

Criminal Justice Committee

**8th Meeting, 2024 (Session 6), Wednesday 21
February 2024**

Legislative Consent Memorandum – Investigatory Powers (Amendment) Bill

Background

1. The Investigatory Powers (Amendment) Bill was introduced in the House of Lords on 8 November 2023. The Bill can be found [here](#).
2. Details of the UK Bill and which provisions affect devolved powers are set out in the Scottish Government’s legislative consent memorandum (LCM); see **Annex A**. In addition, the Scottish Government wrote to the Committee on 5 February (**Annex B**) indicating that amendments made to the Bill did not trigger the need for a supplementary LCM.

Timetable

3. This Bill is now in its final stages in the UK Parliament. As such, the views of this Committee and the Scottish Parliament on the LCM are required.

LCM process

4. The process for considering consent to the relevant provisions in a UK Bill essentially commences with the publication, normally by the Scottish Government, of an LCM. This LCM relates to a Bill under consideration in the UK Parliament which contains what are known as “relevant provisions”. These provisions could:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament devolved to the Scottish Parliament in the Scotland Act 1998); or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
5. Under an agreement formerly known as the “Sewel Convention”, the UK Parliament will not normally pass bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee based on a memorandum. The

motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced (although this can be as late as the last amending stage in the second house). On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

6. The detailed procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Parliament's Standing Orders.

Consideration by the Delegated Powers and Law Reform Committee

7. The Delegated Powers and Law Reform (DPLR) Committee considered the LCM on 20 February. The clerks will provide a copy of their report or provide an oral update at the meeting.

Today's consideration

8. At today's meeting, members will consider the issue of whether to recommend consent to the relevant provisions in the Bill.
9. **The Scottish Government's LCM states that it agrees that consent should be given (see paragraph 23).**

Decisions

10. **Members are asked to discuss whether they agree with the Scottish Government's view on consent and what recommendation they wish to make to the Scottish Parliament.**
11. **Finally, members are asked to agree that the clerks produce a short, factual report, setting out the Committee's recommendations to the Scottish Parliament on the issue of legislative consent. The draft would be cleared by the Convener and then published.**

**Clerks to the Committee
February 2024**

Legislative Consent Memorandum

Investigatory Powers (Amendment) Bill

Background

1. This memorandum has been lodged by Angela Constance, Cabinet Secretary for Justice and Home Affairs, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Siobhian Brown, Minister for Victims and Community Safety. The Investigatory Powers (Amendment) Bill was introduced by the UK Government in the House of Lords on 08 November. The Bill can be found at [Investigatory Powers \(Amendment\) Bill \[HL\] - Parliamentary Bills - UK Parliament](#).

Content of the Investigatory Powers (Amendment) Bill

2. The Investigatory Powers Act 2016 (IPA 2016) [Investigatory Powers Act 2016 \(legislation.gov.uk\)](#) sets out the statutory framework for the use (by security and intelligence agencies, law enforcement and other public authorities) of investigatory powers to obtain communications and communications data. These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. The Bill updates elements of the IPA 2016 to ensure that the UK's investigatory powers framework remains fit for purpose in the face of evolving threats. The introduction of the Bill follows the publication of the Home Secretary's statutory report on the 2016 Act in February 2023 <https://www.gov.uk/government/publications/report-on-the-operation-of-the-investigatory-powers-act-2016/home-office-report-on-the-operation-of-the-investigatory-powers-act-2016-accessible-version#chapter-1-introduction-and-overview-of-the-act>, and a subsequent review by the former Independent Reviewer of Terrorism Legislation, Lord Anderson of Ipswich KBE KC, published in June 2023 <https://www.gov.uk/government/publications/independent-review-of-the-investigatory-powers-act-2016--2>. The key objective of the Bill is to make targeted reforms to the IPA 2016 to ensure that it remains fit-for-purpose for intelligence services, law enforcement and other public authorities.

3. The UK Government, on introducing the Bill, explained that since the introduction of the IPA 2016 there have been significant changes to the technology landscape and the nature of threats faced by the UK has continued to evolve. As a result, the UK Government describes the principal aims of the Bill as making targeted amendments to the IPA 2016 to ensure that the intelligence agencies have the tools they need to continue to keep the country safe.

4. The UK Government has said that this Bill is about delivering focused and targeted changes to the IPA 2016. The intention is not to create new powers but, instead, to recalibrate certain elements of the current regime to ensure that it remains fit for purpose

to respond to modern threats. Factsheets on the main measures can be found here: <https://www.gov.uk/government/publications/investigatory-powers-amendment-bill-factsheets>

5. The Bill will make changes to the Bulk Personal Dataset (BPD) regime, which will improve the intelligence services' ability to use less sensitive datasets (such as publicly and commercially available data). It will place intelligence services' examination of BPD held by third parties (i.e. an external organisation outside of the intelligence services) on a statutory footing. It will make changes to the Notices Regime. There are three different types of notices under that IPA 2016 that can be imposed on telecommunications operators. Amendments are being proposed to ensure the efficacy of those long-standing powers, the necessity of which has long been established. It will create a new condition for the use of Internet Connection records by the intelligence services and the National Crime Agency ("NCA") The proposed measure aims to allow greater detection of high-impact offenders by removing the requirement to unequivocally know a specific time of access, and service in use, and instead allows these factors to be specified within the application. It will make changes to the oversight regime to support the Investigatory Powers Commissioner ("IPC") to effectively carry out their role, including powers to enable the IPC to delegate some of the functions to Judicial Commissioners, appoint deputies and putting certain functions on a statutory basis. It will make changes to the warranty authorisation processes for the intelligence services and NCA. It will make changes to the Communications Data regime.

6. The Bill is in six parts:

- Part 1 makes changes to the BPD regime, which will improve the intelligence services' ability to respond with greater agility and speed to existing and emerging threats to national security;
- Part 2 makes changes to oversight arrangements to support the Investigatory Powers Commissioner to effectively carry out their role;
- Part 3 provides clarity on Communications Data including an additional condition on the use of Internet Connection Records;
- Part 4 makes changes to the Notices Regime;
- Part 5 contains miscellaneous provisions;
- Part 6 contains general provisions.

The UK has also published an impact assessment of the Bill. [Impact Assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Reason for requiring legislative consent

7. Much of the Bill deals with matters which extend to Scotland but are reserved to the UK Parliament by schedule 5 of the Scotland Act 1998 and make no alteration to the executive competence of the Scottish Ministers. Parts 1 and 3-6 of the Bill fall out with the scope of the legislative consent motion as they relate to reserved matters.

8. Provisions of the Bill which apply to Scotland and do require the legislative consent of the Scottish Parliament are those in Part 2 of the Bill to the extent that it provides for the oversight arrangements for devolved authorities and bodies exercising devolved

functions and requires the IPC to inform persons of a relevant error relating to that person. As such, it is a “relevant Bill” under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently one requiring the consent of the Scottish Parliament.

Part 2 – Oversight Arrangements

9. Part 2 of the Bill makes a number of amendments to Part 8 of the IPA 2016 (oversight arrangements). There are a number of authorities who can authorise the use of investigatory powers under the Regulation of Investigatory Powers (Scotland) Act 2000. This includes in Police Scotland, local councils, the Police and Investigation Review Commissioner, Scottish Environment Protection Agency, Food Standards Scotland, Social Security Scotland and the Common Services Agency for the Scottish Health who can authorise the use of directed surveillance or for the conduct or the use of covert human intelligence sources. These clauses relate to the oversight of those devolved functions and therefore relate to devolved matters. The list below outlines the relevant provisions.

10. Clause 7 – Deputy Investigatory Powers Commissioners

This clause allows the Investigatory Powers Commissioner (IPC) to formally appoint Deputy IPCs (DIPCs) when the IPC is unable or unavailable to carry out their functions.

However, because some of the functions exercised by the DIPCs, on behalf of the IPC, will be within devolved competence, the amendments are in part for devolved purposes. On this basis, the legislative consent process is engaged.

11. Clause 8 – Delegation of Functions

This clause allows the IPC to delegate some of his oversight functions to the DIPCs or any other Judicial Commissioner (JC) when the IPC is unable or unavailable to carry out their functions. Some of the functions exercised by the DIPCs and JCs are within devolved competence. The clause is therefore in part for purposes within the legislative competence of the Scottish Parliament. On this basis, the legislative consent process is engaged.

12. Clause 9 – Temporary Judicial Commissioners

This provision gives the IPC the powers to appoint Temporary JCs (TJCs) where the IPC and the Secretary of State considers that as a result of exceptional circumstances, there is a shortage of persons able to carry out JC functions. The maximum term of a TJC is three years. Some of the functions that will be exercised by TJCs will be within devolved competence. The clause is therefore in part for purposes within the legislative competence of the Scottish Parliament. On this basis, the legislative consent process is engaged.

13. Clause 10 – Main functions of the Investigatory Powers Commissioner

Clause 10(4) amends section 231 of the 2016 Act (error reporting) and replaces the reference to “code of practice under Schedule 7” with a reference to a “relevant code of

practice”. This is then defined in a new subsection to mean a code of practice under Schedule 7, the Police Act 1997, the Regulation of Investigatory Powers Act 2000 or the Regulation of Investigatory Powers (Scotland) Act 2000 (“RIPSA”). The IPC will therefore have the power to inform individuals who have been the subject of serious errors (including under RIPSA). This clause affects Scottish public authorities that carry out devolved functions. The clause is therefore in part for purposes within the legislative competence of the Scottish Parliament. On that basis, the legislative consent process is likely to be engaged.

14. Part 2 of the Bill requires the legislative consent of the Scottish Parliament to the extent that it provides oversight arrangements for devolved authorities and bodies exercising devolved functions and requires the IPC to inform persons of a relevant error relating to that person.

15. It is recommended that the Scottish Parliament consents to the UK Parliament legislating in or as regards Scotland for these provisions to ensure consistency across the UK. It would be difficult to legislate separately in Scotland in a coherent way for the provisions relevant to Scotland. The areas which are subject to legislative consent are largely concerned with enhancing the level of independent judicial oversight.

Consultation

16. On 17 Jan 2023, the Home Secretary appointed Lord (David) Anderson KBE KC to carry out an independent review of the IPA 2016. Lord Anderson carried out his own consultation with law enforcement, the intelligence agencies, and wider public authorities, as well as other external organisations and individuals with an interest in this work. His recommendations were reflected in his report which was published in June 2023. [Independent review of the Investigatory Powers Act 2016 \(accessible\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118412/independent-review-of-the-investigatory-powers-act-2016-accessible.pdf)

17. The UK Government undertook a public consultation on changes to the Notices Regime in the IPA 2016, which closed on 31 July 2023. The consultation set out the Government’s proposed objectives to improve the effectiveness of the current regime in response to technological changes and the risk they pose to investigatory powers, as well as the increase in data being held overseas. 301 responses to the consultation were received. Most of these responses were from members of the public as a result of a campaign by Open Rights Group. There were three responses from telecommunications operators, four from advocacy groups and three from trade associations. The Summary of Responses was published on 8 November 2023.

[Government response to the Home Office consultation on revised notices regimes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118412/government-response-to-the-home-office-consultation-on-revised-notices-regimes.pdf)

18. No Scottish Government consultation was conducted on this Bill.

Financial Implications

19. This Scottish Government does not anticipate any financial implications in these proposals.

Conclusion

20. The Scottish Government is supportive of the intent of the Bill and engagement has been good overall between officials, as the policy proposals underpinning this Bill were developed.

21. The areas which are subject to the legislative consent motion are largely concerned with making improvements to the oversight arrangement by strengthening independent judicial oversight.

22. Extending the relevant provisions of the Bill to Scotland will help contribute to the Scottish Government's aim of reducing the harm caused by serious organised crime and making Scotland a safer, fairer and more prosperous country.

Draft Legislative Consent Motion

23. The draft motion, which will be lodged by the Cabinet Secretary for Justice and Home Affairs, is:

“That the Parliament agrees that the relevant provisions of the Investigatory Powers (Amendment) Bill, introduced in the House of Lords on 8 November, relating to Investigatory Powers, so far as these matters fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament.”

**Scottish Government
December 2023**

Letter from the Cabinet Secretary for Justice and Home Affairs (5 February 2024)

Dear Convener

INVESTIGATORY POWERS (AMENDMENT) BILL

I am writing to provide an update on the Legislative Consent Memorandum (LCM) which was lodged at the Scottish Parliament on 15 December 2023 in respect of the UK Government's Investigatory Powers (Amendment) Bill.

Amendments

Lord Sharpe of Epsom OBE has written to advise the Scottish Ministers of amendments to be made to the Bill, tabled ahead of Lords Report stage on 23 January. Full text of the amendments to those arrangements are published online here: [Investigatory Powers \(Amendment\) Bill \[HL\] publications - Parliamentary Bills - UK Parliament](#)

In particular, amendment has been made to clause 8 to reflect that where the Investigatory Powers Commissioner (IPC) decides to delegate his functions under section 90(11) or 257(10) of the Investigatory Powers Act 2016 (IPA) (review of notices), he can only do so where the IPC is unable or unavailable to exercise the function. This amendment relates to functions of the IPC in reserved areas (national security notices, technical capability and retention notices) and therefore does not engage LCM process. Clause 9 of the Bill makes provision for the appointment of temporary Judicial Commissioners where the IPC and the Secretary of State considers that as a result of exceptional circumstances, there is a shortage of persons able to carry out the functions of the Judicial Commissioner, and the appointment of a temporary JC is required to deal with that shortage. That clause requires certain persons to be notified as soon as reasonably practicable after a temporary JC is appointed. An amendment was tabled on 16 January 2023 to ensure that the Scottish Ministers will be notified when a temporary JC is appointed.

We agree with the UK Government's analysis that this amendment does not generate the requirement for a supplementary LCM.

A further amendment has been made to make new provision after Clause 10 to introduce new section 235A to the IPA in relation to personal data breaches. The effect of the clause is to allow the IPC to notify affected individuals of serious personal data breaches relating to warrants issued under the IPA. Changes to the Privacy and Electronic Communications Regulations will ensure that Telecommunications Operators have a clear legal basis to report errors and data protection breaches to IPCO and the Information Commissioner's Office. This is an expansion of existing oversight and addresses a gap in the existing regime. We agree with the UKG view that the clause is for reserved purposes.

EU Alignment

As you are aware, the Legislative Consent Memorandum must detail the UK legislation's likely impact on the Scottish Government's policy to maintain alignment with the EU. This was not included in the LCM lodged on 15 December 2023. My officials have now considered EU Alignment, and I would like to advise that Clauses 7 – 10 are not relevant to the Scottish Government's policy to maintain alignment with the EU because there is no existing EU legislation in this area.

Timeline

UK Government officials have advised that they expect the Bill to have its first reading in the House of Commons at the end of January. Commons Report stage is anticipated at the end of February, with Royal Assent in early Spring.

Yours sincerely

Angela Constance MSP