

Chapter 9

9 Conclusion

9.1 The scale of the challenge

The challenge for our Parliamentarians and Executive is great. Our security services are engaged in activities which are hard to restrain and are capable of widespread harms. Yet we have been denied the public debate needed to start resolving these problems; instead, the Home Office, ministers and former ministers close to the agencies have responded by blaming the messenger, attempting to minimise the public debate in the media and in Parliament, and to by demanding further powers. We have seen no official Parliamentary debate except for a single statement after the PRISM revelations. It is likely D Notices have requested that the media make little follow up to stories based on the NSA and GCHQ documents, that were revealed in The Guardian.

Following recent terrorist atrocities, new demands for acquisition of communications data were made by the Home Secretary and the Prime Minister, with no mention of the powers GCHQ has already accumulated. Nor did they show any demonstrable link between their calls for surveillance powers and the specific problems investigating the criminals in question, all of whom were known to the authorities. This was little challenged by the press, which in many quarters seems reluctant to appear disloyal. In effect, an attempt to extend powers seems to be the official response to the problems outlined in this report, where existing powers are insufficiently understood, overseen or restrained.

9.2 Conceptual disagreements and the role of human rights courts

There are some difficult conceptual disagreements. What we define as mass surveillance includes the acquisition and retention of personal communications data for surveillance purposes, as well as processing and analysing that data, to produce profiling and assessments of individuals. We do not accept that retention, collection or a machine's assessment is unimportant unless the information is presented to a person. Rather we think that collection and retention both present a real and present threat to individuals of future state action; and we contend that the intrusion and analysis machines are capable of achieving presents a far greater threat than human analysis alone.

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In the end, human rights courts are mostly likely to settle questions of how to see and understand intrusion. We outlined the main legal challenges in Chapter Six. It is important that their judgments are respected. There is in our view a risk that the UK government will seek to minimise the impact of judgments, partly to avoid having to change or restrain the activities of GCHQ. However, this would foster further public mistrust and suspicion, as well as undermining the rule of law, and risking future problems by failing to adequately restrain security agencies.

9.3 Could we have known what GCHQ was up to?

Perhaps one of the most important lessons we should learn is that many of these problems were foreseeable. Some technologists were suspicious that agencies would employ bulk collection techniques simply because a lack of security inherent in the technology meant it could take place. Others however were skeptical that GCHQ had the capabilities to exploit the problems very thoroughly. It is likely that from now on, technologists will assume that our secret services will attempt to exploit any technological weakness that is available.

Far more worryingly, our colleagues in the Foundation for Information Policy Research (FiPR) made it plain to Parliament during the debates surrounding RIPA in 1999-2000 that bulk collection could not be prevented in law, and the warranty system for overseas information acquisition could indeed be abused to enable it. Will politicians learn the same lessons as technologists, and assume that any weakness in the law will be exploited by our secret agencies? We would argue that it is folly to assume otherwise, and from a public confidence perspective, groups like ours will point to this period to demand a much higher definition and clarity in our laws. Parliament will have a significant challenge here, as the Executive may continue to believe that laws that can be flexibly interpreted are in their interest.

9.4 Agencies must be restrained

We believe that vague laws that are open to flexible interpretation will create continued mistrust and unease. We argued in Chapter Seven that our oversight regime has proved inadequate. The fact here is that a revolution in GCHQ capabilities was neither spotted nor halted. Nor was there any attempt by the Executive or any oversight body to suggest that new legal powers ought to be sought, because of the step change in activity, including both information gathering and invasive techniques. If you accept this, then tighter laws and greater effective oversight are critical to reestablishing trust. Parliament will need to challenge the Executive to ensure laws are rewritten in ways that can provide predictable

powers and effective constraint. In Chapter Six, we outlined the major changes to oversight that are needed.

9.5 The risks of failing to constrain GCHQ

In Chapter Eight we described a number of tangible threats that are posed by GCHQ's activities. At root, a failure to constrain secret services risks the ability of democratic governments to function, as secret powers can be utilised to constrain the actions of elected politicians. While we may feel it is unlikely that such an occurrence could come to pass, it is worth remembering that secret agents long harboured grudges against Harold Wilson and other Labour politicians. Even when not aiming at the government, secret services can place legitimate groups in their sights, in a way that is unacceptable in a democracy. Institutions can also conflate self-protection with their mission, leading to inappropriate actions. Abuse of information is not an imaginary phenomenon, and GCHQ has made it their job to gather and access an awful lot of it.

When people feel they are under surveillance, it can threaten social cohesion. We noted that specific groups may feel under particular scrutiny. These are serious concerns, and cannot be dismissed by attempting to suggest that people should consider themselves as merely "innocent hay".

There are very real problems that flow from the interference that GCHQ makes in the operation of technologies, equipment and networks. These have the potential to undermine the security of people and companies. In this report, we related the response to these threats in terms of consumer and business confidence, and new economic costs and caution. These too are serious issues. Current oversight regimes at all levels lack the technical ability to assess the threats and ensure that GCHQ's activities balance risks and benefits. We do not even know if GCHQ takes into account the ill-effects of their interventions on actors outside of the UK. This is perhaps one of the most serious, under-examined and misunderstood part of the revelations.

9.6 The goals that the law and oversight must pursue

When people know what is considered legal and illegal, they are able to tailor the actions and activities so they do not fall foul of the state. Human rights add an additional level of legal restraint, by limiting the state from writing laws that have arbitrary and unfair effects.

GCHQ's activities throw much of this up into the air, especially for business. It is clear that GCHQ believes that it can seize data from law abiding companies without their knowledge. It also believes it can take over equipment and networks to harvest data from allied countries.

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It uses definitions of ‘targeted surveillance’ that include collecting data about everyone. It relies on warrants that do not appear to be designed to facilitate this blanket data collection.

All of this undermines the rule of law and creates an unpredictable digital environment, where the most sophisticated actors are GCHQ and the NSA.

The law needs to bring GCHQ’s activities into a predictable legal framework. Sometimes, of course, they will need to act like burglars, and break into equipment. However, the public and Parliament ought to be able to trust that this would not routinely include ongoing heists at major companies in neighbouring countries.

If people can trust their own security measures, and to feel that agencies are not collecting and indiscriminately sharing their data, then it will be possible for GCHQ to rebuild trust with the public.

Visible and working constraints are vital for both wider trust of our secret services, and for avoidance of secret service over reach. We have made the case that over-reach is taking place, and serious errors and abuse are hard to stop under the current oversight regime, especially where it needs to deal with technical risks. This is likely to lead to reputational damage if and when it occurs.

Law and oversight must aim to reduce risks to the government and GCHQ itself by understanding its activities, demonstrating publicly that the trade offs are understood, showing how constraint is applied and spelling out how this is handled.

9.7 A strategy for legal reform and oversight

The government and oversight bodies should start by explaining that they understand the problems they are faced with, including the adverse impacts that can be created by GCHQ’s activities. This must include issues of democracy, trust, personal security and business impacts.

It is vital to involve the public in this process, through a debate about the legal changes we need, where the government can set out what powers it believes they and GCHQ need, and how they are to be constrained.

The actual legal changes needed have been described here and elsewhere. The Don’t Spy on Us coalition, which includes ORG, defines six broad principles:

1. No surveillance without suspicion

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2. Transparent laws, not secret laws
3. Judicial not political authorisation
4. Effective democratic oversight
5. The right to redress
6. A secure web for all

Applying these principles would create multiple levels of oversight and independent authorisation, to ensure that our democratic and legal institutions can form a picture of GCHQ and secret service activities at different points.

We must emphasise again the need for a thorough technical understanding of surveillance technologies within each kind of oversight institution – the executive, judiciary, Parliamentary committees and commissioners.

Finally, the oversight institutions need to show their ability to constrain the services by discussing their powers and abilities in public, and explaining when and how they have restrained the agencies' activities. The oversight institutions must look into unpleasant revelations, question the actions of the agencies, and explain when they have overstepped their remit.

9.8 The need for several national debates

The implications as we have seen extend well beyond national security. Broadly speaking we need to have debates that cover:

- The strategic implications of GCHQ-NSA integration for foreign policy and sovereignty
- Whether the UK's Cyberwarfare capabilities can be separated from GCHQ to increase civilian oversight, as they are in the USA
- The implications and constraints of interference in equipment in the UK and overseas

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- The limitations needed to constrain GCHQ, mass surveillance, international bulk data sharing and introduce effective oversight in the UK

So far the debate, so far as we have had one, has centred on the last of these four questions. Mass data trawling was the first question to emerge. When we approach it, we should remember that data is personal information, and the use to which it can be put can ruin people's lives, or even result in their death. While there can be no question that the agencies have a necessary role, the power they have is in need of serious constraint if we are not to see a string of abuses and foreseeable damage to business, society, the UK's national interests and innocent individuals.