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1 March 2020

Additional evidence to Senate Standing Committees on Environment and Communications: Press Freedom Inquiry

Summary

1. This additional evidence is provided in following up some of the oral evidence on 10 Feb 2020 and specifically in relation to a question from SENATOR GREEN.

2. It has been submitted by Dr Lawrence McNamara (Reader, York Law School, University of York, UK), who gave oral evidence on 10 Feb 2020. The author bio is in the original written evidence submitted 10 February 2020.

3. It argues that the provisions for reporting to Parliament fall a very long way below that which is appropriate in a modern liberal democracy committed to the rule of law

4. It makes recommendations about how provisions requiring reporting to Parliament might be amended to make reporting more effective with regard to transparency and oversight.

Reporting requirements under the Telecommunications (Interception and Access Act) 1979

5. Section 186 sets out the matters on which the Minister must report annually to Parliament. These are, in effect:
   - The number of Journalist Information Warrants (JIWs) issued across the year
   - The number of authorisations made under those warrants

   As the 2018-19 annual report indicates at page 72, these are reported in total numbers.[1] No further information is required to be provided nor has it been provided.

[1] Dept of Home Affairs, *TIA Annual Report, 2018-19* (link), p 72.

6. These provisions are welcome inclusions in the Act but the provisions and the regime in which they sit mean that the transparency levels fall a very long way below that which is appropriate in a modern liberal democracy committed to the rule of law. The extent of secrecy associated with the JIW regime is extreme by comparable UK standards and practices.

The importance of reporting to Parliament

7. A fundamental role of Parliament is to hold the Executive to account. This is a constitutional mainstay. It is vital in a modern democracy that the Parliament has information that is necessary for that function to be carried out effectively. Where the Executive seeks to act in ways that may have adverse effects on public access to information about the actions of the government and its agencies then the Parliament should be particularly vigilant. Accordingly, when there is a risk of such adverse effects upon media access and reporting of information in the public interest then Parliament should set accountability requirements that minimise that risk. This is because the media and journalists are often "the eyes and ears of the public". That observation has been made in the context of reporters in court[2] but it applies equally in the parliamentary and executive context.[3]

8. An Executive that resists transparency and a Parliament that is reluctant to demand it, especially where there are limits on what information emerges about court proceedings, run the risk of undermining public confidence in the key institutions of a democracy.

9. There are, of course, limits to what can and should be made public, especially in the national security sphere. However, the default position should be that information is made public unless the particular circumstances in any given situation require that information be withheld. An appropriate test for that would be, for example, whether, based on the evidence, disclosure "would be damaging to the interests of national security".[4]

The approach in the TIA

10. The position in the TIA is at odds with the standards and approach set out above. The TIA takes a blanket approach to maintaining secrecy. Even if there were administrative reasons for this at the time a JIW is sought, the disclosure of information at the reporting stage should be far less problematic, especially when investigations have been concluded or a warrant executed.

11. Five examples may be taken of the provisions that illustrate the blanket approach to secrecy and the absence of reporting information that will enable Parliament to carry out its function of holding the Executive to account:

    - First, section 182A imposes blanket and extensive restrictions on disclosure of the existence of a JIW or even the fact that one has been applied for. This applies

[2] Eg, Lord Bingham in *Turkington v Times Newspapers Limited (Northern Ireland)* [2000] [UKHL 57 [4]

[3] Eg, UK Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24th Report of session 2010-2012, chapter 6 (link)

[4] This phrase is drawn from the UK Justice and Security Act 2013, s 6(11).

regardless of whether there is any evidence that disclosure would pose a risk to an investigation or to national security.[5]

- Second, section 186(4) states that reports to Parliament "must not be made in a manner that is likely to enable the identification of a person." Again, this applies regardless of whether identification would pose any risk of any kind. But very significantly, it seems also to prevent the issuing authority being identified. Section 186(2) provides that "The report may contain any other information the Minister considers appropriate" but it would seem that the express wording of s 186(4) would prevent identification.

- Third, following on from the second point, there is no requirement that the issuing authority be identified. This is extraordinary because the courts are a key safeguard and yet their participation in the process is hidden from view at every stage, including after the fact.

- Fourth, while there is some transparency around how many warrants have been issued, there is no requirement for reporting on the number and frequency of applications fro warrants. Again, given the restrictions on the visibility of proceedings and that warrants can be sought *exp parte* and without notice to the media, and that it seems a person subject to a warrant cannot disclose its existence (due to s 182A), there is no way for Parliament to judge the extent to which the Executive seeks to exercise its reach, nor any way to judge how the courts might be managing that reach.

- Fifth, there are provisions in the Act for a Public Interest Advocate to make representations in the absence of notice to the media. However, there is no requirement for reporting on how often Public Interest Advocates have been engaged.

12. In the UK the system for obtaining warrants in relation to journalistic material is very different. However, in the UK there are two useful parallels that provide examples of transparency that far exceed those associated with the TIA:
    - Reporting to Parliament under section 12 of the Justice and Security Act 2013 (JSA), and
    - Reporting on investigation errors by the Investigatory Powers Commissioner (IPC).

13. The JSA provides for the use of Closed Material Procedures in civil proceedings, under which non-state parties will not see all the evidence that the state relies on. Section 12 requires the executive to report on a range of matters associated with their use, including the number of applications the Executive has made for use of CMPs. Section 12 also has a provision that allows for inclusion of material beyond mere numbers of matters: "the report may also include such other matters as the Secretary of State considers appropriate".[6] The reports by the Secretary of State began with the mere provision of numbers but since the second annual report have provided information about the specific cases in question.[7] Time has shown that

[5] The recommendations below focus on reporting to Parliament and do not address whether this provision is justifiable. However, while making stronger requirements for reporting to Parliament is important, improving reporting will not resolve all the concerns that s 182A gives rise to.

[6] Justice and Security Act 2013, s 12(3) (link)

[7] See 'Use of closed material procedure reports', which contains all annual reports to date: https://www.gov.uk/government/collections/use-of-closed-material-procedure-reports.

it would be more appropriate to have a mandatory requirement for disclosure of specific information (unless a risk would result), but the discretionary provision in the UK is at least some safeguard.[8]

14. The IPC is a sitting or retired senior judge. The IPC report on the exercise of investigatory powers provides another example of where detail about specific matters can be provided. For each of the errors in the use of investigatory powers the IPC provides a description of 100-200 words of the issue and error in question and identifies the type of authority, the cause of the error and the consequence.[9] It is an example of how information can be provided without any risk to national security.

15. The sum position should be that where information can be made public without risk then it should be made public. The onus should fall on the state to establish, before a judicial or other independent authority, that disclosure would carry a risk.

Recommendations

16. **<u>Recommendation 1</u>: The Minister's report should identify the circumstances and individuals concerned where a warrant was issued. This should only be omitted where the Minister can establish to the satisfaction of a judicial officer or other suitable independent person that such identification would pose a risk.**

17. **<u>Recommendation 2</u>: The Minister's report should state the number of occasions on which a JIW was sought from an issuing authority.**

18. **<u>Recommendation 3</u>: The Minister's report should state the number of occasions on which Public Interest Advocates have been engaged, and for how many warrants.**

19. **<u>Recommendation 4</u>: The Minister's report should identify the issuing authority for each warrant and whether the warrant was issued or refused at first instance, and whether it was issued or refused on a revised application.**

Draft provisions to give effect to the recommendations

20. Provision to give effect to Recommendations 1-4:

The complexity of the TIA means that the following recommendations would best be given effect by a legislative drafter familiar with the structure and content of the Act. However, the following is an indicative draft.

The present Section 186(4) should be repealed and replaced with the following:

Section 186(4)(a): A report under this section should describe circumstances where each warrant was issued, including but not limited to:

(i) the identification of individuals and organisations that were the subject of warrants,
(ii) the identification of the issuing authority

[8] See L McNamara & D Lock, *Closed Material Procedures under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State*, Bingham Centre for the Rule of Law, 2014 (link)
[9] Investigatory Powers Commissioner's Office (IPCO) *Annual Report 2017*, p 114-127 (link).

(iii) whether a Public Interest Advocate was engaged
(iv) the identification of any record of associated proceedings of the issuing authority

Section 186(4)(b): Identification requirements of paragraph (a) will not apply where the Minister has established to the satisfaction of a judicial officer or suitable independent person that identification would prejudice an ongoing investigation or would be likely to damage national security.

Section 184(4)(c): A report under this section must state the number of occasions on which a Journalist Information Warrant was sought from an issuing authority.

Section 184(4)(d): A report under this section must state the number of occasions on which a Public Interest Advocate was engaged when a Journalist Information Warrant was sought from an issuing authority.

Section 184(4)(e): A report under this section must state the issuing authority for warrants and the number of times that each issuing authority:

(i) issued a warrant in the first instance
(ii) refused to issue a warrant in the first instance
(iii) issued a warrant on a revised application

21. I hope the above comments and recommendations are helpful to the Committee in its Inquiry.

Dr Lawrence McNamara

University of York, 1 March 2020