The Media Lawyers Association
Defending freedom of expression

Response to the Government Consultation on the Investigatory Powers Act 2016 and the treatment of Communications Data.

Background

1. This is a response to the Government's consultation, *Investigatory Powers Act 2016: Consultation on the Government's proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data,* published in November 2017*.*

2. The Consultation invites responses to the Draft Communications Data Code of Practice ("the draft Code") and proposes changes to the Investigatory Powers Act 2016 ("the IPA") by draft Data Retention and Acquisition Regulations ("the draft Regulations").

3. The draft Regulations are the Government's response to the decision of the Court of Justice of the European Union ("CJEU") in the joined cases of *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* C-203/15 and C-698/15 ("*Watson*") that the Data Retention and Investigatory Powers Act 2014 ("DRIPA") was incompatible with EU law, including the Charter of Fundamental Rights of the European Union.

4. This response is from The Media Lawyers Association ("MLA") is the association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies.

5. This document has also had input and is supported by:

    a) The News Media Association is the voice of national, regional and local news media organisations. Their 1100 titles are read by 48 million adults in print and online each month ("NMA")

    b) The Society of Editors is the association of editors, managing editors, editorial directors, training editors, editors-in-chief and deputy editors in national, regional and local newspapers, magazines, radio, television and digital media, media lawyers and academics in journalism education. It has nearly 400 members.

    c) The NUJ represents journalists and media workers across the UK and Ireland. The union was founded in 1907 and has 30,000 members. Representing staff, students and freelances working at home and abroad in the broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media

and as photographers. The union is not affiliated to any political party and has a cross-party parliamentary group.

6. All of the above organisations are content for this response to be published and duly attributed. For the purpose of this joint response, the organisations are referenced as "the Media Associations".

Introduction

7. The Media Associations consider that the IPA provides inadequate procedural and substantive protections for journalistic sources. The Media Associations remain concerned that the scope of the Act is overbroad and its safeguards insufficiently robust to meet the standards laid down in the case law of both the CJEU and on the European Convention on Human Rights ("ECHR").

8. This Response is in four parts:

   a) General concerns arising from the Consultation;
   b) *Watson* and the proposed changes to the Act;
   c) Suggested changes to the draft Regulations; and
   d) Suggested changes to the draft Code.

9. The Media Associations focus specifically on thematic concerns arising from the Consultation, the draft Code and the draft Regulations; and on specific amendments to the draft Code and the draft Regulations necessary for the protection of the rights of journalists and journalistic sources, including under Article 10 EHCR. A failure to comment on other matters should not be taken as an indication of support by the Media Associations for the proposals in the Consultation.

a) General concerns arising from the Consultation

10. The Media Associations have a number of overarching concerns which arise from the Consultation:

    i) **Interpreting the law:** The Media Associations are concerned that the Government's reading of the decision in *Watson* is overly narrow. The Government's position on the case has been subject to limited judicial scrutiny and we are aware that a further reference to the CJEU has been made. This focuses on the application of the principles in the case to activities for the purposes of national security and is beyond the scope of this Consultation.[1] The Media Associations are acutely conscious that the Government's interpretation of the case is unlikely to alter during the course of this brief Consultation exercise. However, the approach of the CJEU reflects and draws upon the case-law of the European Court of Human Rights on evolving use of bulk and digital

[1] *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*, IPT/15/110/CH , 8 September 2017.

surveillance.[2] In reading *Watson* narrowly, the Government will continue to exercise the wide-reaching surveillance powers in the IPA in a manner which is likely to be incompatible with individual rights. This creates significant further litigation risk and endangers public confidence in both the Executive and the rule of law.

ii) **The role of Parliament:** The Government proposes to make changes to the IPA in the draft Regulations by Section 2(2) of the European Communities Act 1972. Section 2(2) creates the power for Ministers to make provision by secondary legislation, in Regulations, for the for the "*purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised*" or for the purposes of "*for the purpose of dealing with matters arising out of or related to any such obligation or rights*". The draft Regulations must be approved by affirmative resolution of Parliament. Both Houses may wish to closely scrutinize the extent to which these proposed draft Regulations give effect to the judgment in *Watson.* For example, the Government considers that it has a broad discretion in defining "serious crime" for the purposes of its response to the CJEU in *Watson.* Parliament may wish to consider whether Regulations which widen the definition of "serious crime" in the IPA are for "the purpose of" giving effect to that decision (we consider this issue in some detail, below). The safeguards and limitations in the Act were subject to parliamentary consideration, both in pre-legislative scrutiny and during its passage. (The scope of the Regulations will, of course, be open to the scrutiny of the domestic courts, to the extent that they may appear to step outside the scope of the power in Section 2(2)).

iii) Respecting rights in the Codes: Parliament was assured that the Codes of Practice issued pursuant to the Act would help ensure the lawful and fair implementation of the IPA, consistent with the General Privacy Protections in Part 1 of the Act and the Human Rights Act 1998 ("HRA"). The Media Associations consider that each of the Codes, including this one, fail to give adequate prominence to the principles underpinning the Act; to the significance of key safeguards provided for by the IPA; and provide limited guidance on the impact of the duties imposed on public authorities by the HRA and EU law. The Media Associations recommend that greater prominence should be given to substantive guidance on necessity and proportionality, and on specific human rights risks, not limited to privacy, but including Article 10 ECHR on freedom of expression, and Articles 6 and 14 ECHR where relevant. This should be clear and detailed, and should outline the key principles in well-known case law in a way which can be easily followed by officials. The Codes should help provide a road map to lawful decision making in practice. The Media Associations consider the current draft

[2] See, for example, *Zakharov v Russia,* App No 47143/06, 4 December 2015, [250]. See also *Szabó and Vissy v. Hungary (Application no. 37138/14),* 12 January 2016, [73]. The European Court of Human Rights will reach judgment shortly in a series of cases on surveillance and data retention in the UK, including *Big Brother Watch and others v UK*, App No 58170/13; *10 Human Rights Organisations v UK*, App No 24960/15.

Code falls far short of this standard. For example, in considerations on proportionality in Section 3, there is limited reference to the public interest, beyond privacy and the integrity of systems (reflecting the Act). Such reference to freedom of expression and journalistic material is limited and distinct from the Code's consideration of public interest (see draft Code [3.18]). There is no consideration of the fact that less intrusive powers or investigative tools should be used before resorting to the measures in the IPA which pose a significant interference with Convention rights. The Code should make clear, from the outset, and again in Section 3, that public authorities remain bound by the HRA, the Equality Act 2010 and by EU law in discharging their duties under the IPA. We make further detailed recommendations for changes to highlight the significance of human rights – and specifically freedom of expression – in decision making pursuant to the IPA, below.

iv) Journalistic material and sources: The Media Associations consider the protection offered in the draft Code for journalistic material and sources is wholly inadequate. As drafted, we consider that the draft Code could significantly undermine the safeguards provided in the Act for the protection of journalistic activities and could lead to significant violations of the right to free expression as guaranteed by both the HRA and the common law. The draft guidance on defining and identifying acts of journalism, and on identifying any journalistic source, currently adopted in the draft Code is likely to rob genuine journalistic acts of protection, in violation of Article 10 ECHR. The standard of protection offered to journalism in domestic law, the ECHR and EU law is recognised by the inclusion of such activities in the protected classes offered some statutory protection against abuse in the IPA. That the right of journalists to protect their sources is a "*cornerstone*" of the freedom of the press is closely protected by both the European Court of Human Rights and the domestic courts.[3] That this right is crucial both for the press and the wider community means weighty justification is required before any interference can be justified.[4] In *Goodwin v United Kingdom* (1996) 22 EHRR 123*,* the Grand Chamber explained that interfering with the confidentiality of a journalist's source can only be justified by "*an overriding requirement in the public interest*" (at [39]). This test is expressly recognised in Section 77(6)(b), IPA and it should form the backbone of the guidance on journalism and free expression in the draft Code. References to key case law and these principles can and should be used to help officials understand the significance of the safeguards provided in Section 77 for the press and individual sources. We make some recommendations for amendments to the draft Code, below.

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3 See, for example, *Sanoma Uitgevers BV v The Netherlands* (GC), App No 3224/03, [50]; *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, [113].

4 In *Goodwin v United Kingdom,* the Grand Chamber explained that interfering with the confidentiality of a journalist's source can only be justified by "an overriding requirement in the public interest" (at [39]). Considering this obligation, David Anderson QC in *A Question of Trust,* concluded that the threshold that must be passed is significantly higher than the ordinary necessary and proportionality test. See David Anderson QC, *A Question of Trust*, June 2016, [5.49]

Robust guidance is required to ensure that, in circumstances where surveillance will most-often remain secret and isolated from challenge, that journalists and their sources can have some confidence that public authorities are acting with respect for their rights, subject to the oversight of the Investigatory Powers Commissioner ("IPC") and the Judicial Commissioners ("JC").

b) *Watson* and the proposed changes to the Act

i) The scope of data retention and acquisition: definitions

11. The Government considers that the conclusions of *Watson* are relevant only in so far as it relates to "Events" data as distinct from "Entity" data as defined in Section 261, IPA. Media Associations do not share this confidence. Not least, there may be circumstances where the disclosure of subscriber or "Entity" data might be sufficient to undermine the confidentiality of a source, when combined with other information. Since this distinction is at the heart of the Government's proposed new approach, permitting different approaches to Entity and Events data, getting this right will be crucial. The definition of Entity data in the Act includes information about users, including as to their location (except in so far as this extends to "Events data"). The Consultation does not explain clearly how the Government intends this distinction to be operated in practice. The experience of the Regulation of Investigatory Powers Act 2000 and the evolution of digital technology has taught UK lawyers that the definitions used in surveillance law are exceptionally important, but that black lines can fade to grey as technology and practice evolves. The Media Associations consider significantly greater caution is required by the ECHR and by EU law, in light of both *Watson* and, the recent ECtHR jurisprudence in *Zakharov* and *Szabo*.

i) The scope of data retention and acquisition: functions

12. *Watson* reiterates well-established principles in the case law of the CJEU and the ECHR; clearly concluding that untargeted and indiscriminate blanket retention of data is unjustifiable. The decision finds that limits must be applied, including in respect of the functions of data retention. These limits include providing retention only for the purposes of addressing serious crime (at [102]); and the setting of objective criteria which establish a connection between the data retained and the objective pursued, including geographical targeting, for example (at [110])):

    a) The listed functions for retention and acquisition: The Government rejects the assessment of the CJEU that the regime in DRIPA – on which the IPA is modelled – is general and indiscriminate. It proposes extremely limited changes to the Act in the draft Regulations. First, express references to the purposes for which data can be retained are added to the provisions of the Act on notification (see Regulation 6; Section 87, IPA). Second, the Secretary of State is to be required only to "take into account" the appropriateness of limits on data retention, including in respect of location when making a retention notice (Regulation 7, Section 88, IPA). Thirdly, three of the statutory purposes for which data can be acquired are removed (Public health, collecting any tax etc, and exercising functions in relation to the regulation of financial services and markets or financial stability). <u>All</u> other functions beyond

criminal investigation remain within the scope of the IPAFourthly, the Government proposes to revisit the definition of "serious crime" in Section 263 of the Act in order to *expand* rather than circumscribe the application of the powers to retain and acquire data. The proposal to leave in place a range of outstanding functions for which communications data may be retained and accessed is in the view of the Media Associations, unlikely to satisfy the requirements of *Watson*. . The draft Regulations make clear that this means that the powers in this part of the IPA will be continued to be used for a wide swathe of public activity, including regulatory oversight by organisations as diverse as the Department for Transport, the Gambling Commission and the Food Standards Agency and for purposes ranging from the activities of the DWP's Child Maintenance Group to the investigation of market abuse by the Financial Conduct Authority. Greater circumscription is likely to be required by the ECHR and by EU law, in light of the reasoning in *Watson* and in *Zakharov*. In *Zakharov,* although the ECtHR did not circumscribe the purpose of retention to crime alone, the Court expressed real concern that the breadth of the functions of a retention power could render that power a disproportionate interference with Article 8 ECHR.[5]

b) National security: The Media Associations do not support the Government's view that the assessment of the CJEU is entirely irrelevant for the purposes of national security applications. This issue is outside the scope of this Consultation. However, even if the Government's view is correct, the case law of the ECHR suggests that further safeguards than those currently proposed for national security claims may be needed in order to comply with Convention standards. The approach proposed by the Government may create significant risk that appropriate safeguards will not be applied and/or that powers are used disproportionately without access to adequate independent oversight. It appears inappropriate in our view, for example, for the Code to indicate that it will be for individual decision makers to determine whether internal authorisation or authorisation by the new OCDA will be appropriate (see draft Code, [5.19]).

c) Serious crime: The Media Associations consider that the proposal to broaden the definition of "serious crime" in the Act is very unlikely to satisfy the requirements of *Watson.* While the concept of serious crime is rightly informed by the national legal framework, the decision here to meet the concerns of the CJEU over disproportionality, by opening the gates to the use of surveillance even more widely, appears out of step with both the spirit and the substance of the judgment. The expansion of the definition of serious crime to include offences attracting sentences of less than 6 months; and to include corporate crime of all kinds; alongside the breadth of the other functions for which data may be sought, in our view, significantly increases the likelihood that journalistic material may be targeted; that there will be

[5] *Zakharov v Russia,* App No 47143/06, 4 December 2015, [246] – [260]. The Court in *Zakharov* expressed particular concern about a Russian surveillance law which permitted bulk collection of mobile telephone data for reasons connected with "national, military, economic or ecological security", noting that "*which events or activities may be considered as endangering such types of security interests is nowhere defined in Russian law*". The only safeguard against abuse of this absolute discretion was effective judicial authorisation, capable of conducting a more focused assessment of the proportionality of an individual measure. The oversight provided was inadequate.

collateral interference with journalistic information and or sources in the exercise of these powers; and exacerbates the chilling effect of these powers on press freedom.

For example, on the definition of serious crime proposed by the Government, it appears that, where there is any allegation of a crime involving a corporate body, the door is immediately to be opened to the use of IPA powers. This is a serious cause for concern for the Media Associations, in so far as it suggests that *any* criminal investigation of a media corporation's conduct will immediately trigger the use of IPA powers. In light of the limited guidance proferred in the draft Code on the use of existing tools of criminal investigation less intrusive to free expression, this gives rise to a particular risk of abuse. The significant safeguards for free expression recognised in the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 should not be sidestepped by inappropriate and disproportionate overreliance on IPA powers.

These concerns are compounded by the proposed amendment of the IPA to include any offence which involves "the sending of a communication or a breach of a person's privacy" (New Section 86(2A)(b)). This is an exceptionally broad category of offences, and will potentially include minor, potentially technical infringements of the Data Protection Act 1998 to contentious allegations under the Protection from Harassment Act 1997. It is plain these offences cover a spectrum of activity and that they may particularly open the door to chilling restrictions on legitimate acts of journalism in the public interest. There is no recognition either in the Consultation or in the proposed draft Code to recognise the significant public interest defences which may be open to journalists in respect of such alleged offences. Given that the use of the powers under the IPA are - for the most part – likely to remain secret except where charges are pursued, the Media Associations are deeply concerned that the circumstances when these powers may be utilised by the police and other agencies is now to be expanded exponentially. The availability of these powers on such a broad and open basis will have a clear chilling effect on the confidence of journalists in the inviolability of their communications, including with their sources.

This shifts the assessment of the proportionality of these powers significantly and, in our view, creates a substantial risk that these measures will be open to abuse in violation of the right to free expression as protected by Article 10 and the common law. It is a change of such magnitude that it renders full parliamentary oversight essential. These changes should be excised from the draft Regulations before they are tabled in Parliament.

ii) Independent Authorisation

13. The CJEU in Watson held that:

> *"It is required that access of the competent national authorities to retained data should, as a general rule, except in cases of validly established urgency, be subject to prior review carried out by a court or by an independent administrative body, and that the decision of that court or body should be made following a reasons request by*

those authorities, submitted inter alia, within the framework of procedures for the prevention, detection and prosecution of crime" (at [120])

14. The Government proposes to address this issue by the introduction of independent authorisation by a "newly appointed body of staff" in the Office for Communications Data Authorisations" ("OCDA"), subject to the supervision of the IPC. The Regulations create the structure sufficient for the delegation of such powers by the IPC.

15. All authorisations for access to data will be in consultation with a Specified Point of Contact ("SPoC"), subject to review by the OCDA, except where those authorisations are sought for "national security" purposes or where the matter is "urgent". In these cases, a designated senior officer will be able to authorise internally. Urgent authorisations will lapse within 3 days. In addition, following Section 77, in any of these cases, it appears that where there is no imminent risk to life, but an authorisation is sought for the "purpose or identifying or confirming a source of journalistic information" then the approval of a JC will be required before the authorisation takes effect.

16. The Media Associations welcome the Government's concession that an independent body is required to undertake the exercise of authorisation in these cases. Unfortunately, the nature and make-up of the OCDA is not fully explained in the Consultation and is far from clear in the accompanying documents. We are unable to comment on the effectiveness and independence of the OCDA. We maintain our existing concern that the process of "authorisation" in the IPA, whether by the OCDA or the JCs, is not in any form of prior judicial authorisation, but instead, a more limited form of review. (Full criticism of the review mechanism in the Act is well rehearsed and we do not repeat it here.)

17. Subject to the general submissions above on fairness and the Act's structure, the Media Associations consider it important that the "urgent" exemption for oversight does not apply to Section 77 authorisations. A process for sidestepping the safeguards of the Act in circumstances of urgency is already recognised in the IPA, which allows for authorisation by a JC to be skipped in circumstances where there is an imminent threat to life. While a 3-day period may appear brief (see New Section 65 (3A)), the catastrophic impact on the life of a source and the integrity of a journalist, following from the disclosure of data could have far longer lasting effects. The draft Regulations and the draft Code should be amended to make clear that "urgent" authorisations are not available in cases which would otherwise trigger the application of Section 77 (as below).

ii) Security, data-retention and journalism

18. Finally, the CJEU reiterated the importance of data security. It was particularly clear on the provision in national legislation for data retained, to be retained within the EU and for all data to be destroyed irreversibly at the end of the relevant period of lawful retention (at [122]). The Government considers that it would not be appropriate to make further provision for data security on the face of the Act. It considers a "one size fits all" approach inappropriate, instead, a flexible approach is proposed which is outlined in the draft Code.

19. The Media Associations reiterate the importance of confidence for the security of journalistic information and source identity, including in the context of the security of data retained pursuant to any notification under the IPA. Issues of the safe and secure storage of data are significant within the UK, but heightened in circumstances where the data may be held in or transferred to countries where lesser respect is afforded by the national authorities to journalism and free expression. The Government proposes in the draft Code that where data is held outside the EU, it need not be transferred except where consistent with EU law and the benefits outweigh the risks (at [19.52]). Data is only to be transferred outside of the EU where consistent with EU data protection requirements and the data can be retained at least as securely within the EU. There is limited clarity offered in the draft Code on *who* decides whether data is retained security or can be transferred securely; that is, who assesses the quality of law and its equivalence in the relevant third country. These are difficult questions and it appears that, except in specific circumstances where judicial cooperation is sought - they will be left to individual decision makers subject to the oversight of the IPC (see draft Code [13.30] – [13.31]).

20. A further dimension is added to this debate by Brexit. The Government reiterates that following Brexit, EU standards will not apply as they do when the UK is a member, but that data protection requirements will continue to apply. The Data Protection Bill currently making its way through Parliament will give effect to the new General Data Protection Directive. The Bill is not without controversy. In any event, that Bill may yet be subject to amendment following exit day and under the operation of the EU (Withdrawal) Bill.

21. The Media Associations invite the Government to provide greater specificity on the minimum EU standards which must apply in any circumstances where a) data retained under the IPA is stored outside of the EU and b) data acquired is transferred to a third country outside of the EU. Public authority decision makers should be encouraged to take legal advice early on any issues of transfer of data acquired outside of the UK and, where there is any doubt about the equivalence of protection offered, including for journalistic material and the protection of sources, assistance should be requested from the IPC (see draft Code [13.30] – [13.31]). Explicit guidance should be provided in the draft Code to make clear that where data may be shared or disseminated outside of the UK, specific consideration should be given to (a) freedom of expression and the public interest in the protection of journalistic material and sources; (b) whether the information disseminated may be used by the recipient to interfere with the right of freedom of expression, including the activities of journalists in the UK and/or overseas; and (c) any risk to the safety of journalists or the sources of journalistic information, whether in the UK or overseas. The Media Associations consider that the draft Code should include case study examples illustrating when dissemination of data overseas would be inappropriate and unlawful as a result of risk to journalists and their sources, the right to freedom of expression and the public interest in the freedom of the press (in either or both Section 8 or Section 13, draft Code). These amendments are particularly important in circumstances where there is reliable evidence that the global dangers which

journalists face – including risk to life and physical safety - are significant and increasing in some countries.[6]

22. The draft Code should also be amended to remove the introductory and confusing statement at [19.50]. This indicates both that location is relevant to security, but that where data is retained is not more significant than a fact-sensitive assessment of its general security. This is far from clear and could be misleading, directing individual decision makers to downplay the significance of the dissemination of data overseas for the purposes of the assessment of necessity and proportionality.

iv) Notification

23. The CJEU in *Watson* concluded that individuals subject to surveillance should be notified:

> "*as soon as that notification is no longer liable to jeopardise the investigations being undertaken by those authorities"* (see [121]).

24. The Government proposes to make no change to the IPA, which provides for very limited notification only in circumstances of serious error (see Section 231). This appears, in part, driven by concerns that notification would be pre-emptive, putting ongoing activities and lives in danger. It is primarily motivated by the need to protect the secrecy of techniques used by law enforcement agencies and others in conducting surveillance.

25. The Media Associations note that the CJEU did not require disclosure to be made at any time when an ongoing investigation could be jeopardised. The CJEU did not accept any wider interest in secrecy would adequately justify a blanket refusal to notify. Models for notification operate in other countries and their significance is recognised in the case law of the ECtHR.[7] Without amendment, to incorporate a mechanism for notification into the IPA, the Media Associations consider that the IPA remains inconsistent with the requirements of EU law.

26. Without prejudice to this wider concern, the Media Association invite the Government to consider that, at least in cases involving the identification of journalistic material and/or sources, and other special classes afforded protection by the IPA, notification would serve as an additional safeguard. These cases would be particularly easy to identify, monitor and notify, in light of the special procedures already provided for in the Act. At all times, any decision maker should be live to the existence of these cases; in many cases involving journalism and sources, they will be referred to a JC. Incorporating a requirement for notification would significantly reinforce the safeguards provided for in the Act, by providing for individuals an opportunity to seek redress when public authorities fail to meet the standards in the Act.

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6 See, for example, The Guardian Online, *'You can get killed': journalists living in fear as states crack down*, 30 Nov 2017 and the International News Safety Institute, *Annual Review* (2017).

7 See for example, *Weber and Savaria v Germany,* (2008) 46 EHRR 35, [135]; see also *Szabó and Vissy v. Hungary (Application no. 37138/14),* 12 January 2016, [86].

c) Specific changes to the draft Regulations

27. Some amendments to the draft Regulations are outlined above in our general concerns. Specific changes proposed by the Media Associations include:

    a) The urgent procedure for authorisation must not apply to Section 77 authorisations. The Regulations should be amended to make clear that the urgent procedure in New Section 61A will not apply where Section 77 is engaged. The amendments in Schedule 1 to Section 77 should be redrafted accordingly (Regulation 5; New Section 61A).

    b) The Media Associations do not consider the changes to the definition of serious crime compatible with the guidance given in *Watson* and would excise these changes. (Regulation 3; new Section 60A (et seq)). We elaborate on our concerns above, and would recommend that this whole section is removed from the draft Regulations. At an absolute minimum, new Section 88(2A)(b) should be deleted. These sections expose media organisations and individual journalists to particular risk and expand the chilling effect of these measures substantially. We consider the change is entirely inappropriate and likely to be unlawful in the light of the guidance in *Watson.* If this change is to be considered at all, it must be proposed in primary legislation.

    There may be alternate changes necessary to further circumscribe the targeting of both retention and acquisition of data to the purposes connected with serious crime; and to revise the existing definition of serious crime in the existing Act. For example, the application of serious crime to all otherwise undefined "group" criminality creates the unfortunate circumstance that it may capture all alleged offences committed during protest and demonstrations. The likelihood that journalists will be reporting and affected in these circumstances is high; previous instances of journalists being captured during containment or kettling are apposite. The Media Associations have constrained its response herein to the Government's proposed changes. Others will comment on constructive changes to the Act which may be necessary in light of the decision in *Watson.*

    c) The Media Associations do not consider that the changes to the scope of the powers in the Act are sufficient to meet the *Watson.* For the reasons given above, the Regulations (and the Act) should be amended to a) reduce the functions for which Communications Data may be retained and accessed and b) to provide for a clear connection between a criminal investigation and the retention and/or accessing of such data. While the definitions in the Act remain overbroad, the risk of harm to journalistic activities and violation of Article 10 is heightened. (Regulation 3; new Section 60A (et seq). The continued retention and processing of such data is likely to be in violation of both EU law and the ECHR.

    d) A scheme for post-hoc notification should be provided in the Regulations, consistent with the conclusions in Watson. At a minimum, this should provide for protected

categories to be notified when any prejudice to any ongoing inquiries has passed, including journalists (as outlined, above).

d) Specific changes to the draft Code

28. There are a number of difficulties with the draft Code, a number of which were replicated in the earlier draft Codes produced. These include:

a) **Ambiguity over the status of the Code should be removed**. It will not be discretionary for the IPT to have regard to the Code – as a statutory Code - and it should not be expressed as such (see draft Code, [1.9]).

b) **There are very few case-study examples given throughout the draft Code.** The draft Code is fairly impenetrable, particularly in respect of the treatment of internet records and digital data. The document does not, in our view, serve the purpose for which it was intended, as currently drafted. It is not user friendly, nor does it appear designed to create a clear road map to lawful decision making. The Media Associations recommend amendment to (a) incorporate clear statements on the principles in Part 1, IPA and on the substantive assessment of necessity and proportionality required to meet the standards in the HRA and the ECHR and (b) to provide case-study examples throughout, particularly on the handling of journalistic material and sources (throughout, but as a matter of priority in draft Code, Section 8) (we make some more detailed suggestions, below).

c) **Guidance on proportionality (draft Code, Sections 1-3) fails to incorporate sufficient guidance on human rights and the public interest.** For example, there is no guidance on Police and Criminal Evidence Act 1984 or Terrorism Act 2000 powers as a less intrusive means of securing information where journalistic material is concerned; nor is there sufficient referencing to Article 10 ECHR standards on the right of protection guaranteed to journalistic material and sources. These more targeted, less intrusive powers will remain in force, and the Media Associations suggest that the ability to seek to use these powers (on notice) in order to secure information from a media outlet will be highly relevant to the assessment of proportionality. The availability of alternative powers and less intrusive means of securing data should be addressed both in Section 3 and Section 8 of the draft Code. These changes should be incorporated in Section 3 of the draft Code at a miniumum. The reference to freedom of expression here at [3.18] is cursory and gives limited assistance in understanding the high hurdle which must be crossed before an interference with such rights will be considered proportionate. Similarly, the treatment of collateral intrusion is slim. Section 3 should be amended to appropriately reflect the test in respect of sources and Article 10, including by cross reference to clear provision in Section 8, on journalism and journalistic material (as outlined above). The guidance provided in *Goodwin,* and supported in subsequent jurisprudence of domestic and European courts, should be incorporated expressly in the draft Code (as outlined above). The tone of the draft Code should be revisited in order to provide greater prominence and significance for the safeguards necessary to protect individual rights and to acknowledge the principles in Part 1, IPA. There should be

amendments in the introductory sections of the draft Code, in Sections 1 and 2 to emphasise that all decision making pursuant to the IPA and the draft Code should be consistent with the requirements of the principles, the HRA, the Equality Act 2010 and applicable EU law.

d) **The application process should incorporate a requirement to state when any authorisation involves journalistic material or sources (Section 5, draft Code).** The Media Associations recommend that the draft Code at [5.4] is amended to include such a requirement. This should reflect the guidance at draft Code [8.11]. Similarly, the guidance offered to SPoCs in Section 5, and to JCs, should be amended to include specific provision for the consideration of Section 77 authorisations, and any circumstances where authorisation may be likely to interfere with journalistic material or sources of journalistic information.

e) **The definitions of journalism and journalistic sources are inadequate and must be revised consistent with UN and other guidance.** See draft Code, Section 8. The factors identified for consideration of whether an individual is a journalist includes the frequency of their activities, "*the level of professional rigour they seek to apply to their work*", the time of information they collect, the means by which they disseminate their work and whether they are remunerated (see draft Code [8.15]). The Media Associations consider this guidance is misleading and inappropriate. There are many definitions of journalism used in international law, none of which are dependent on level of payment; whether you publish on or offline, in a hard copy paper or a periodical, and on any official's assessment of whether you conduct yourself with an adequate degree of professional rigour. The Media Associations commend to the Government several sources to assist public authorities in assessing whether an individual is a journalist. These should provide a foundation for the guidance in Section 8 and should be cited directly to assist decision makers:

- In 2012, the then Special Rapporteur on Freedom of Opinion and Expression, Frank la Rue said journalists should be "*defined by their function and their service*". He went on:

> *"Journalists are individuals who observe and describe events, document and analyse events, statements and policies, and any propositions that can affect society, with the purpose of systemising such information and gathering of facts and analyses to inform sectors of society or society as a whole". Such a definition of journalists includes all media workers and support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play that role"*

- General Comment 34, on States' obligations Article 19 International Covenant on Civil and Political Rights ("ICCPR") asserts that journalism is a function shared by a wide range of actors, including full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.

- The Council of Europe Committee of Ministers Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information states that:

  > "*A 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.*"

- These statements should be informed by the approach of the CJEU and the ECHR to the evolving protection offered in the public interest to free speech by those acting in the public interest, particularly in the role of journalist (see, for example, the application of Article 10, in *Magyar Helsinki Bizottsag v Hungary* (App No 18030/11)).

Similarly, the definition of a source at [8.14] is drawn too narrowly. As it stands, the guidance in the draft Code appears to hinge on a subjective assessment by the decision maker on the extent of knowledge and intent of any individual communicating with a journalist. This is in our view, inappropriate and significantly open to abuse. The definition should refer to international guidance on the protection of sources of journalistic information, including in the case law of the ECHR. A broad definition should be adopted and guidance should encourage decision makers to recognise that communications with all individuals providing journalists with information may be sensitive and subject to the protection of Section 77, IPA. This is consistent with the approach of domestic and international authorities on the search of journalists, their premises and the search of media organisations, where an assessment of the proportionality of the likely impact on the confidentiality of sources is required from the outset, without first giving consideration to the specific knowledge and commitment of an existing source.[8]

f) **Clearer guidance is needed on <u>when</u> safeguards for journalistic material should be triggered.** The Code should provide for such processes to be triggered in any circumstances where there are reasonable grounds to believe that the powers used may reveal confidential journalistic material or identify or confirm a journalistic source. This amendment will be necessary throughout Section 7 and 8.

g) **There should be clear guidance on the relationship between decision makers, SPoC and OCDA, for the purposes of the identification of journalistic material and authorisations which may engage Section 77 IPA.** This should be addressed in Sections 4, 5, 7 and 8 of the draft Code, including with appropriate cross referencing.

h) Specific changes to draft Code, Section 8, include:

i. Greater clarity must be offered on the significant protection offered to sources by Article 10 ECHR (distilling the guidance in the case law of the

[8] See, for example, *Ernst & Ors v Belgium,* App. No 33400/96, Judgment 15 July 2003.

ECtHR briefly). As recommended above, the specific guidance found in *Goodwin,* and outlined above, should be incorporated in this Section. This should include a clear expression of (a) the high-hurdle that must be crossed before interference with journalists sources will be justified and proportionate; (b) a statement on the priority of less intrusive means of sourcing information and data, including the use of other investigative powers and tools, for example in the Police and Criminal Evidence Act 1984 and the Terrorism Act 2000 and (c) the need for caution in any case involving a journalist and the potential to interfere with the public interest in free expression, including through the endangerment of journalistic activity and journalists' sources. This should include restricting authorisations to the extent strictly necessary and ensuring that they are adequately time limited to avoid any accusation of fishing for information potentially relevant to an investigation or inquiry and/or potentially significantly damaging to the integrity of journalists' communications (see draft Code [8.13]).

ii. The guidance on assessment and identification of journalism is inaccurate and must be revisited (as above) (see draft Code [8.15]).

iii. It must be clear that where there is uncertainty in respect of journalistic status, caution should be exercised. Where advice is sought, it should be clear that legal advice, including external, specialist advice on media law, and the advice of the IPC, can and should be obtained where there is doubt over the application of Section 77, or the necessity or proportionality of any authorisation (see, for example, draft Code [8.16]).

iv. The current draft Code urges "care" where an authorisation is not intended to identify journalistic material or a source. This is overly vague and does not sufficiently articulate the responsibility on decision makers to act compatibly with Convention rights, and Article 10, imposed by Section 6, HRA. This section of the draft Code must be amended to explain that where there are reasonable grounds to support the conclusion that an authorisation may, or is likely to identify such material or individuals, authorisation should be sought by a JC. This will provide for decision makers to more fully articulate their reasoning on proportionality and necessity, will allow for more effective post-hoc scrutiny by the IPC and will ensure that individual officers are better able to defend their decision making against subsequent challenge (see draft Code [8.19]; [8.28]-[8.30]).

v. Guidance on the identification of sources may yet be misleading (as above). In addition to the recommendations above, the draft Code must be amended to make clear from the outset that caution is necessary where communications data alone might operate to identify an individual source whether through the combination of material publicly available, available to the relevant authority or otherwise (see draft Code [8.20]).

vi. The Guidance on applications to identify journalistic material and/or sources must be amended to make clearer that the hurdle is a high one. In addition to the recommendations on the defintions, set out above, further specific changes are necessary. The current draft refers to the need for another "overriding public interest" but does not make clear the weight afforded to source protection and the weighty justification likely to be required (see draft Code, [8.23]). The case law is clear and addressed above. The test outlined in *Goodwin* (set out above), and confirmed in domestic and European cases since, should be included in the draft Code with clear case studies on how this should impact on decision making. Notably, decision makers should be reminded throughout that this is a high hurdle and one which requires significantly greater justification than a basic assessment of necessity and proportionality (as above). Similar amendments should be made to the guidance for Judicial Commissioners and public authorities at draft Code [8.27] – [8.33].

vii. While the indications in draft Code [8.28] – [8.30] on the identification of sources other than by targeted applications in respect of their identity are helpful; these should be supplemented by further case studies on the nature of source identification and risk to highlight the risks posed by identification and the means by which communications data may expose a journalist and their source. The Media Associations would be happy to assist in the formulation of further examples.

viii. Most of the case study examples on collateral intrusion or untargeted intrusion which are given in the draft Code refer to circumstances where referral to the Judicial Commissioner is NOT required. Balance should be inserted into these examples, by illustrating more circumstances where JC referral and authorisation WILL be required and/or where guidance must be sought. Some of the examples given are ambiguous and unhelpful. For example, the first bullet point example, in [8.40], provides that where a journalist is a victim of crime and sources are not relevant to the investigation, authorisation may not be required. This begs the question whether sources might collaterally be revealed in the course of the investigation and whether such is likely to be a result of the authorisation sought (see draft Code [8.40]). There is no recognition that a journalist may be a victim of a crime, targeted precisely because of their status *as* a journalist. That crime may, in fact, be perpetrated in an attempt to identify a source. Imagine, for example, a physical assault or a break-in designed to identify the source of a leak on a politically or commercially sensitive story. In these circumstances, the Media Associations consider referral to a JC would be and the application of Section 77, IPA, essential. The Media Associations would be happy to assist in the formulation of further examples.

ix. In the examples given for referral to the Judicial Commissioner for authorisation, but where no intent to capture relevant data is established, includes collateral intrusion, and suggests referral is appropriate when

identification will "*likely result*". This is too a high threshold and should be tempered to provide for referral when it "*may*" result (see draft Code [8.42]). Other examples of stark language which the Media Associations consider should be tempered include the example which provides that where information is already known about a source and identification will "*unavoidably result*" if subscriber checks are conducted (see draft Code [8.43]). The Media Associations recommend that this is amended to read *"may be likely to result".* The Media Associations would be happy to assist in the formulation of further examples.

x. Throughout, we consider that the draft Code would be improved by the addition of case study examples on when authorisation under the Act would be clearly inappropriate, unnecessary and disproportionate, inconsistent with the IPA safeguards, the principles in Part 1 and Convention rights. The current draft Code, for example, gives guidance that public authorities should give "*careful consideration before seeking to acquire communications data to identify or confirm who within a public authority may have leaked information to the media*". We consider that this guidance is entirely inappropriate without further instruction on the circumstances where JC approval will clearly be refused (for example, where a public interest whistleblower is being tracked down to punish them or to save the blushes of public officials). These examples would be a particularly useful addition to Section 8, where guidance on protected groups will be especially important. The Media Associations would be happy to assist in the formulation of further examples.

xi. The guidance provided on the threat to life exception should further emphasise the exceptionality of this provision. The draft Code should incorporate a reminder that in respect of the examples given, authorities should consider other less intrusive means before resorting to the IPA. In the examples given in draft Code, [8.36], for example, there may be many means of securing access to the data needed without using Communications Data powers. Even in respect of a missing journalist, or a source suspected to be in danger, investigative tools other than the interference with Communications Data. The Media Associations would, for example, strongly caution against any concern constructed around the safety of a journalist or a source being used without further inquiry or justification, to support the use of Communications Data powers without authorisation by a JC. This kind of subjective decision making on journalistic safety and propriety should be subject to independent oversight, lest it undermine the public interest in free expression; open the door to abuse or have the unintended consequence of placing individual journalists and their sources in greater personal danger.

i) **Guidance on safeguards for journalistic material and sources – by cross reference or otherwise – should be provided in respect of the acquisition of internet data (draft Code, Section 9) and in respect of the operation of the**

request filter (draft Code, Section 11; in particular at [11.25] – [11.26]) and in respect of the acquisition of data on behalf of overseas authorities (draft Code, [13.22] – [13.24], [13.30] – [13.31]). Suggestions are provided above on amendments to address the issue of non-judicial cooperation, legal advice and referral to the IPC. Where journalistic material is targeted or may be likely to result from an authorisation, the Media Associations recommend that public authorities are routinely advised to refer to the IPC before transferring acquired data out of the jurisdiction (see draft Code [13.30] – [13.31]).

j) **Record keeping and error reporting should make clearer provision on authorisations relevant to the sensitive professions.** The Media Associations welcome the specific provision for record keeping on these applications, and provision for referral to the IPC on inspection. However, this provision should make clear that the records kept should include the relevant considerations in respect of the discharge of the Section 77 safeguards and the proportionality considerations undertaken by the relevant public authority, including in respect of the consideration of any less intrusive means (see draft Code [8.34]). In addition, we recommend that authorities and the IPC are required to keep records on the cases where legal advice or assistance is sought, and whether internal, external or IPC advice is obtained, particularly in respect of Section 77. This material – on the frequency of advice sought and furnished - should be recorded for analysis in any inspection and to inform the work of the IPC, including in the preparation of its Annual Review.[9] Consistent with the view expressed on notification (above), error reporting should specifically address errors in respect of journalistic material and sources, as categories to be routinely to be referred to the IPC (draft Code, Section 14).

29. **Further consequential changes are recommended, consistent with the criticism by the Media Associations of the Government's proposed response to *Watson* and in response to the the draft Regulations, above.** For example, the treatment of Entity and Event data in draft Code [2.34] – [2.44] (as above) should be revisited to make clear that the safeguards in Section 77 shall apply in respect of both kinds of data sought in any authorisation, without distinction. Similarly, the urgent procedure for the authorisation of interference with communications data should not apply where Section 77 is engaged. That provision provides its own exceptionality, in the case of imminent danger to life. The draft Code should make this clear in both Section 5 and Section 8.

30. **Guidance on the approach of decision makers to authorisation, training for decision makers and access to legal advice, including on necessity and proportionality, could be more clearly addressed in the draft Code.** The Media Associations consider that training should be offered to all decision makers using the powers in the IPA on the nature of proportionality and necessity for the purposes of the

[9] For the avoidance of doubt, the Media Associations do not encourage the disclosure of confidential legal advice subject to legal professional privilege. The recording of occasions where advice is sought and/or provided is designed to inform the approach of the IPC to the accuracy and care taken by individual decision makers in their approach to necessity and proportionality, including, and specifically in respect of groups offered specific protection by the IPA. This recording would also assist the IPC and individual authorities in understanding whether increased resources may be required to support lawful decision making on the Act.

ECHR, and specifically, on the thresholds which apply to any interference with journalistic material and the identification of sources. The Media Associations commend to the Government the language used in the draft Code of Practice on Security and Intelligence Agencies Retention and Use of Bulk Personal Datasets.[10] We consider that, without mandatory, full and regular training for all public officials likely to be taking decisions on authorisations pursuant to the IPA, the protection offered by the draft Code is likely to be much reduced. This training must incorporate accessible guidance on the safeguards in the Act, but also on the public duty on decision makers imposed by Section 6 HRA, to exercise their functions under the Act in a manner which respects Convention rights, including the right to freedom of expression, protected by Article 10 ECHR. The draft Code should make clear throughout that decision makers should have access to legal advice, including from experts on the operation of the media and media law. As above, there should be a formal requirement to record when and what advice has been sought in respect of potential Section 77 authorisations.

Conclusion

31. The Media Associations regret that the Government has not grasped this opportunity to revisit its approach to the retention and acquisition of data. As outlined above, our members consider that the provisions of the IPA are out of step with the jurisprudence of the CJEU – including in *Watson* – and the requirements of the ECHR. While the legal position is clarified, both in the EU and within the Council of Europe for the purposes of the ECHR, we are concerned that, without significant further steps being taken by the Government (including in the amendments to the draft Code suggested above) and by the IPC, there may be a significant chilling effect on whistle-blowers and on investigative journalism in the public interest. While journalists will innovate and adopt working practices designed to better protect the safety of sources; unless revised or appropriately constrained in practice, the retention of data in the IPA will continue to create a significant new barrier to the effective operation of the press. The expansion of these kind of data retention and acquisition powers is unlikely be long confined; neither to Europe nor to conscientious states bound by international human rights standards. Good practice in the United Kingdom is crucial.

32. If sources and individual journalists cannot have faith in the inviolability of their confidences, public debate in this country will be the poorer. While there remains uncertainty over the conditions for transfer of acquired data overseas, the safety of both journalists and their sources operating in countries with little respect for the freedom and inviolability of the press will be a cause for concern.

33. The Media Associations have been limited in their capacity to consult their members and to respond within the short time frame afforded for consultation (seven weeks, including the festive vacation). The judgment in *Watson* has been available since December 2016

[10] This provides "Users should receive mandatory training regarding their professional and legal responsibilities, including the application of the provisions of the Act and this code of practice. Refresher training and/or updated guidance should be provided when systems or policies are updated."

and the Government has been embroiled in litigation on its impacts for over a year. The Consultation on the other Codes in the Act was concluded in February 2017.

34. The Media Associations would be grateful for any further opportunity to inform the Government's approach to the final draft Regulations and the draft Code before they are tabled in Parliament.

Media Lawyers Association
News Media Association
Society of Editors
National Union of Journalists

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