shortly be laid in draft before Parliament so that it can be considered by both Houses prior to the dissolution.

New offence of throwing articles into prison (New clause "*Throwing articles into prison*" and amendments to clauses 80 and 81 and the long title)

Under the Prison Act 1952 it is already an offence to convey certain specified articles or substances into prison, including controlled drugs, alcohol and mobile phones. The existing offences do not, however, cover other articles and substances creating a vulnerability in terms of maintaining prison security and good order. In particular, throwing packages over prison walls is a key method of supplying prisoners with new psychoactive substances (NPS). NPS are now a drug of choice among prisoners and their use can lead to mental health problems and disturbed behaviour by prisoners, including violence, with all that entails in terms of maintaining good order and security.

Whilst we have controlled approximately 500 NPSs under the Misuse of Drugs Act 1971, which automatically go on to 'List A' of prohibited items (and are therefore caught by the existing offence in section 40B of the Prison Act 1952), the police have indicated that there have been occasions where they have been powerless to prosecute persons – often members of criminal gangs – caught throwing non-controlled NPS over prison walls because it is not currently a criminal offence.

This new offence will close this loophole in the law. Whilst the immediate target of the offence is persons throwing NPS over prison walls, the offence will apply to any article or

substance thrown into a prison without authorisation. Given the ingenious ways in which contraband can be hidden in everyday items, the throwing of any item into a prison is always treated as a threat to the security of the establishment. In addition, this legislation will ensure that we can also address future threats to prison security and good order. The new offence will attract the existing authorisation regime in the Prison Act 1952. Whilst there will be limited circumstances where it would be appropriate to confer such authorisation, it may be necessary, for example, where contractors are undertaking building works and need to throw articles into prison.

The new offence will be triable either way and have a maximum penalty (following conviction on indictment) of two years' imprisonment. As with other prison conveyance offences it will be necessary to show that the person charged had intended the item to be thrown into a prison.

The new offence is part of the Ministry of Justice's wider strategy to deal with NPS in prisons in the same way as controlled drugs, and will complement the new powers in section 16 of the Criminal Justice and Courts Act 2015 to test prisoners for non-controlled drugs as part of the Mandatory Drug Testing Programme.

As announced by the then Minister for Crime Prevention in a Written Ministerial Statement on 30 October 2014 (Hansard, columns 28WS-29WS), the Government is committed to introducing a general ban on NPS instead of the current substance by substance approach. The Government is moving swiftly so that the necessary primary legislation is ready to be introduced at the earliest opportunity, notwithstanding the lack of an appropriate legislative vehicle in the current Parliament.

I am copying this letter to all members of the Public Bill Committee, Keith Vaz (Chair, Home Affairs Select Committee), Sir Alan Beith (Chair, Justice Select Committee), Dr Hywel Francis (Chair, Joint Committee on Human Rights), Julian Huppert, John McDonnell, Baroness Smith of Basildon, Lord Rosser, Lord Laming, Baroness Hamwee and Lord Strasburger. I am also placing a copy in the library of the House and on the Bill page of the Government website.

Karen Bradley