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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Special Rapporteur on the right to privacy, Joseph Cannataci, on his visit to United Kingdom of Great Britain and Northern Ireland

Comments by the State*

* The present document is being issued without formal editing.



United Kingdom response to the Report of the Special Rapporteur on the Right to Privacy following his visit to the United Kingdom of Great Britain and Northern Ireland in 2018

1. The United Kingdom welcomes the report from the UN Special Rapporteur on the Right to Privacy and his assessment of the UK's approach to balancing privacy and security. The UK welcomes in particular his recognition that significant progress has been made on the oversight of investigatory powers, and the intelligence and law enforcement agencies, since his previous visit.

2. The UK takes a world-leading approach to oversight of investigatory powers, and its regulatory structures, which ensure the right to privacy as well as the security of UK citizens. The UK Government remains fully committed to supporting human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights and relevant international human rights treaties. The UK Human Rights Act (1998) incorporates those rights set out in the European Convention on Human Rights (ECHR) into domestic UK law, including Article 8, the right to respect for private and family life, and case law has clarified that this includes the protection of personal data. We welcome the Special Rapporteur's recognition of the UK Government's commitments in this space.

The Special Rapporteur's UK visit 2018

3. The UK welcomed the opportunity to host the Special Rapporteur and his team during his visit to the UK in 2018. During his visit he had productive conversations with representatives of Her Majesty's Government, officials from the Devolved Administrations in Scotland, Wales and Northern Ireland, the Police, the Information Commissioner's Office (ICO), the Investigatory Powers Commissioner's Office (IPCO) as well as other stakeholders. Following his visit, the UK welcomed in particular the Special Rapporteur's comment that the UK has "equipped itself with a legal framework and significant resources designed to protect privacy without compromising security. Given its history in the protection of civil liberties and the significant recent improvement in its privacy laws and mechanisms, the UK can now justifiably reclaim its leadership role in Europe as well as globally."¹

The International Intelligence Oversight Forum 2019

4. The UK was pleased to support the Special Rapporteur's International Intelligence Oversight Forum (IIOF) in London in October 2019, at which safeguards on international intelligence oversight were discussed. This was an excellent forum in which representatives from governments, intelligence agencies, academic institutions and NGOs were able to share best practice and explore new ways to promote security while taking account of human rights and fundamental freedom, chiefly, the rights to freedom of expression and to privacy. The UK welcomed the Special Rapporteur's comment following the conference that "The significant reinforcement of oversight mechanisms in the UK since 2016 and thus several best practices, including some pioneered by the UK, could be explored by the participants."²

The overall picture of the UK's approach to privacy and surveillance

5. The UK was pleased to note the Special Rapporteur's comments regarding the balance needed between the right to privacy and the responsibilities of the UK's law enforcement and intelligence agencies. His view that the UK is a "textbook case of the benefits of healthy

¹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23297>.

² <https://www.ipco.org.uk/news/uns-international-intelligence-oversight-forum-meets-in-london/>.

tensions”³ between Government and civil society draws a clear link between the UK’s approach to competing interests and the strengths of our democratic processes in this area.

6. The Special Rapporteur noted the contribution of non-governmental organisations and civil society groups in forming strong policy, and their role in the ongoing discussion in this area. The UK notes his comments regarding the value that civil society groups advocating privacy can offer, especially where they understand the needs of law enforcement. The UK Government will continue to work co-operatively with stakeholders to foster a greater understanding of the necessity of our actions to maintain security and public safety in the UK.

An overview of UK investigatory powers

7. The UK welcomes the Special Rapporteur’s comments regarding the improvements he has identified in the UK’s oversight regime, which he described as “more vigorous, robust and effective”⁴ when compared to his previous visits. Investigatory powers are available to a range of specified public authorities in the UK and can be used for specific and detailed purposes, including for national security related investigations and operations.

8. A key basis of this protection is the Data Protection Act (DPA) (2018). In addition to the safeguards and limitations provided for by the DPA (2018), the Investigatory Powers Act (IPA) (2016) applies further protections and restrictions on the acquisition and use of communications and communications data by public authorities under the IPA. The IPA’s provisions also extend to the regulation of retention of, and access to, bulk personal data sets acquired by UK intelligence services e.g. through their restrictive information gateways under the Security Services Act (SSA) (1989) and Intelligence Services Act (ISA) (1994). Clearly, the IPA does not regulate in itself the acquisition of bulk personal data. Some of these safeguards and limitations are set out below.

9. Alongside the DPA (2018), the Human Rights Act (HRA) (1998) underpins the protections provided to data subjects in the UK. The HRA (1998) places a duty on public authorities to act compatibly with human rights and enables individuals to enforce those rights directly in courts in the UK. Article 8 of the ECHR provides that any interference with privacy must be in accordance with the law, in the interests of one of the aims set out in Article 8(2) and proportionate in light of that aim.

10. The safeguards provided for in the IPA (2016) reflect the UK’s international reputation for protecting human rights. All the statutory protections are supported internally by rigorous physical, technical, and procedural requirements. These include vetting of personnel, additional handling restrictions based on the classification of data, firewalling of internal IT, and access restrictions based on the established principle of ‘need to know’. These controls provide for strong protections for personal data and ensure in particular that it is held securely.

The Investigatory Powers Act (2016)

11. The UK welcomes the recognition by the Special Rapporteur that the introduction of the IPA (2016) has significantly strengthened provisions of intelligence oversight by law. This legislation introduced unprecedented transparency and world leading privacy, redress, and oversight arrangements which strengthen previous safeguards, such as those set out in the Regulation of Investigatory Powers Act (RIPA) (2000).

12. The IPA (2016) makes clear the circumstances in which various investigatory powers may be used and the strict safeguards that apply to prevent abuse. The Act requires that the use of investigatory powers must always be justified on the grounds of both necessity and proportionality: it must be necessary for the purpose specified; and the action authorised must

³ A/HRC/46/37/Add.1 paragraph 13.

⁴ A/HRC/46/37/Add.1 page 17.

be proportionate to the outcome sought to be achieved. If the proposed action is not both necessary and proportionate it cannot be taken.

13. The IPA (2016) sets out general duties regarding privacy to make clear that the protection of privacy is at the heart of this legislation. Public authorities therefore must have regard to whether the same effect could reasonably be achieved by less intrusive means and whether additional safeguards are required due to the sensitivity of the information.

14. Lord Anderson QC, the former Independent Reviewer of Terrorism Legislation concluded in a report in 2015: “the collection and retention of data in bulk does not equate to so-called “mass surveillance”. Any legal system worth the name will incorporate limitations and safeguards designed precisely to ensure that access to stores of sensitive data is not given on an indiscriminate or unjustified basis. Such limitations and safeguards certainly exist in the [Investigatory Powers] Bill.”⁵

15. The IPA (2016) legislative framework is supported by statutory codes of practice on each of the key investigatory powers, providing a transparent and comprehensive explanation of how powers are to be used by public authorities.

16. The IPA (2016) also introduced a double lock mechanism, whereby a decision by the Secretary of State, (or Scottish Minister and in certain circumstances, a law enforcement chief) is required to authorise specific use of the most intrusive powers, and is also subject to mandatory review and approval by an independent Judicial Commissioner before it can have legal effect.

17. Given this particular set of safeguards, the UK strongly rejects the Special Rapporteur’s suggestion that “the system of having politicians involved in signing off on warrants of interception remains inherently open to abuse if a conflict of interest should arise as to whom it is being proposed be put under surveillance.”⁶ All UK ministers are subject to the Ministerial Code⁷, which is the set of rules and principles which outline the standards of conduct for government ministers. Ministers are also accountable to UK Parliament as well as to the UK’s regulatory oversight bodies.

18. Above all, the safeguards in the IPA (2016) continue to reflect the UK’s international reputation for protecting human rights. This unprecedented transparency sets a new international benchmark for how the law can protect both privacy and security whilst continuing to respond dynamically to an evolving threat picture.

19. In addition to the extensive legislative framework, there is ministerial oversight and accountability; parliamentary oversight by the Intelligence and Security Committee (ISC) of Parliament; and independent oversight from both the Information Commissioner (powers and functions provided for in the DPA (2018)), and Investigatory Powers Commissioner, a role established under the IPA (2016).

Bulk data

20. The United Kingdom has considered the Special Rapporteur’s comments regarding the use of ‘bulk’ data in the context of maintaining national security, particularly the view that “the very collection of personal data, even without analysis, has significant risks for society which should be avoided if at all possible.”⁸

21. The UK wishes to clarify further the circumstances in which these powers are used, as well as the clear statutory framework and safeguards against abuse which the IPA (2016) provides.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546925/56730_Cm9326_WEB.PDF page 4 paragraph 1.9.

⁶ A/HRC/46/37/Add.1 page 4.

⁷ <https://www.instituteforgovernment.org.uk/explainers/ministerial-code>.

⁸ A/HRC/46/37/Add.1 page 19 paragraph 36.

22. The UK is reassured that the Special Rapporteur recognises the challenges faced by Law Enforcement Agencies and UK Intelligence Community (UKIC) with the maintenance of security and public order. Terrorists and criminals have embraced social media and new technology to radicalise, recruit, inspire, plan, coordinate and increasingly to execute their attacks. Evolving technology, including more widespread use of the internet and ever-more internet-connected devices, stronger encryption and cryptocurrencies, continue to create challenges in fighting terrorism.

23. In this context, and given data is more dispersed, localised and anonymised, bulk powers have proved essential to UKIC over the last decade and will be increasingly important in the future to identify threats that cannot be identified by other means.

24. Bulk data enables UKIC to identify new threats, wider networks, attack planning and threats overseas. Within the UK itself, the analysis of bulk communications data or bulk personal datasets is often the only way for UKIC to progress investigations and identify terrorists from very limited lead intelligence, or when their communications have been deliberately concealed.

25. Lord Anderson's independent review into the operational case for bulk powers in 2016 made absolutely clear the critical importance of bulk powers to UKIC. It concluded that: "The bulk powers play an important part in identifying, understanding and averting threats in Great Britain, Northern Ireland and further afield."⁹

26. Lord Anderson stressed that bulk interception is of "vital utility" to UKIC and alternative methods fall short of providing the same results. In one case assessed by the review team, in which a kidnap had taken place in Afghanistan, the report finds that: "Without the use of bulk interception, it was highly likely that one or more of the hostages would have been killed before a rescue could be attempted."¹⁰

27. Bulk powers are not indiscriminate and can only be used where it is necessary and proportionate to do so, as with other powers. UKIC are always required to operate in accordance with strict safeguards and under parliamentary, independent judicial and ministerial oversight.

28. The IPA (2016) established a clear statutory framework for the bulk powers available to the UKIC, providing robust, consistent safeguards across all of those powers.

Review of the IPA (2016)

29. In line with statutory requirement, a report on the operation of the Investigatory Powers Act (2016) will be prepared in 2022. Consideration will be given to the comments made by the Special Rapporteur in his report.

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546925/56730_Cm9326_WEB.PDF page 1.

¹⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546925/56730_Cm9326_WEB.PDF page 85 paragraph 5.26.