

ISPA response to the Home Office Consultation on revised notices regimes in the Investigatory Powers Act 2016

About ISPA

The Internet Services Providers' Association (ISPA) is the trade association for providers of internet services in the UK. ISPA has approximately 200 members, 90% of which are SMEs, as well as large multinational companies. Our members provide internet access, infrastructure, hosting, and a wide range of other services to consumers and businesses and we represent a wide eco-system of providers including those that build their own networks and those that resell services via fixed and wireless networks.

Introduction

ISPA welcomes the opportunity to respond to the Home Office's consultation on the revised notices regimes in the Investigatory Powers Act 2016 (IPA). The Act is a large and highly complex piece of legislation, setting out the electronic surveillance powers of the UK intelligence community and police, as well as providing safeguards on the exercise of those powers. We have been following the governance over the use and oversight of these powers for many years, helping members understand the framework and representing their views to Government and parliamentarians.

In her Ministerial Forward, the Home Secretary has stated that this consultation is “not about the creation of new powers, it is about the efficacy of long-standing powers the necessity of which has long been established”. However, we believe that the accompanying document couches the significance of what is being proposed in a language that undermines the scale of potentially far-reaching changes to the legislation. ISPA is also concerned with the level of technical detail provided in the consultation, including on next steps, as this limits our ability to fully assess the impact of the proposed changes to the IPA, as well as our capacity to comment on what they could ostensibly mean for our members.

We recognise the points raised in the Home Office's recent [review](#) regarding the operation of the IPA, including that, in the period since the Act was passed, the global volumes of data that exist have grown exponentially, and significant, fast-paced technological change has become the norm. This pace of change also means there will be many new organisations unaware if and how these measures may apply to them. However, we would like to take this opportunity to underscore the importance of striking a balance for security measures with business certainty and innovation at a time where the UK is seeking new global opportunities - including technology.

Whilst we appreciate the Government must ensure that the law enables it to mitigate the risk of any negative impact from novel technological change, ensuring that the proposals are proportionate and do not cause companies to question the UK's suitability as a location for investment or market in which to offer their services is also of paramount importance. This is particularly the case for global telecoms companies who have to balance a myriad of competing regulatory and legal obligations.

We would caution that the UK already has one of the most intrusive and extensive investigatory powers regimes operating under broad definitions. From our reading of the document, which we would argue does not provide sufficient evidence as to why the revisions are needed when the

regime has been designed to be technologically-neutral, the proposal could disproportionately increase the scope of the UK's investigatory powers regime, and run the risk of removing due process safeguards for our sector.

We are of the view that each of the objectives outlined in the consultation document could warrant its own specific call for evidence, particularly after the questions and important details that are openly lacking in this review have been properly addressed. We would therefore strongly advocate for further consultation on the five proposals, including defined terms in the proposed wording for industry to review before any formal decisions are made.

Furthermore, we would suggest that it is crucial for this and any future reviews of the IPA to operate with a spirit of engagement and openness with industry. Given the far-reaching effects that the proposed changes would have, we urge the Home Office to engage fully with communications providers, civil society, legal experts, and academics to assess the best way forward after this initial consultation closes.

Summary of Main Points

- ISPA UK is concerned with regard to the level of detail provided in the consultation document as it limits our ability to fully assess the impact of the proposed changes to the IPA, as well as our capacity to effectively comment on what they could mean for communications providers.
- We would ask that Government provide clarification, guidance and worked examples of the key terms that are used throughout the consultation document. We believe that these must be strengthened to allay any concerns with regard to interpretation, particularly for:
 - "changes to systems";
 - "Obligation";
 - "timely";
 - "Complex corporate structures";
 - "Relevant changes";
 - "technical information";
 - "strengthening enforcement options";
 - The metric of "reasonable amount of time", and to confirm whether this would follow that which is already used in the Investigatory Powers (Technical Capability) Regulations 2018 ((Schedule 1 paragraph 13, Schedule 2 paragraph 13 and Schedule 3 paragraph 11).
- We would strongly advocate for further consultation on each of the five objectives (proposals), including defined terms in the proposed wording for industry to review before any formal decisions are made.
- We would urge the Home Office to undertake that the objectives are proportionate to fostering business innovation. Communications operators must be allowed to develop and run their businesses independently, and such provisions would curtail innovation.
- It is unclear from the consultation what the overall aim is from Government. We understand the premise of improving the "efficacy of long-standing powers" so that investigatory powers are properly regulated and subject to appropriate safeguards and oversight, and recognise that a review was written into the legislation when it became an Act. However, we would urge caution around the unspecified nature of the review's proposals contained in the consultation

document. In their current form, they appear to propose ill-defined expansions of the power, whilst simultaneously reducing the safeguards which were embedded by Parliament when the legislation was originally passed.

— ISPA would welcome guidance from the Home Office on the next steps from this consultation, including whether the proposals would require changes to the Act or to the guidance, and if this would be undertaken through primary legislation or secondary legislative instruments.

Specific points

Objective One - Strengthening the notice review process

Our understanding of Objective One is that it would create a mandated requirement to specifically bar operators from making “changes to their system that would have a detrimental effect on a current lawful access capability”, closing an apparent loophole in which telecoms operators are not required to comply during notice periods.

Objective One is an enormous proposal couched in language that partially obscures the potential of the changes to the IPA. This includes that firms may have to take action immediately if a notice to disable or block a feature is received from the Home Office, without the opportunity to challenge.

Whilst our members agree that measures should be taken to diminish the risk of forming a “capability gap” during the review period, it is not clear to us what making “changes to their system” would mean. Furthermore, we would caution that removing the right to appeal as a procedural safeguard could increase the scope for the notice process to be misused. This objective does not adequately balance innovation with security.

Objective Two - Timely and informative responses

The proposal would place an obligation on operators to cooperate with the consultation process before the decision to give a notice is made, and require that firms provide any relevant information as is considered “necessary” in a timely fashion.

It is unclear from the consultation what this “obligation” to cooperate with the consultation would entail, and whether there would be any forms of penalty for those found to be non-compliant.

Objective Three - Scope of the regime

This measure seeks to strengthen the “operational effectiveness” of the IPA’s extraterritorial powers, specifically calling out that the provisions of the Act will continue to apply to those with “complex corporate structures” that operate across different jurisdictions. It would also strengthen enforcement options available for non-compliance.

Our members who operate across multiple, different jurisdictions hold major concerns regarding the proposed expansion of the regime scope, particularly on proportionality. Whilst the language used is unclear, this objective appears to propose to assert UK jurisdiction over providers operating overseas and outside the UK. It also appears to suggest that a notice could be served on more than one entity, including entities other than the one providing the service to users, and that have no legal authority or ability to provide the types of information in scope of the IPA regime.

Objective Four - Notification requirements

This would require that operators inform the Secretary of State (SoS) of planned technical changes to their service that “could have a negative impact on investigatory powers” before they are implemented. Furthermore, it would grant additional powers to the SoS to determine who the duty to notify would apply to, as well as develop a series of thresholds that would also trigger the notification requirement.

ISPA harbours serious concerns with this objective. It has the potential to grant the Home Office very wide ranging and ill-defined powers to block service changes, with no real indication to industry of how these powers would work in the future. It could also trigger a new notification regime which works against innovative practices by communications providers, as well as create uncertainty for planned activities or upgrades undertaken by firms, increasing administrative burden. There also appears to be little in the way of new or strengthened safeguards, such as an appeals process, to offset this expanded power.

Communications operators must be allowed to develop and run their businesses independently, and the provision in its current form runs the risk of curtailing their ability to develop future technological advances to service. It also appears to go against Number 10’s recent target of making the UK the best place to start and grow tech businesses¹, and instead poses significant questions around how Government works to foster innovation and ensure a proportionate burden on those being regulated.

In addition, the objective may go against certain other important policy steers such as ensuring that new communications services are built with “privacy by design”. There is a concern that this may not only be stepping beyond the limits of any Notice that is in place; and may also raise concerns around commercial confidentiality of new services in development.

With regard to potential thresholds, our members would welcome further clarity and information on those that are being considered.

Objective Five - Renewal of notices

We appreciate that the Commissioner already has a formal role in the review of renewals. However, there is limited detail provided in the consultation on what a statutory role for the Investigatory Powers Commissioner would look like. Our members would welcome clarification on the criteria and further detail than that which is provided in the document.

Conclusion

Overall we believe that a more tightly drafted review on potential reforms, containing a greater amount of detail of Government’s aims and proposed powers to fully assess its impacts, would be welcomed by our sector. We would also strongly advocate for further consultation on each of the five objectives, including defined terms in the proposed wording for industry to review before any formal decisions are made.

¹ <https://www.gov.uk/government/speeches/pm-london-tech-week-speech-12-june-2023>