REGULATION OF INVESTIGATORY POWERS
(SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Regulation of Investigatory Powers (Scotland) Bill introduced in the Scottish Parliament on 25 May 2000:

   • Explanatory Notes;
   • a Financial Memorandum;
   • an Executive Statement on Legislative Competence; and
   • the Presiding Officer’s Statement on Legislative Competence.

A Policy Memorandum, also prepared by the Scottish Administration, is printed separately as SP Bill 16–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The main purpose of the Bill is to ensure that the relevant investigatory powers are used in accordance with human rights. These powers are:

- intrusive surveillance (on residential premises/in private vehicles);
- covert surveillance in the course of specific operations;
- the use of covert human intelligence sources (agents, informants, undercover officers).

5. For each of these powers, the Bill will ensure that the law clearly covers:

- the purposes for which they may be used;
- which authorities can use the powers;
- who should authorise each use of the power;
- independent judicial oversight;
- a means of redress for the individual.

6. Not all of these matters need be dealt with in this Bill - in many cases existing legislation already covers the ground. The Bill will work in conjunction with existing legislation, in particular the Police Act 1997 and the Human Rights Act 1998.

7. The Bill creates a system of authorisations for various types of surveillance and the conduct and use of covert human intelligence sources. The Bill will regulate the use of these techniques and safeguard the public from unnecessary invasions of their privacy. The provisions themselves do not impose a requirement on the public authorities to seek or obtain an authorisation where, under the Bill, one is available (see section 25). Nevertheless, the consequences of not obtaining an authorisation under this Part may be, where there is an interference with Article 8 rights and there is
no other source of authority, that the action is unlawful by virtue of section 6 of the Human Rights Act 1998.

COMMENTARY ON SECTIONS

Surveillance

Section 1: Conduct to which this Act applies

8. This section describes and defines the conduct which can be authorised under this part of the Bill. Three types of activity are covered: "directed surveillance", "intrusive surveillance" and the conduct and use of covert human intelligence sources.

9. "Directed surveillance" is defined in subsection (2) as covert surveillance that is undertaken in relation to a specific investigation and which is likely to result in private information about a person being obtained. Under subsection (2)(c) actions taken by way of an immediate response to events for which it would not be reasonably practicable for an authorisation to be sought are not included as ‘directed surveillance’. By subsection (8), surveillance will be covert where it is carried out in a manner calculated to ensure that the person or persons subject to the surveillance are unaware that it is or may be taking place.

10. "Intrusive surveillance" is defined in subsections (3) to (5) as covert surveillance carried out in relation to anything taking place on residential premises or in any private vehicle. This kind of surveillance may take place by means either of a person or device located inside residential premises or a private vehicle or by means of a device placed outside which consistently provides a product of equivalent quality and detail as a product which would be obtained from a device located inside. For these purposes, a private vehicle is one used primarily for private purposes, for example for family, leisure or domestic purposes (section 27(1)).

11. Subsection (4) provides that surveillance is not intrusive when the device is one that only provides information about the location of the vehicle (eg a tracking device).

12. Subsection (7) defines a "covert human intelligence source".

13. Subsection (9) defines what is meant by private information for the purposes of section 1. It is stated to include any information relating to a person’s private or family life.

14. Subsection (10) defines, for the purposes of the section, what is meant by the references to the presence of a surveillance device in a vehicle.
Section 2: Lawful surveillance etc

15. This section provides that all conduct defined in section 1 will be lawful, provided it is carried out in accordance with the authorisation to which it relates.

16. Furthermore, there will be no civil liability arising out of conduct which is incidental to the authorised conduct. However, this does not apply in the case where the incidental conduct is conduct which itself should have been separately authorised either under this Bill or under Part III of the Police Act 1997 which relates to authorisation of interference with property and wireless telegraphy.

Sections 3, 4 and 5: Authorisation of directed surveillance; Authorisation of covert human intelligence sources; and Persons entitled to grant authorisations under sections 3 and 4

17. These sections deal with the scheme of authorisations for directed surveillance and the conduct and use of covert human intelligence sources.

18. Section 5 provides that the persons entitled to grant such authorisations will be such persons within the relevant public authorities that are designated by order of the Scottish Ministers. In this respect, the relevant public authorities are:

- a police force maintained under or by virtue of section 1 of the Police (Scotland) Act 1967;
- the National Criminal Intelligence Service (NCIS); or
- any other public authority specified by order of the Scottish Ministers.

19. Police or NCIS authorisations may only be granted an application from within the force or authority in question (see section 7(1)).

20. Sections 3 and 4 provide that authorisations cannot be granted unless specific criteria are satisfied, namely, that the person granting the authorisation believes that:

- the authorisation is necessary on specific grounds; and
- the authorised activity is proportionate to what is sought to be achieved by it.

21. The specific grounds are that the authorisation is necessary:

- for the purpose of preventing or detecting crime or of preventing disorder;
- in the interests of public safety;
- for the purpose of protecting public health; or
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

• for other purposes which may be specified by order of the Scottish Ministers.

22. Section 4(4) confers a power on the Scottish Ministers to make an order which imposes certain constraints on authorisations which may be made in relation to covert human intelligence sources. The order may prohibit the giving of authorisations in relation to certain descriptions of conduct or use of covert human intelligence sources. An order may also impose requirements, in addition to those provided for by section 4(2), that must be satisfied before an authorisation may be granted in relation to certain descriptions of the conduct or use of covert human intelligence sources.

23. There is a further criterion in relation to covert human intelligence sources, which is set out in section 4(6), namely that specific arrangements exist to ensure that, amongst other things, the source is independently managed and supervised and that records are kept of the use made of the source. The responsibility for such tasks falls to specified individuals within the organisation benefiting from the use of the source. As there may be cases where a source carries out activities for more than one organisation, it is provided that only one organisation will be identified as having responsibility for such arrangements and record-keeping.

24. Subsection (2) of section 5 provides that Scottish Ministers may impose, by order, restrictions on the types of authorisations granted and on the circumstances or purpose for which such authorisations may be granted.

25. Sections 3(4) and 4(5) set out the conduct that is authorised by the authorisation. Broadly speaking, it covers any conduct that occurs whilst carrying out the specified surveillance or is comprised in the activities involving the specified conduct or use of a covert human intelligence source, provided it is carried out or takes place in the manner and for the purposes described.

Section 6: Authorisation of intrusive surveillance

26. This section deals with authorisations for intrusive surveillance. Such authorisations may only be granted by chief constables in the police forces or the Director General of NCIS. Section 7(2) provides that a chief constable of a police force or the Director General of NCIS may not grant an authorisation, except on an application by a member of his/her force or Service.

27. By virtue of subsection (2), intrusive surveillance authorisations cannot be granted unless specific criteria are satisfied, namely that the chief constable or the Director General believes that:

• the authorisation is necessary for the purpose of preventing or detecting serious crime (which is defined in section 27(6)); and
• the authorised activity is proportionate to what is sought to be achieved by it.
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

28. An additional factor which must be taken into account is specified in subsection (3) that the chief constable or the Director general must be satisfied that the information which it is thought necessary to obtain by the authorised conduct could not reasonably be obtained by other means.

Section 7: Rules for grant of authorisations

29. Section 7 sets out rules for granting authorisations for any conduct to which the Bill applies and sections 8 to 16 detail the rules and procedures for the granting of intrusive surveillance authorisations. They outline very similar procedures to those set out in part III of the Police Act 1997 (interference with property and wireless telegraphy).

30. Subsection (1) provides that a person who is a designated person for the purposes of section 3 or 4 (which relate respectively to the authorisation of directed surveillance and the authorisation of the conduct and use of covert human intelligence sources) should not grant an authorisation except on an application made by a member of the same police force or the National Criminal Intelligence Service.

31. Subsection (2) restricts an authorisation for intrusive surveillance involving residential premises to being granted only where the premises are within the area of operation of that force or Service. The area of operation is defined in subsection (4).

32. Subsection (3) enables a single authorisation to combine both an authorisation granted under the Bill and an authorisation given by, or on the application of, a member of a police force or of the National Criminal Intelligence Service under Part III of the Police Act 1997 which relates to the authorisation of interference with property and wireless telegraphy. Nevertheless, subsection (3) also provides that the provisions of the Bill or the 1997 Act that are applicable in the case of each of the authorisations shall apply separately in relation to the part of the combined authorisation to which they are applicable.

Section 8: Grant of authorisations in cases of emergency

33. Where an application is made for an intrusive surveillance authorisation and the case is urgent but it is not reasonably practicable for the application to be considered by a chief constable in the police force or the Director General of NCIS or his designated deputy, an authorisation may be granted by a person entitled to act in his/her absence. Subsection (4) lists the officers entitled so to act and subsection (6) sets down those officers entitled to act as "designated deputies".

34. Subsection (3) provides that in the case where a person considers an application for an authorisation for the carrying out of intrusive surveillance where the case is urgent, the person concerned shall have the same power to grant an
authorisation as the person for whom he is entitled to act. The person concerned would be a person who is entitled under section 8(4) to act for the chief constable or the Director General of the National Criminal Intelligence Service.

**Section 9: Notification of authorisations for intrusive surveillance**

35. Where an intrusive surveillance authorisation is granted or cancelled, except where it is cancelled under section 11(2), written notification must be given to an ordinary Surveillance Commissioner as soon as reasonably practicable. *Subsection (2)* requires that notification to be in accordance with arrangements made by the Chief Surveillance Commissioner and must specify the matters prescribed by order of the Scottish Ministers.

36. By virtue of *subsection (3)*, such a notice must indicate that the authorisation or renewal requires the approval of an ordinary Surveillance Commissioner before it takes effect (see section 10) or that the case is one of urgency, together with the grounds for that belief.

37. *Subsection (4)* provides that the ordinary Surveillance Commissioner must, as soon as practicable, scrutinise the notice, which can be transmitted by electronic means, and decide whether or not to approve the authorisation in those case where his approval is required.

38. *Subsection (5)* specifies that the Scottish Ministers must not make an order under section 9(2)(c) unless a draft of the order has been laid before and approved by resolution of the Scottish Parliament.

39. *Subsection (6)* provides that any notice that is required by any provision of section 9 to be given in writing may be given, instead, by being transmitted by electronic means.

**Section 10: Approval required for authorisations to take effect**

40. *Subsection (1)* provides that, except in urgent cases, authorisations granted for intrusive surveillance will not take effect until they have been approved by an ordinary Surveillance Commissioner and written notice of the Commissioner's decision has been given to the person who granted the authorisation.

41. *Subsection (2)* provides that where the person who granted the authorisation believes the case to be one of urgency, the authorisation will take effect from the time of grant, provided the appropriate notice is given to the ordinary Surveillance Commissioner, as described in section 10(2).
42. *Subsection (3)* provides that an ordinary Surveillance Commissioner shall give his approval only if he is satisfied that there are reasonable grounds for believing that the authorisation is necessary and that the surveillance is proportionate to what is sought to be achieved.

43. If an ordinary Surveillance Commissioner decides not to approve an authorisation, *subsection (4)* requires him to make a report of his findings to the "most senior relevant person" (as defined in *subsection (5)*). This will be the chief constable or the Director General of NCIS.

44. *Subsection (6)* specifies that any notice that is required by any provision of section 10 to be given in writing may be given, instead, by being transmitted by electronic means.

### Section 11: Quashing of authorisations etc.

45. This section gives Surveillance Commissioners the power to quash or cancel an authorisation for intrusive surveillance.

46. Under *subsection (1)*, an ordinary Surveillance Commissioner may quash an authorisation, with effect from the time of the grant of the authorisation or renewal, if he believes that the criteria for authorisation in section 6 were not met at the time the authorisation was granted or renewed.

47. Alternatively, he may, under *subsection (2)*, cancel an authorisation if he believes that there are no longer any reasonable grounds for believing that the criteria in section 6 are met. In such a case, he may cancel the authorisation from the time that the criteria, in his opinion, ceased to be met.

48. *Subsection (3)* provides that if an authorisation was granted or renewed by way of the urgency procedure, and the ordinary Surveillance Commissioner is not satisfied that, at the time of grant or renewal, there were reasonable grounds for believing the case to be one of urgency, he may quash the authorisation.

49. He may also, under *subsections (4) and (5)*, order the destruction of records, apart from those required for pending civil or criminal procedures. Where an authorisation is cancelled, he may only order the destruction of records from the time the authorisation no longer meets the criteria specified in section 6.

50. *Subsection (6)* provides that no order may be made under section 11 of the destruction of any records which are required for pending criminal or civil proceedings.
51. Subsection (7) provides that where an ordinary Surveillance Commissioner exercises a power conferred by this section, he will make a report of his actions, together with his reasons, as soon as reasonably practicable, to the most senior relevant person and to the Chief Surveillance Commissioner.

52. Subsection (8) provides that an order to destroy records does not become operative until after the period allowed for appealing against the decision or the dismissal of such an appeal.

Section 12: Appeals against decisions by Surveillance Commissioners

53. Subsections (1) and (2) provide that an senior authorising officer, or a designated deputy or other person granting an intrusive surveillance authorisation in the absence of the chief constable or the Director General, may appeal to the Chief Surveillance Commissioner against:

- a refusal of a Surveillance Commissioner to approve an authorisation or renewal;
- a decision by a Surveillance Commissioner to quash or cancel an authorisation; or
- a decision to make an order for the destruction of records.

54. Subsection (3) imposes a time limit of 7 days for making an appeal.

55. Subsection (4) provides that the Chief Surveillance Commissioner must allow an appeal if:

- he is satisfied that the criteria set out in section 6 were met at the time in question; and
- he is not satisfied that the urgency procedure has been abused.

56. By virtue of subsection (5), in relation to appeals against decisions to quash or cancel authorisations, the Chief Surveillance Commissioner may modify the decision if he considers that there were grounds for the action which the Surveillance Commissioner has taken but such action should have taken effect at a different time. In such cases, he may modify the Surveillance Commissioner's decision to that which he considers should have been made.

57. Where an appeal against a decision to quash or cancel an authorisation is allowed, subsection (6) provides that the Chief Surveillance Commissioner shall quash any related order for the destruction of records.

Section 13: Appeals to the Chief Surveillance Commissioner: supplementary
58. Where the Chief Surveillance Commissioner has determined an appeal under section 12, **subsection (1)** requires him to give notice of his determination to:

- the person who brought the appeal; and
- the ordinary Surveillance Commissioner whose decision was appealed against.

59. **Subsection (2)** provides that where the appeal is dismissed, he will report his findings to the appellant, the ordinary Surveillance Commissioner and to the Scottish Ministers.

60. **Subsection (3)** provides that the Chief Surveillance Commissioner shall not, other than as mentioned in subsection (2), give any reasons for his determination.

**Section 14: Information to be provided to Surveillance Commissioners**

61. Section 14 imposes a duty on every member of a police force and every member of the National Criminal Intelligence Service to comply with certain requests of a Surveillance Commissioner. This relates to requests for documents or information required by the Commissioner concerned for the purpose of enabling him to carry out the functions of a Commissioner under sections 9 to 13.

**Grant, renewal and duration of authorisations**

**Section 15: General rules about grant, renewal and duration**

62. This section sets out the general rules for authorisations, including their granting, renewal, and duration.

63. **Subsection (1)** provides that, in urgent cases, an authorising officer may give an oral authorisation. All other authorisations must be in writing.

64. **Subsection (2)** provides that a single authorisation may be given, combining two or more authorisations under this Act. When this occurs, the provisions of this Act which relate to one type of activity only shall apply to those parts of the authorisation which authorises that type of activity. Further provisions for combined authorisations are in section 7(3).

65. **Subsection (3)** provides that oral authorisations and those granted by officers entitled to act in urgent cases in the absence of the authorising officer or his designated deputy will expire after 72 hours, beginning with the time when the grant or renewal of an authorisation takes effect.
66. Except where granted or renewed orally or by an officer entitled to act in urgent cases, authorisations for the use of covert human intelligence sources will last for 12 months, beginning with the day on which the grant or renewal takes effect.

67. Authorisations for the use of intrusive or directed surveillance will last for 3 months subject to subsection (8).

68. Subsection (4) provides that an authorisation may be renewed at any time before it ceases to have effect by any person entitled to grant a new authorisation of the same type. The same conditions attach to a renewal of surveillance as to the original authorisation. However, before renewal of an authorisation for the use or conduct of a covert human intelligence source, subsection (6) requires there to be a review of the use made of that source, the tasks given to that source and the information so obtained.

69. Subsection (5) applies sections 3 to 14 in relation to renewal of authorisations on the same basis as those sections apply to grants of authorisations.

70. Subsections (6) and (7) impose conditions for the renewal of an authorisation for the conduct of the use of a covert human intelligence source. The person who is empowered to renew the authorisation must be satisfied that a review has been carried out of the matters mentioned in subsection (7) and has, for the purpose of deciding whether he should renew the authorisation, considered the results of that review. The matters which must be reviewed are specified in subsection (7) and are the use made of the source in the period since the grant or, as the case may be, latest renewal of the authorisation and the tasks given to the source during that period and the information obtained from the conduct or the use of the source.

71. Subsection (8) makes provision for an enabling power which will permit the Scottish Ministers to specify that subsection (3) will have effect so that the periods mentioned there may be shorter in relation to authorisations of a description specified.

72. Subsection (9) provides that a renewal of an authorisation shall take effect not from the time of renewal but from the day the authorisation would have ceased to have effect, but for the renewal. The policy is to replicate the position in section 95(1) of the Police Act 1997 so as to ensure synchronisation between a single authorisation under those provisions and a Police authorisation.

SECTION 16: CANCELLATION OF AUTHORISATIONS

73. Subsection (1) sets out when the person who granted or renewed an authorisation must cancel it.
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

74. **Subsection (2)** provides that the person who granted or renewed any authorisation must cancel it where it was granted or renewed by a person entitled to act for any other person or as his deputy. However, by virtue of **subsection (3)**, an authorising officer's deputy (defined in **subsections (6) and (7)**) who granted an authorisation is also under a duty to cancel an authorisation in those cases where he would have had the power to act on the authorising officer's behalf.

75. **Subsections (4) and (5)** provide for the Scottish Ministers to make regulations setting out how the duty for cancelling authorisations should be performed where the authorising officer is no longer available and on whom such a duty should fall.

76. **Subsections (6) and (7)** define the references to a person’s deputy and designated deputy.

Chief Surveillance Commissioner

**Section 17: Functions of Chief Surveillance Commissioner**

77. This section outlines the functions of the Chief Surveillance Commissioner, who is appointed under section 91(1) of the Police Act 1997, in keeping under review the use of powers or duties conferred by this Bill.

78. **Subsection (2)** imposes a duty upon the Chief Surveillance Commissioner to give the Tribunal established under clause 57 of the Regulation of Investigatory Powers Bill at Westminster (referred to as “section 56” in this Bill) all such assistance (including his opinion as to any issue falling to be determined by the Tribunal) as the Tribunal may require in connection with the investigation of any matter by it or otherwise for the purposes of the Tribunal’s consideration or determination of any matter.

79. **Subsection (3)** makes it clear that **subsection (1)** does not apply in the case of any power of the Scottish Ministers to make, amend or revoke any subordinate legislation. Accordingly, the Chief Surveillance Commissioner does not have a function to review the exercise of any such power.

**Section 18: Co-operation with and reports by the Commissioner**

80. **Subsection (1)** requires that all those who may be involved in requesting, authorising, carrying out or using the products of relevant surveillance or covert human intelligence sources should co-operate with the Chief Surveillance Commissioner.
81. **Subsection (2)** imposes a duty upon the Chief Surveillance Commissioner to make a report to the Scottish Ministers with respect to any case where he considers that there has been a contravention of the provisions of the Bill in relation to any matter with which the Commissioner is concerned and where the contravention has not been the subject of a report made to the Scottish Ministers by the Tribunal established under section 56 of the Regulation of Investigatory Powers Act 2000.

82. **Subsection (3)** imposes a duty upon the Chief Surveillance Commissioner, as soon as practicable after the end of each calendar year, to make a report to the Scottish Ministers with respect to the carrying out of his functions under the Bill.

83. **Subsection (4)** requires the Scottish Ministers to lay before the Scottish Parliament a copy of every annual report made by the Chief Surveillance Commissioner under section 18(3), together with a statement as to whether any matter has been excluded from that copy in pursuance of the provisions of section 18(5).

84. **Subsection (5)** provides that the Scottish Ministers may exclude from the copy of any annual report to be made by the Chief Surveillance Commissioner such matters which it appears to them should not be published because it would be contrary to the public interests or prejudicial to the prevention or detection of serious crime or the continued discharge of the functions of any public authorities whose activities include activities that are subject to the view by the Commissioner.

**Complaints by Aggrieved Persons**

**Section 19: Complaints to the Tribunal**

85. **Subsection (1)** provides that the Tribunal which will be established under clause 57 of the Regulation of Investigatory Powers Bill when that Bill is passed and brought into force, will apply to the use of the powers set out in this Bill.

86. **Subsections (2) and (3)** set out the key elements of the Tribunal's jurisdiction. It is to be the appropriate forum for complaints or proceedings in relation any complaint by a person who believes that he has been subject to any use of investigatory powers under this Bill which he believes to have been carried out in the challengeable circumstances described in **subsection (5)**.

87. **Subsection (4)** limits those proceedings relating to the types of conduct listed which the Tribunal may hear only to that conduct which is by or on behalf of or in relation to any person holding any office, rank or position with any Scottish police force or the National Criminal Intelligence Service.

88. **Subsection (5)** defines what are challengeable circumstances. Conduct should only fall within these circumstances if it is conduct which took place with, or might
reasonably have been considered necessary to take place only with, the authority, or purported authority, or an authorisation under the Bill or an authorisation under section 93 of the Police Act 1997 if given by a Scottish police force or the National Criminal Intelligence Service.

Codes of practice

Section 20: Issue and revision of codes of practice

89. This section deals with the issuing of one or more codes of practice to explain in greater detail the practical arrangements relating to the use of the provisions of this Bill.

90. Subsections (1) and (2) require the Scottish Ministers to issue one or more codes of practice covering the powers and duties in this Bill and those relating to interference with property or wireless telegraphy in Part III of the Police Act 1997.

91. Subsections (3), (4) and (5) require the Scottish Ministers to consult on any code of practice, lay the draft of the code of practice before Parliament and bring them into force through an Order.

92. Subsection (5) provides that a code of practice issued by the Scottish Ministers under section 20 shall not be brought into force except in accordance with an order made by them. Subsection (6) provides that such an order may contain transitional provisions in connection with the bringing into force of the code of practice.

93. Subsection (7) provides that the Scottish Ministers may from time to time revise the whole or any part of a code issued under section 20 and issue the revised code.

94. Subsection (8) provides that the provisions of section 20(3) to (6) apply (with appropriate modifications) in relation to the issue of any revised code as they apply in relation to the first issue of such a code.

95. Subsection (9) sets out the Parliamentary procedure for making an order under section 20(5). A draft of the order must be laid before and approved by a resolution of the Scottish Parliament before the order may be made.

Section 21: Interim codes of practice
96. This section gives provides statutory effect to interim codes of practice. An interim code will have effect from its date of issue until it is superseded by a code issued in accordance with section 20.

**Section 22: Effect of codes of practice**

97. Subsection (1) requires any person to take account of any applicable code of practice issued under sections 20 or 21 while exercising or performing any power or duty under this Bill.

98. Subsection (2) explains that a failure to comply with a code of practice issued under sections 20 or 21 will not of itself constitute a criminal offence or give rise to liability in civil proceedings.

99. Subsection (3) allows the evidential use of a code of practice in court.

100. Subsection (4) requires that, where relevant, the statutory bodies described in this subsection must take into account the provisions of a code of practice.

**Supplementary Provisions**

**Section 23: Power to extend of modify authorisation provisions**

101. Subsection (1) enables the Scottish Ministers, by order, to change the types of activities which fall within the categories of intrusive and directed surveillance by providing that a type of directed surveillance will be treated as intrusive surveillance or vice versa. Furthermore, they may, by order, provide that additional types of surveillance, which are not at present defined as directed or intrusive surveillance in section 1, will be covered by the Bill and become capable of being authorised.

102. Subsection (2) provides that no order shall be made under section 23 unless a draft of it has been laid before the Scottish Parliament.

**Section 24: Orders and regulations**

103. Section 24 makes supplementary provision with respect to making of orders and regulations under any provision of the Bill.
104. **Subsection (2)** provides that any order or regulations which the Scottish Ministers have the power to make under any provision of the Bill shall be exercisable by statutory instrument.

105. **Subsection (3)** specifies that orders or regulations shall be subject to negative resolution procedure before the Scottish Parliament except in the case of the powers to make orders under the section specified.

106. **Subsection (4)** provides that there is power, when making orders or regulations, to make different provision for different cases and for incidental, supplemental, consequential and transitional provisions.

**Section 25: Financial Provision**

107. Section 25 provides for Scottish Ministers to pay the Secretary of State an amount which will be agreed between them to reimburse the Secretary of State for any expenditure or increased expenditure incurred by him as a result of this Act. This expenditure will be for the Commissioners and the tribunal.

**Section 26: General saving for lawful conduct**

108. Section 26 ensures that nothing in this Bill makes any actions unlawful unless that is explicitly stated. The availability of an authorisation or a warrant does not mean that it is unlawful not to seek or obtain one. In this respect, the Bill must be read with section 6 of the Human Rights Act, which makes it unlawful to act in a way which is incompatible with a Convention right.

**Section 27: Interpretation**

109. This section gives interpretations for the terms used in the Bill. Amongst other things, it gives an interpretation for "surveillance" and clarifies that this does not include references to:

- the use of a recording device by a covert human intelligence source to record any information obtained in the presence of the source (subsection (3)(a));
- activity involving interference with property or with wireless telegraphy which requires authorisation or warrant under Part III of the Police Act 1997.

**Section 28: Short title and commencement**

110. **Subsection (1)** specifies the short title. **Subsection (2)** provides that the provisions of this Bill will come into force as set out by Scottish Ministers by order.
INTRODUCTION

111. This Memorandum is prepared in accordance with Rule 9.3 of the Standing Orders of the Scottish Parliament, and sets out best estimates of the costs and savings to which the provisions of the Regulation of Investigatory Powers (Scotland) Bill may give rise.

COSTS ON THE SCOTTISH ADMINISTRATION

112. The principal costs flowing from this Bill will be those associated with the oversight and complaints functions. The oversight functions will be fulfilled by the Commissioners currently holding office under section 91 of the Police Act 1997 (c.50). Therefore, no set-up costs will be incurred, and the costs will be limited to those associated with increased case load created by this Bill. Based on existing costs and projected estimates as to the number of Intrusive Surveillance cases requiring approval, the estimated increase is in the region of £30,000. These costs will be met from within existing resources.

113. The other element is that associated with the complaints Tribunal. The Home Office has estimated that the total costs of the Tribunal will be in the region of £100,000. The Scottish element of these costs will be dependent on the number of Scottish cases examined. However, it is unlikely that the total costs to the Scottish Administration for Tribunals will be more than £33,000. These costs will be met from within existing resources.

114. This Bill will also result in some costs to the Scottish Executive resulting from the processing of a greater load of warrant applications. These costs will be met from within existing resources.

COSTS ON LOCAL AUTHORITIES

115. There may be costs incurred by local authorities, associated with processing authorisation warrants in cases where local authorities employ directed surveillance or the use of covert human intelligence sources. These costs are difficult to quantify and would depend on the number of cases. However, given that it is expected that the number of relevant cases will be few, it is unlikely the costs will be significant.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

116. The Bill will also incur additional costs in terms of the police time involved in processing additional warrant applications. Again, these costs are difficult to quantify and depend on the number of cases. It is unlikely, though, that the additional costs here will be great since the Bill represents a formalisation of existing practices by the police.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

117. On 24 May 2000, the Minister for Justice (Jim Wallace) made the following statement:

“In my view, the provisions of the Regulation of Investigatory Powers (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

118. On 24 May 2000, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Regulation of Investigatory Powers (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”