



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 23 December 2020  
SP Paper 901  
80th Report, 2020 (Session 5)

# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Legislative Consent Memorandum: Covert Human Intelligence Sources (Criminal Conduct) Bill**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

---

All documents are available on the Scottish  
Parliament website at:  
[http://www.parliament.scot/abouttheparliament/  
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact  
Public Information on:  
Telephone: 0131 348 5000  
Textphone: 0800 092 7100  
Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

# Contents

<b>Introduction</b>	<b>1</b>
<b>Overview of the Bill</b>	<b>2</b>
<b>Delegated Powers</b>	<b>3</b>
<b>Annex - Correspondence</b>	<b>4</b>

# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



[dplr.committee@parliament.scot](mailto:dplr.committee@parliament.scot)



0131 348 5212

# Committee Membership



**Convener**  
**Bill Bowman**  
Scottish Conservative  
and Unionist Party



**Deputy Convener**  
**Stuart McMillan**  
Scottish National Party



**Mary Fee**  
Scottish Labour



**Michelle Ballantyne**  
Scottish Conservative  
and Unionist Party



**Gil Paterson**  
Scottish National Party

# Introduction

1. At its meetings of 15 and 22 December 2020 the Committee considered the provisions in the UK Government's [Covert Human Intelligence Sources \(Criminal Conduct\) Bill](#) ("the Bill") that confer power to make subordinate legislation in areas of devolved competence.
2. The Bill was introduced by the UK Government in the House of Commons on 24 September 2020. The Bill is currently at the Report Stage in the House of Lords.
3. Some of the Bill's provisions apply to Scotland for a purpose within the legislative competence of the Scottish Parliament and/or alter the executive competence of the Scottish Ministers. The Bill is therefore a "relevant Bill" for the purposes of Standing Order Rule 9B.1, and the Scottish Government has therefore lodged a [Legislative Consent Memorandum](#) ("LCM") for the Parliament's consideration. The LCM was lodged on 4 December 2020.
4. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions. The lead committee in respect of the LCM is the Justice Committee.

# Overview of the Bill

5. The [Explanatory Notes](#) for the Bill states:

” The Bill amends Part II of the Regulation of Investigatory Powers Act 2000 (“RIPA”) to provide a statutory power for the security and intelligence agencies, law enforcement agencies and a limited number of other public authorities to authorise Covert Human Intelligence Sources (CHIS) to participate in criminal conduct where it is necessary and proportionate to do so for a limited set of specified purposes. The Bill includes equivalent amendments to Regulation of Investigatory Powers (Scotland) Act 2000 (“RIP(S)A”).

6. The Bill therefore provides an express power for persons within certain public authorities to authorise CHIS (which could be a member of the public or a member of law enforcement e.g. an undercover police officer) to undertake conduct which may, but for the authorisation, constitute a criminal offence. The effect of a valid authorisation is that the conduct is rendered lawful for all purposes. As some Covert Human Intelligence Sources activity taking place in Scotland is authorised under the RIP(S)A, the amends RIP(S)A, so that the regimes in RIPA and RIP(S)A remain broadly consistent.

7. Paragraph 24 of the LCM states that the Scottish Government will not recommend that the Scottish Parliament give its consent to the Bill:

” The Scottish Government supports relevant authorities having the necessary powers they require in order to keep our communities safe. These, however, must be balanced by protection of civil liberties. The Scottish Government has been insistent with the UK Government in requiring enhanced independent oversight by the Investigatory Powers Commissioner’s Office at an early stage in the authorisation process to be included in the Bill. The Scottish Government’s position, which has been explained to the UK Government, is that the Scottish Government requires satisfactory amendments to be made to the Bill to achieve the above in order for the Scottish Government to recommend that the Scottish Parliament consents to the relevant provisions in the Bill.

8. While the Scottish Government is not recommending approval of the Bill, the remit of the Committee nevertheless remains engaged.

# Delegated Powers

9. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (“DPM”). As is normal for UK Bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s view is set out in the LCM.
10. The DPM identifies each of the provisions of the Bill which confer powers to make delegated legislation. It explains in each case the purpose of the power, why in the UK Government’s view a delegated power is appropriate, and the parliamentary procedure that has been selected.
11. Of these delegated powers, the following five confer powers on the Scottish Ministers:
  - Paragraph 4 of Schedule 1: power to impose requirements in respect of arrangements which must exist for authorisations to be granted and power to prohibit the authorisation of conduct or impose additional requirements in respect of the authorisation of conduct
  - Paragraph 5 of Schedule 1: power to designate persons for the purpose of section 7A (amending Section 8 of RIP(S)A)
  - Paragraph 5 of Schedule 1: power to amend section 8(3A) of RIP(S)A
  - Paragraph 7 of Schedule 1: power to specify that certain authorisations cease to have effect after a shorter period than that provided for by section s.19(3) of RIP(S)A
  - Paragraph 8 of Schedule 1: power to provide for a person to be able to cancel an authorisation in certain circumstances
12. The Committee considered each of these powers in turn and determined that each was acceptable in principle and was also subject to the relevant procedure.
13. As part of its scrutiny, the Committee wrote to the Cabinet Secretary for Justice in relation to the proposal that the cancellation of authorisation powers under section 20 of RIP(S)A will be extended such that criminal conduct authorisations will also be subject to such powers. The Committee asked about the circumstances envisaged for the use of this power; what additional safeguards will be put in place to ensure that it is appropriate in those circumstances to cancel an authorisation; as well as what is the effect on any activities which remain active under that authorisation at the point of cancellation.
14. The Committee's letter, as well as the Cabinet Secretary for Justice's response, are included in the **Annex**.
15. The Committee agreed to highlight this correspondence to the lead committee.



# Annex - Correspondence

## Convener to the Cabinet Secretary for Justice

At its meeting today, the Delegated Powers and Law Reform Committee considered the LCM for the Covert Human Intelligence Sources (Criminal Conduct) Bill.

It is proposed that cancellation of authorisation powers under Section 20 of the Regulation of Investigatory Powers (Scotland) Act 2000 will be extended such that criminal conduct authorisations will also be subject to such powers. This extension will also enable Scottish Ministers, by regulations, to provide that a person other than the person specified in Section 20 (the person who granted or last renewed the authorisation) can cancel an authorisation, in circumstances where that person is not able to perform the cancellation.

The Committee seeks to understand how this power will be put into effect by the authorities who are able to grant and therefore cancel such an authorisation. Specifically, what circumstances are envisaged where the person who granted the authorisation is not able to perform the cancellation? What additional safeguards will be put in place to ensure that it is appropriate in those circumstances to cancel an authorisation, such that the person cancelling the authorisation is fully aware of relevant facts and information pertaining to the investigation and the authorisation? Further, if an authorisation is cancelled, what is the effect on any activities which remain active under that authorisation at the point of cancellation?

I'd be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by close of business on Thursday, 17 December 2020. I appreciate this is a very short deadline, but the Committee is keen to reconsider this LCM before parliamentary recess.

Bill Bowman MSP, Convener of the Delegated Powers and Law Reform Committee

## Cabinet Secretary for Justice to the Convener

Thank you for your letter of 15 December.

The Regulation of Investigatory Powers (Scotland) Act 2000 (RIP(S)A) provides a statutory regulatory framework within which covert activity may be authorised by designated public authorities in cases where it can be demonstrated that it is both necessary and proportionate to do so. The ongoing consideration of necessity and proportionality requires that an authorisation be cancelled as soon as either of those conditions cease to be met. Where possible, cancellation of the authorisation should be undertaken by the person who made the initial authorisation.

Section 20(4) of RIP(S)A enables regulations to be made to allow for situations whereby the original authorising officer is not available to make the cancellation. This is in recognition of the importance that authorisations be cancelled as soon as they are judged to be no longer necessary and/or proportionate. Circumstances where this may occur include the original authorising officer being on leave, or absent due to sickness, or that they have moved post or left the organisation. As per the Regulation of Investigatory Powers (Cancellation of Authorisations) (Scotland) Regulations 2002 (SSI 2002/107), in any of these circumstances, the person appointed will be someone of at least the same rank as the original authorising officer. That person, as a matter of practice, will have

sufficient background and training in the matters concerned.

RIP(S)A requires that a person within the relevant organisation – a handler - be responsible the day to day management of the source. This allows authorisations to be brought to an end with the welfare of the individual in mind and for the individual to be fully cognisant that the authorisation will cease and that any protections afforded by that authorisation will no longer exist.

All of the matters referred to above are subject to regular inspection by the independent, judicially-led Investigatory Powers Commissioner's Office (IPCO). As part of that regular program of inspection, IPCO will seek to ensure that all persons engaged in the authorisation process have undergone appropriate training.

The extension of this duty to cancel to cover Criminal Conduct Authorisations is, therefore, a sensible extension of the existing arrangement.

I hope that this is helpful.

Humza Yousaf MSP, Cabinet Secretary for Justice

