

## Consultation on establishing a UK Privacy and Civil Liberties Board

### Response from Open Rights Group and Privacy International

#### **Question 1**

*To what extent do you agree or disagree that independent oversight enhances the fairness and effectiveness of counter-terrorism legislation and powers?*

Strongly agree

*Please give reasons for your answer.*

Independent oversight of both counter-terrorism legislation and surveillance legislation is necessary to ensure the legislation operates in compliance with human rights law, and that discretionary powers are exercised in a lawful and non-arbitrary manner. However, the form of oversight proposed in the present consultation is weak, lacks independence and is limited to narrowly defined counter-terrorism legislation to the exclusion of surveillance and 'national security' legislation. We believe this draws an artificial distinction between the types of legislation and excludes legislation that urgently requires increased oversight. This is not the oversight that was anticipated as it was introduced as compensation for the accelerated approval of the Data Retention and Investigatory Powers Act (DRIPA).

In order to be truly independent and effective, oversight of specific executive actions should be provided by Judges rather than by a panel appointed by the executive. It should take the form of prior authorisation of decisions on a case-by-case basis, rather than a limited review after the event. Whilst any Privacy and Civil Liberties Board would fall far short of truly independent and effective oversight of executive action, we recognise that such a Board could contribute to a degree of improved oversight of the way in which the legislation is implemented, if its remit, powers and technical abilities are sufficient.

#### **Question 2**

*Do you support the proposal to establish a statutory Privacy and Civil Liberties Board, which would support the role of the Independent Reviewer of Terrorism Legislation?*

No

*Please give reasons for your answer.*

We think this question is unhelpfully formulated, as we support the idea of a Board in general, but not one that has the stated purpose of supporting the role of the Independent Reviewer of Terrorism Legislation.

We welcome the laudable intentions that have led to proposals for an independent counterpoint to the interests of the intelligence agencies, and in principle we would be in favour of establishing such a Board. However, the proposed remit and function of the Board are so narrow that we do not support the proposal in its current form. We note that the creation of the Board was announced in the context of the Data Retention and Regulatory Powers Act (DRIPA), creating the impression it would

review surveillance powers, but its proposed remit does not extend to DRIPA or RIPA (Regulation of Investigatory Powers Act) only to narrowly defined terrorism legislation. If the remit of the Board were to be extended to the operation of all surveillance legislation, including DRIPA and RIPA, we would be more likely to support it. We also note that the Board's proposed functions are too limited, for example they do not appear to include reviewing executive action. With respect to surveillance legislation, both DRIPA and RIPA vest considerable powers in the executive to issue orders; were the Board to have a remit which covered surveillance legislation its functions would have to specifically include review of executive action. However, if the Board's powers and ability to access sensitive information were to be increased alongside its remit we would be more likely to support it.

Rather than supporting only the Independent Reviewer of Terrorism Legislation, the Board's remit should extend to supporting other oversight mechanisms, including:

- The Interception of Communications Commissioner;
- The Intelligence services Commissioner;
- The Investigatory Powers Commissioner for Northern Ireland;
- The Chief Surveillance Commissioner;
- The Assistant Surveillance Commissioners; and
- The Information Commissioner's Office.

We also highlight that a Board alone would not be sufficient to rectify the current problems. As discussed above there is an urgent need for accompanying the establishment of an ex post oversight body with a legislative requirement for prior judicial authorization of specific surveillance decisions. A Board would also need to form part of the end of the culture of secrecy and the out-of-date 'cold war' mentality across the intelligence agencies.

### **Question 3**

*To what extent do you consider that a Privacy and Civil Liberties Board would add value to the oversight arrangements for counter-terrorism legislation and related powers?*

Tend to disagree

*Please give reasons for your answer.*

The real problem that must be addressed is the lack of effective oversight of surveillance legislation including RIPA and DRIPA. The consultation begins from an incorrect assumption that the purpose of a Privacy and Civil Liberties Board would be to provide oversight for narrowly defined counter-terrorism legislation. We have no view as to whether it would add value to the oversight of the specified counter-terrorism legislation, but it is clear that an opportunity is being missed to increase oversight of surveillance legislation. Increased oversight of surveillance legislation is likely to make it more acceptable to the public, who currently view it with concern.

As the Board in its proposed form is only supportive of the Independent Reviewer there will be little change from the current situation. It appears the Board would be subject to the same constraints and would have no new powers. The existence of the Board may also serve to remove the incentive to create more effective oversight mechanisms. The Board should form part of a more general move towards increased

transparency and reduced secrecy if it is to add real value.

#### **Question 4**

*What, in your view, are the likely benefits of creating a Privacy and Civil Liberties Board?*

As discussed in question 1, a Privacy and Civil Liberties Board would fall far short of providing truly independent and effective oversight, which must be exercised by Judges and should consist of prior authorisation of surveillance decisions. However, we recognise that in principle such a Board could contribute to improved oversight, if its remit and powers were to be sufficient. A Board has the potential to force real change and be of genuine benefit if it is truly independent and produces challenging public reports. The ultimate aim is to ensure legislation and executive actions comply with human rights obligations. Unfortunately the present proposal unnecessarily limits the remit and functions of the Board. We do not believe it would bring any significant benefit in the form in which it is proposed.

*Please give reasons for your answer.*

Please see above.

#### **Question 5**

*Do you agree that the principles / objectives set out above at 5.1 of this consultation paper fully encompass the key elements required for effective oversight of UK counter-terrorism laws and powers?*

No

*Please give reasons for your answer.*

The proposed Board's remit has inexplicably been tied to that of the Independent Reviewer of Terrorism Legislation, who already seems to act effectively in most cases. The Board was announced in the context of DRIPA, whereas its proposed remit does not extend to DRIPA or RIPA, only to a narrow list of terrorism legislation. Its mandate should include all surveillance or 'national security' legislation. As mentioned at paragraph 7.8 of the consultation document, David Anderson has praised the corresponding Australian legislation, which allows the Monitor to review any other law relating to counter-terrorism and national security.

The clear limitations of an ex post oversight Board such as the current proposal are well illustrated by looking at the failure of the corresponding US model (the Privacy and Civil Liberties Oversight Board or PCLOB) to identify and expose the unlawful activities of US intelligence services prior to the publication of documents leaked by National Security Agency whistleblower Edward Snowden. The telephone metadata collection programme operated by the NSA, ruled unconstitutional by the Eleventh Circuit Court of Appeals in June 2014 in *United States v Davis*, was not prevented by the US PCLOB, the powers of which are more expansive than the current proposed UK PCLB model. The US PCLOB is able to initiate its own investigations and members of Congress are able to ask it to investigate matters (which they did in

respect of surveillance). It has a designated role related to signals intelligence under Presidential Policy Directive 28.<sup>1</sup>

With respect to the listed core objectives of the proposed UK Board, if part of the Board's mandate is to consider whether counter-terrorism measures are "sufficient to meet the threat", then it is not really a "privacy and civil liberties" Board. From a human rights perspective, calculating the appropriateness of a particular measure requires an assessment not of whether it is sufficient, but whether it is strictly necessary to meet the threat. The operational adequacy of the measure is a consideration for the Home Office, not an oversight Board.

One of the Board's key objectives is defined as providing public assurance. This suggests that the Board may represent a PR exercise rather than a genuine attempt to provide independent oversight. Public trust in the security services is a vitally important issue, however it is best served through the establishment of a Board that is genuinely independent and produces effective public reports with the potential to force real change.

We note that currently the Board's proposed functions include: reviewing the operation of legislation (not executive action); advising the government (not parliament); and carrying out inquiries including at the direction of Ministers. It thus appears the Board will be assisting the government rather than providing independent oversight.

It must also be made clear that the government cannot "outsource" human rights considerations to the Board. All government personnel must take account of human rights considerations as they are subject to human rights obligations. The term "Privacy and Civil Liberties" was likely used in the US on the basis of the US constitution. In the UK we have binding human rights obligations so the Board's title should reflect this rather than simply adopting the weaker American terminology. In addition, it is unclear why the positive term "oversight" has been excluded from the UK Board's title.

We concur with the findings of the Joint Committee on Human Rights and we make further recommendations. First, the Committee found that:

*"the Independent Reviewer should not chair the new Board, particularly if there is to be differential access to sensitive material... the proposed Privacy and Civil Liberties Board should exist separately from the Independent Reviewer and issue reports which may be of use to the Independent Reviewer in his work."*<sup>2</sup>

Our recommendation goes further as we believe differential access is problematic. If the Board is to scrutinize executive action effectively it should have access to sensitive material. However, we recognize that this raises problems in respect of security screening and members potentially being forced to sign the Official Secrets Act. This issue requires more discussion and consultation. It may be that a digest of sensitive material would have to suffice for non-security-screened members of the Board. We believe it is very important that the Board is not constrained in what it can communicate to the public. We wish to emphasize that the reports must be public

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<sup>1</sup> <http://www.pclob.gov/about-us.html>

<sup>2</sup> Legislative Scrutiny: Counter-Terrorism and Security Bill - Human Rights Joint Committee, para 7.7, available at: <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/86/8609.htm>

reports. As discussed above, we also believe the Board should have a broader remit than the Independent Reviewer currently does. This point is also addressed by the Joint Committee, which recommended:

*“...the major gaps in his functions should be filled by extending his remit beyond the four specific statutes that he currently reviews, to cover all terrorism legislation and other areas of law to the extent that they are applied for counter-terrorist purposes, such as immigration law and the prerogative power in relation to passports.”*

Our view is consistent with the Joint Committee’s, but it must also be clear that the remit of the Board includes surveillance and national security legislation. As set out in our response to question 2, the Board should have a role in supporting not only the Independent Reviewer but also the various commissioners who oversee surveillance, including the Interception of Communications Commissioner.<sup>3</sup>

### **Question 6**

*What do you think would be the optimum number of members for the Privacy and Civil Liberties Board?*

We do not have a strong preference in terms of the number of members, provided the Board is properly balanced and is on a scale where discussions (rather than debates) remain feasible.

*Please give reasons for your answer.*

From our perspective it is not the number of members of the Board that is a concern, it is the balance of the Board. In the US, PCLOB is described as ‘bipartisan’ but the same arrangement would not make sense in the UK context. The Board as a whole should be comprised of representatives from a) a civil society organisation; b) the technical community; c) the legal community. It is important that all members of the Board must have access to relevant materials or a digest of them for non-security-screened members sufficient to be trusted and provide relevant insight in the view of security-screened members.

The inclusion of consideration of whether measures are “sufficient to meet the threat” suggests a member of the security establishment would be included in the membership. This would be problematic if the individual were to have privileged access to documents above the other members of the Board, which would lead to an unacceptable imbalance.

### **Question 7**

*Do you consider that there are any pre-requisites in terms of background or qualifications (for example, legal background) for appointment to a Board of the kind envisaged?*

Yes

*Please give reasons for your answer.*

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<sup>3</sup> See question 2 for a full list of relevant commissioners

As set out in the above answer, the balance of the Board is vitally important. In the US, PCLOB is described as 'bipartisan' but the same arrangement would not make sense in the UK context. The Board as a whole should have representation from a civil liberties organisation; someone with technical knowledge; and legal expertise. Whilst the function of considering whether measures are "sufficient to meet the threat" suggests a member of the security establishment would be included in the membership, it would be difficult for them to meaningfully participate. Including a member of the security establishment would be beneficial only if the other members of the Board were given equal access to material and if the individual were sufficiently independent to provide a critical view. It is hard to see how an active member of the security or intelligence services could fulfil these criteria. It is also unclear which individuals in the UK would be considered sufficiently part of the establishment to be appointed but independent enough to provide a critical view.

### **Question 8**

*Who would you consider the most appropriate individual to appoint people to the Board?*

No individual. Parliament.

*Please give reasons for your answer.*

We consider this question is also misconceived. It assumes that an individual will appoint the Board, rather than a body such as Parliament. If a Board is to provide independent oversight the executive should not appoint it.

### **Question 9**

*Do you think these Acts (at 7.7) are the right areas of counter-terrorism law to be subject to independent review?*

No

*Please give reasons for your answer.*

As discussed above, we disagree that any oversight Board should be limited to reviewing the listed Acts, and we further disagree that it should be limited to narrowly defined counter-terrorism law. Any privacy and civil liberties Board should be empowered to review all counter-terrorism, surveillance and national security related laws.

### **Question 10**

*Are there, in your view, other areas of counter-terrorism laws which should be subject to independent review or oversight?*

Yes

*Please give reasons for your answer.*

All terrorism, surveillance and national security related laws should be subject to independent oversight (in addition to the Acts listed at 7.7 of the consultation

document). These include:

- Regulation of Investigatory Powers Act 2000 (RIPA)
- Data Retention and Regulatory Powers Act 2014 (DRIPA)
- Anti-Terrorism, Crime and Security Act 2001
- Security Service Act 1989
- Intelligence Services Act 1994
- Those aspects of the Telecommunications Act 1984 relating to surveillance
- Protection of Freedoms Act 2012
- Police and Criminal Evidence Act 1984
- Counter-Terrorism Act 2008;
- Justice and Security Act 2013; and
- If enacted, the Counter-Terrorism and Security Bill 2014

### **Question 11**

*To what extent do you agree or disagree that an annual programme of work setting out what the Board will report on (in addition to any statutory requirements of the Independent Reviewer), would ensure a sufficiently flexible approach?*

Strongly disagree

*Please give reasons for your answer.*

The Board should have the flexibility to report on issues it identifies as being of concern. Unduly restricting the Board to an annual programme of work would leave it unable to react to changing events and new threats to privacy or other human rights. We note that the US PCLOB is not limited to a rigid annual work programme and that David Anderson appears to favour increased flexibility (paragraph 7.8 of the consultation document).

### **Question 12**

*Under such an arrangement, who, in your view, should be responsible for determining the work programme for review of counter-terrorism laws and powers?*

The Privacy and Civil Liberties Board itself should be responsible for determining its own work programme.

*Please give reasons for your answer.*

As discussed above, the Board should have sufficient powers and flexibility to enable it to investigate emerging issues that are of concern for the Board. It should also be able to respond to requests from the independent Reviewer, the various oversight commissioners, the government and Parliament. It will be necessary for another body to have responsibility for governance issues relating to the Board. Further discussion and consultation is needed on which body this would be.

### **Question 13**

*Are there any others views or comments that you would like to add in relation to the proposal set out in this consultation document that were not covered by the other questions in this consultation?*

Yes

*Please give reasons for your answer.*

The following are important considerations:

1. How the Board fits within the wider government structure. Including:
  - Who the Board reports to – it should be appointed by Parliament (see also question 8). We believe further discussion and consultation is needed regarding the status of the Board. It should be an independent body protected from executive influence but not part of the Parliamentary machinery;
  - Who sets its agenda – the Committee itself should set the agenda (see question 12); and
  - Who chairs it – this must be someone who is a privacy and civil liberties advocate.
  
2. The Board's scope / remit. Including:
  - Which legislation it will cover - this should include all surveillance and national security related legislation as well as counter-terrorism legislation (see questions 1,2,3,5,9,10); and
  - Whether it includes reviewing executive actions as well as legislation – the remit must include this power (see questions 2,5);
  
3. The Board's functions and operational issues. Including:
  - Preparation of reports – it should be mandated to publish a certain number of reports per year;
  - Provision of advice – to the Independent Reviewer, the Government, the Surveillance Commissioners and the Interception of Communications Commissioner (see question 2);
  - Access to documents – the Board members must be allowed access to sensitive documents or at least digests of sensitive information (see questions 5 and 6);
  - The Board's functions should include those of the US PCLOB, as set out in the PCLOB's Enabling Statute.<sup>4</sup> We recommend reviewing that statute. In summary, these functions include:
    - 1) Advice and counsel on policy development and implementation, including:**
      - review proposed legislation, regulations, and policies
      - review the implementation of new and existing legislation, regulations, and policies
      - advise the executive to ensure that privacy and civil liberties are appropriately considered in the development and implementation of legislation and policies
      - providing advice on proposals to retain or enhance a particular governmental power, considering whether the executive has established:
        - that the need for the power is balanced with the need to protect privacy and civil liberties;
        - that there is adequate supervision of the use of

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<sup>4</sup> [http://www.pclob.gov/library/42USC2000ee-PCLOB\\_Enabling\\_Statute.pdf](http://www.pclob.gov/library/42USC2000ee-PCLOB_Enabling_Statute.pdf)



- the power to ensure protection;
  - that there are adequate guidelines and oversight to properly confine its use.
- 2) **Oversight, including** continually reviewing:
  - the regulations, policies, and procedures, and their implementation by the executive to ensure that privacy and civil liberties are protected;
  - the information sharing practices of the executive, to determine whether they appropriately protect privacy and civil liberties and adhere to information sharing guidelines;
  - other actions by the executive, to determine whether such actions appropriately protect privacy and civil liberties and are consistent with governing laws, regulations, and policies
- 3) **Testimony**
  - Members should appear and testify before Congress upon request.

We would also like to draw attention to the helpful guidance prepared by the Centre for Technology and Democracy (CDT) in light of its experience with regard to the US PCLOB.<sup>5</sup> We are in agreement with CDT’s recommendations, which are set out below for ease of reference:

Any privacy and civil liberties oversight body should be:

- **Part of a complete, well-functioning, and transparent system of checks on surveillance powers, including judicial checks.** In the US, as in the UK, we have struggled to hold intelligence agencies accountable before courts and legislative bodies. These other checks on the agencies’ activities are crucial, and an oversight body such as PCLOB does not (and cannot) serve as an adequate replacement for them. One thing an oversight board can do is make findings and recommendations that inform the decisions and policies of these other bodies, as PCLOB does.
- **Fully empowered to obtain all necessary documents and testimony.** Despite repeated urging by civil-liberties groups, the US Congress has not yet given the US PCLOB the power to compel any person or entity to produce documents (or testify). (By a majority, the Board may decide to ask the Attorney General to compel the production of documents—or compel witnesses to testify—but the Attorney General is not required to comply with such a request.) US PCLOB members have assured the public that they have received access to all of the information that they require, but the power to compel such access where necessary remains desirable. Regardless of whether an oversight body has the power to order the production of documents and witnesses in this manner, all members should have (or be eligible to obtain) security clearances at whatever level is necessary for them to do their work effectively. This may limit the number of potential candidates for membership in the body, but the ability to view classified information will be essential to their tasks.
- **Independent.** By statute, the US PCLOB is “an independent agency within the executive branch,” meaning that it is not subservient to any other authority

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<sup>5</sup> The guidance is available at <https://cdt.org/blog/how-to-build-an-effective-pclob-cdts-recommendations-to-the-uk-government/>

and is not in any way affiliated with the agencies whose surveillance activities it oversees. Furthermore, its members cannot be current employees of the federal government, and the executive branch does not have the power to terminate their service on the Board. Congress substantially increased PCLOB's independence after an earlier iteration of the oversight board (with different members) permitted the White House to censor portions of a report it had written.

- **Able to refer abuses of power to prosecutors.** The statute that established the US PCLOB emphasizes the importance of civil liberties and explicitly acknowledges the possibility that the US government may misuse its surveillance powers and/or overstep its legal bounds. However, the statute unfortunately does not give PCLOB the power to refer cases of suspected criminal violations of the law for prosecution.
- **Expert and credible.** The required qualifications of the members of such an oversight board should be considered carefully. The US PCLOB includes lawyers with extensive expertise in privacy, data security and counterterrorism, as well as a former judge who served on an appeals court that regularly handles cases involving national security. Although the president appoints the Board's members, the Senate must confirm each of them. These requirements help to ensure that appointees are credible and that their recommendations will be taken seriously.
- **Balanced and representative of different views.** While all of the members of this type of oversight body should be committed to privacy and civil liberties, they should also be diverse as to gender, race, ethnicity and religion and include a variety of experiences and viewpoints.
- **Transparent (and charged with promoting transparency).** The US PCLOB regularly holds public hearings and invites public comment, and it is able to enter a closed session when reviewing classified material. Both are essential attributes of a well-functioning oversight body. By law, the US PCLOB is required to make its reports public "to the greatest extent that is consistent with the protection of classified information and applicable law." To date, much of the evidence and documentation upon which the Board has relied remain classified. The Board has sought and obtained the declassification of some materials; however, the fact that many documents remain classified means that it is sometimes difficult to evaluate the extent to which the Board's reports are fully informed. It may be advisable for the new UK oversight body to be able to recommend the declassification of particular documents and to trigger a mandatory process to evaluate whether such documents should be declassified.
- **Adequately funded and staffed.** It would be difficult to overstate how miniscule the resources the US government has allotted to the PCLOB are in comparison with the amount it has budgeted for the intelligence agencies and relevant private contractors. Better funding and an increase in staff support would likely lead to broader and deeper oversight of clandestine surveillance activities. All members of such an oversight board should be fully compensated.
- **Willing and empowered to ensure respect for the rights of non-citizens and non-residents.** The oversight body's charter should make it clear that the body's responsibilities extend to ensuring respect for the fundamental

rights of persons who are not citizens or residents of the country that establishes it. The US PCLOB's statutory authorization is silent on this point, although the Board has stated an intention to weigh the rights of non-US persons.

- **Obligated to report its activities and findings.** The US PCLOB is required by law to issue at least two reports per year concerning its activities, findings and recommendations, as well as any minority views among its members. It sometimes issues additional reports on particular matters.
- **Inclusive of, or supported by, independent and competent technical experts.** Given the level of complexity of the technology implicated in today's secret surveillance programs, it is essential for an oversight board to include members or staff who have substantial training in computer science or engineering, or to be empowered to retain advisors who have such specialized training. While the US PCLOB does not include any computer scientists, the Board has the power to retain consultants with such qualifications where necessary.