



The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Investigatory Powers (Amendment) Bill



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Delegated Powers and Law Reform Committee

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;

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

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



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Committee Membership



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Introduction

1. At its meeting on 20 February 2024, the Committee considered the delegated powers that are exercisable within devolved competence in the [Investigatory Powers \(Amendment\) Bill](#) ("the Bill").
2. The Committee considered the Legislative Consent Memorandum ("LCM") for the Bill under Rule 6.11.1(b) of Standing Orders, which provides that the Committee may consider and report on proposed powers to make subordinate legislation in particular bills or other proposed legislation. In this case, the proposed powers are powers for UK Ministers to make subordinate legislation within devolved competence.

Overview of the Bill

3. The Bill was introduced by the UK Government in the House of Lords on 8 November 2023. It moved to the House of Commons and had its first reading on 31 January 2024. At time of writing, it is anticipated that the report stage in the House of Commons will take place at the end of February, with Royal Assent in early Spring.ⁱ
4. The Bill contains 31 sections and a Schedule. It extends and applies to the whole of the UK, with the caveat that amendments and repeals made by the Bill have the same extent as the provision being amended or repealed.
5. Most of the provisions of the Bill operate by amending, and inserting substantial new provision into, the Investigatory Powers Act 2016 (“the 2016 Act”).
6. The 2016 Act gives statutory powers to security and intelligence agencies, law enforcement and other public authorities to obtain communications and data about communications. This covers, for example, the interception of communications and the retention and acquisition of data about communications. The 2016 Act also requires certain categories of warrants to be approved by independent Judicial Commissioners, and provides for judicial oversight of how investigatory powers are used.
7. The stated purpose of the Bill is to amend the 2016 Act; to make provision about information supplied by, or relating to, the Judicial Commissioners; and for connected purposes. The [Explanatory Notes](#) state that the Bill updates elements of the 2016 Act, (following a review in 2023) to ensure that the UK’s investigatory powers framework remains fit for purpose in the face of evolving threats.ⁱⁱ
8. The Explanatory Notes identify the main elements of the Bill as follows. The provision that is within devolved competence relates to the oversight regime (being the fifth point below, in bold).
 - 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).
 - Placing the intelligence services’ examination of bulk personal datasets held by third parties (i.e. an external organisation outside of the intelligence services) on a statutory footing. If the examination was of datasets retained by intelligence services, existing provisions in the 2016 Act would apply.
 - Changes to the Notices regimes, which will help the UK anticipate and develop mitigations against the risk to public safety posed by multinational companies rolling out technology that precludes lawful access to data for the statutory purposes set out under the 2016 Act.
 - Creating a new condition for the use of Internet Connection Records by the

ⁱ By [letter of 5 February 2024](#) from the Cabinet Secretary for Justice and Home Affairs to the lead committee.

ⁱⁱ Explanatory Notes, paragraphs 1 and 2

intelligence services and the National Crime Agency.

- **Improvements to the oversight regime to support the Investigatory Powers Commissioner to effectively carry out their role, including powers to enable the IPC to delegate some of their functions to Judicial Commissioners, appoint deputies and putting certain functions on a statutory basis (Part 2 of the Bill, clauses 7-10).**
 - Measures to increase resilience of the warranty authorisation processes for the intelligence services as well as for the National Crime Agency.
 - Changes to the communications data regime to provide greater certainty on the circumstances for lawful data acquisition.
9. The Scottish Government lodged the [LCM for the Bill](#) on 20 December 2023. The Scottish Government is supportive of the intent of the Bill and has published a draft motion recommending that the Scottish Parliament gives its legislative consent.
10. The lead committee for the LCM is the Criminal Justice Committee.

Delegated Powers

11. The UK Government has published a [Delegated Powers Memorandum](#) ("the DPM") to accompany the Bill. It explains in each case the purpose of the power, why a delegated power is appropriate, and the proposed parliamentary procedure.
12. As indicated above, most of the provision in the Bill is reserved. Within the main provisions of the Bill the devolved content is limited to Part 2 of the Bill, concerning the oversight regime. This includes provision for the oversight arrangements for devolved authorities and bodies exercising devolved functions; and provides for the Investigatory Powers Commissioner to delegate functions to a deputy; allows for temporary Judicial Commissioners and requires the Commissioner to inform persons if there has been a relevant error relating to that person. There are no delegated powers in Part 2 of the Bill.
13. There are only two delegated powers in the Bill which could be capable of being exercised within devolved competence. Both are in the "ancillary" category, meaning they are sweeping-up powers to ensure that the changes to the law which the Bill makes works smoothly, they are not powers that deliver the main effect of the Bill. They are a power to make consequential provision (clause 28(2)) and a power to make transitional or saving provision (clause 30(4)).

Review of relevant powers

Clause 28: Power to make consequential provision

Power conferred on: the Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: negative if amending secondary legislation, affirmative if amending primary legislation

Provision

14. This a power to make provision that “is consequential on” the Bill. Regulations made under this power may, in particular, amend, repeal or revoke primary legislation that was passed before the Bill or during the same legislative session.

Committee consideration

15. The DPM states that the power is necessary to ensure that other provisions on the statute book properly reflect and refer to the provisions in this Bill once enacted, and to ensure that the changes effected by the Bill can be effectively delivered. The DPM states further that the UK Government accepts that the power may, on the face of it, appear wide, but that any consequential amendment made under this power would have to be genuinely consequential on the provisions of the Bill.ⁱⁱⁱ
16. The Committee noted the power is widely drawn, that it could conceivably be used to make provision with legislative competence, including modifying Scottish primary and secondary legislation, and that such provision would not be subject to scrutiny by the Scottish Parliament.
17. However, considering this ancillary power in the context of the Bill as a whole, while the power is relatively widely drawn, the Bill itself is not. The policy is developed on the face of the Bill, and the type of provision that could be made under this power is limited to provision that is consequential on those detailed provisions. The Committee considered that it is unlikely that it could be used to make significant new policy which is not foreseeable from reading the Bill itself. The Bill contains only limited devolved content, and if the Parliament is content with those main provisions, the Committee considers that the Parliament can be content with this particular ancillary power.
18. The Committee was also content with the proposed parliamentary procedure: the negative procedure for regulations which amend secondary legislation and the affirmative procedure for regulations amending primary legislation.

19. **The Committee is content with this power.**

Clause 30(4): Transitional or savings provisions in relation to commencement

iii DPM paragraphs 16-18

Power conferred on: **the Secretary of State**

Power exercisable by: **Regulations**

Parliamentary procedure: **No procedure**

Provision

20. This is a power to make transitional or saving provision in connection with the coming into force of any provision of the Bill. By virtue of clause 30(5), this includes power to make different provision for different purposes.

Comment

21. The DPM does not include a specific justification for the transitional and savings element of the commencement provision, but states that this is a standard clause.
22. The Committee agreed that this is a standard clause. As noted above, the Committee considered it could potentially be used within devolved competence, but what the power can be used to do is narrow. It cannot be used to be make substantive new policy of the kind that the Scottish Parliament might want to scrutinise.
23. Accordingly, the Committee considered that if the Parliament is content with the main provisions, it can be content with this standard ancillary power.
24. It is standard for this type of clause not to be subject to any parliamentary procedure.

- 25. The Committee is content with this power.**

