

PRESS RELEASE

The Law Association of Trinidad and Tobago notes with grave concern the statement of the Prime Minister made in Parliament on Friday last (November 12, 2010) in which she disclosed that a significant number of law abiding citizens had been the subject of surveillance for which there was no legal authority.

The Law Association deplores these violations of the fundamental rights of citizens and considers that they are a direct attack on the Constitution.

We note with further dismay that it was stated that judges were among those being spied upon. This constitutes an attack on the independence of the judiciary.

Legislative intervention to permit surveillance of persons suspected of serious crime is urgently required and the Law Association also notes that a Bill for that purpose has been placed on the Parliamentary agenda for Friday November 19, 2010.

Unfortunately, a preliminary review of the draft legislation reveals serious deficiencies with deeply disturbing consequences the effect of which will leave law-abiding citizens open to abuse. The draft legislation will effectively permit surveillance to be secretly carried out at the behest of a Minister by use of the provisions in the concessions granted to telecommunications service providers.

In addition, the draft legislation, in its proposed application to all offences, is too wide in its scope to enable citizens to foresee whether they fall into the category of persons whose communications may be intercepted. By contrast, the Jamaican Interception of Communications Act applies only to serious offences that are expressly set out in a schedule to the Act.

There is an urgent need for meaningful consultation on this draft legislation. Meanwhile, attached to this Press Release are the Association's preliminary comments on the draft legislation. These comments are put forward as a first step towards arriving at legislation that will provide sufficient safeguards around surveillance, which should target only criminal activities of a serious character.



President
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Comments on The Interception of Communications Bill, 2010

1. The telecommunications services loophole

Clause 6(2)(c) and (d) – appear to cover the instances of interception of communications pursuant to section 22(1)(e) of the Telecommunications Act, Chap. 47.31, where a concessionaire is required, when requested by the Minister of National Security to collaborate with the Ministry of National Security in matters of national security.

When Clause 6(2) and section 22(1) are read together, clause 6(2) anticipates legitimate interception of communications outside of the scheme envisaged by the Bill. It would therefore be possible to circumvent the safeguards of the warrant scheme envisaged by the Bill.

What is even more disturbing, is that clause 17(2) allows information collected through this “collaboration” to be used in a criminal prosecution.

2. Investigation of all crimes – too wide in scope

Under section 5(3)(b) of the UK Regulation of Investigatory Powers Act, 2000, one of the prerequisites to the issue of the warrant is that it is for the purpose of preventing or detecting serious crime.

In contrast, the Bill at clause 8(2)(a)(ii) provides for the prevention or detection of any offence.

This incursion into private and family life may be disproportionate to the legislative aim of detection, investigation and prosecuting crime. The suspicion of any minor offence can become a tool for abuse of power and political victimization.

3. Use of information gained from the issue of urgent warrants

Clause 11 of the Bill provides for a warrant to be issued by the Judge in urgent cases, without the need for a written application. It is anticipated that the warrant will be automatically revoked in 72 hours if no written application is submitted thereafter.

Clause 17(3) declares the information obtained in that circumstance inadmissible in criminal proceedings. However, the same clause gives the court an extraordinarily wide discretion in a criminal trial to admit the information as evidence.

Again there is the potential for abuse where the court is pressed, without affidavit evidence, to issue a warrant on the ground of urgency. When no affidavit is thereafter submitted, there is still the possibility that the information can be used as evidence. The cumulative effect is to allow abuse of power by legitimizing "fishing" expeditions, again a disproportionate incursion into private and family life.

4. Proportionality safeguard is absent

Under section 5(2)(b) of the UK Regulation of Investigatory Powers Act, 2000, the Secretary of State shall not issue a warrant unless he believes that the conduct authorized by the warrant is proportionate to what is sought to be achieved by that conduct.

Despite the safeguards in clause 8(2) of the Bill, there is no notion of proportionality, even though potentially the most minor crime can be investigated thereunder. This omission may lead to abuse.

Further, and unlike the UK position, the Judge is given the wide and undefined discretion under clause 8(2)(d) to issue where "it would be in the best interest of the administration of justice". Again, the case law on proportionality cautions against wide, undefined discretion as being disproportionate. (see *Elloy v. de Frietas* [1999] A.C. 69).

5. Not enough safeguards for security of collected information

Under section 16 of the UK Regulation of Investigatory Powers Act, 2000 the Secretary of State must ensure that arrangements are in force for securing the number of persons to whom the information is disclosed, the extent to which the material is disclosed and the number of copies made.

In the Bill, the Judge must under clause 14 merely give directions for these things to be done. There is no sanction for failure save criminal sanctions clause 21.

The Judge's directions do not anticipate that he is satisfied that arrangements are in place for the security of the information collected, the names of the persons to whom the information is disclosed or the arrangements for storage and accountability.

A private citizen may therefore have no recourse if the Judge's directions are not complied with.

6. No provision for destruction of collected information

Under section 16(3) of the UK Regulation of Investigatory Powers Act, 2000 each copy of collected information is to be destroyed as soon as there are no longer any grounds for retaining it as necessary for the authorized purposes.

The Bill does not provide for such destruction. Clause 14(b) anticipates the Judge's direction as to storage for as long as necessary, but is silent on what is to be done thereafter.

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