REGULATION OF INVESTIGATORY POWERS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Regulation of Investigatory Powers (Scotland) Bill introduced in the Scottish Parliament on 25 May 2000. It has been prepared by the Scottish Administration to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Administration and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 16–EN.

THE NEED FOR LEGISLATION

2. The purpose of this Bill is to ensure that certain covert investigation techniques are used in accordance with human rights.

Covert Investigation

3. Covert investigation techniques, in particular the use of surveillance and human sources such as undercover officers and informants, often provide vital intelligence in preventing and detecting serious criminal activity. But criminals involved in such activity are often practised in the use of counter-measures. To combat this type of criminal the police must be able to use the most effective techniques available. These techniques need to be safeguarded, while at the same time ensuring that they are properly controlled and those employing them are accountable. It is important, too, that other public authorities in Scotland who use these techniques are also properly regulated and comply with controls and procedures.

European Convention on Human Rights (ECHR)

2. The legal right to a fair trial and the right to respect for private and family life are established in Articles 6 and 8 of the European Convention on Human Rights (ECHR). The Scotland Act 1988 requires that actions of the Scottish Executive must be compatible with the ECHR. The Convention has also been incorporated into UK law in the Human Rights Act 1998 which will be implemented on 2 October 2000 and will apply to all public authorities in the UK. In accordance with Article 6, everyone is entitled to a fair and public hearing of any criminal charge and to examine or have
examined witnesses. Article 6 also guarantees fairness in the determination of civil rights. Under Article 8 everyone has the right to respect for their private and family life, their home and their correspondence, although it is recognised that there may be circumstances in a democratic society where it may be necessary for the state to interfere with this right.

3. The State only has the right to interfere with the right to privacy if it is in accordance with the law and for clearly defined purposes. Such purposes are:

   (a) the interests of national security, public safety or the economic well-being of the country;

   (b) the prevention of disorder or crime;

   (c) the protection of health or morals;

   (d) the protection of the rights and freedoms of others.

4. To be acceptable in ECHR terms:

   (a) a framework of controls must have a basis in law;

   (b) the law must define the scope and manner of the exercise of a public authority’s functions with sufficient clarity to protect the individual from arbitrary interference and to ensure that it is the subject of effective control;

   (c) the law must be sufficiently accessible and precise;

   (d) the exceptions which allow interference should be constructed narrowly and interference with those rights should be necessary and proportionate to any offence.

5. This Bill proposes to put the use of covert investigation techniques as defined below on to a statutory footing. The Bill will apply to the Scottish police and the National Criminal Intelligence Service. In relation to directed surveillance as defined in this Bill and the conduct and use of covert human intelligence sources, the Scottish Ministers will also be able to apply the provisions to other public authorities so far as the exercise of the relevant powers is within devolved competence. The use by Scottish police of some other techniques (interference with property and wireless telegraphy) is already covered by Part III of the Police Act 1997. UK public authorities that operate in Scotland, such as the Customs and Excise and the Security Service, will be regulated for the use of techniques covered by this Bill by the Regulation of Investigatory Powers Bill, which is currently being considered by the UK Parliament. The Intelligence Services Act 1994 and Part III of the Police Act 1997 also apply to UK public authorities operating in Scotland.
6. In order to ensure that all covert investigation techniques are compliant with the ECHR this Bill will ensure that the law clearly covers:

   (a) the purposes for which these techniques may be used;

   (b) which authorities can use the powers;

   (c) who should authorise each use of the power;

   (d) independent judicial oversight;

   (e) a means of dealing with complaints and redress for the individual.

Categories of Investigative Technique covered by the Bill

7. The focus of the legislation is on “directed surveillance”, “intrusive surveillance” and the conduct and use of covert human intelligence sources. These are defined in the Bill. Less intrusive forms of surveillance where there is a general awareness on the part of the public that surveillance is taking place, such as CCTV for crime prevention, public order or traffic management purposes are excluded from the authorisation process.

8. The legislation will primarily cover the use of the above investigative techniques by Scottish police. It will also cover the National Criminal Intelligence Service and, in relation to directed surveillance as defined in this Bill and the conduct and use of covert human intelligence sources, other public authorities who carry out an enforcement or investigative role who will be named in an order-making power.

9. Surveillance is defined as covert where it is undertaken 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. “Directed surveillance” is surveillance which is covert and which is undertaken in relation to a specific investigation in order to obtain information about, or identify, a particular person or to determine who is involved in a matter under investigation. Authorisations will be given by police superintendents or equivalents in other organisations.

11. “Intrusive surveillance” is surveillance which is covert and carried out in relation to anything taking place on residential premises or in any private vehicle. This type of surveillance may take place by means either of a person or device located inside a 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. Authorisations will be given by Chief Constables of police forces. In practice only police forces will undertake this type of surveillance under the Scottish legislation.
12. The use of “covert human intelligence sources” covers the use of informants, agents and undercover officers. Authorisations will be given by police superintendents or equivalents in other organisations.

13. In the case of intrusive surveillance, authorisations for the use of such techniques will only be granted only if it is necessary for the purpose of preventing or detecting serious crime. Serious crime is defined as that which might reasonably be expected to result in imprisonment for a first offence of three years or more, or involves the use of violence, or results in substantial financial gain, or involves a large number of persons in pursuit of a common purpose.

14. Authorisations of directed surveillance as defined in this Bill and the use of covert human intelligence sources will be granted only if it is necessary:

(a) for the purposes of preventing or detecting crime or preventing disorder;

(b) in the interests of public safety;

(c) for the purpose of protecting public health;

(d) for other purposes which may be specified by order of the Scottish Ministers.

Codes of Practice

15. This Bill will require Scottish Ministers to issue one or more Codes of Practice covering the powers and duties in the Bill. Any person or body undertaking the surveillance activities covered by the Bill will be required to comply with these Codes of Practice which will have the force of law and will be published and accessible to the public. It is intended to consult on these Codes before they are brought into operation.

Oversight and Redress Arrangements

16. Oversight of the granting and operation of authorisations under the Bill will be provided by the Surveillance Commissioners established under Part III of the Police Act 1997. No authorisation for intrusive surveillance as defined in this Bill will become effective until approved by a Commissioner, except in cases of urgency (the circumstance for these latter cases will be set out in the Code of Practice). The Chief Surveillance Commissioner will also review the use of directed surveillance as defined in this Bill and human sources. The Chief Surveillance Commissioner will report annually on authorisations granted under the Scottish legislation to Scottish Ministers, who will lay a copy of the report before the Parliament. The report as laid would not include operationally sensitive material.

17. Where individuals consider that they have been improperly subjected to surveillance under the legislation they shall have a right to have the complaint independently considered and to remedial action if the complaint is found to be justified. The policy intention is that there should be UK-wide arrangements for redress that will apply to the use of the powers set out in the Bill. These redress arrangements are being established by the Regulation of Investigatory Powers (RIP) Bill currently
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

being considered by the United Kingdom Parliament. This will establish a new tribunal that will provide an avenue of complaint and a means of redress for any individual concerned about the operation of techniques under the Scottish (and UK) legislation or more generally about human rights issues connected with the use of all covert investigative techniques and not only those regulated under the Bill.

POLICY OBJECTIVES

18. There are two important policy objectives:

- The first is to seek to achieve a balance between safeguarding the rights of individuals to their privacy without hindering the effective use of covert investigation techniques by law enforcement agencies as a valuable tool in tackling serious and dangerous crime.

- The second policy objective is to ensure that the regimes put in place to regulate the use of these techniques are similar north and south of the border. This is important from the point of view of law enforcement agencies who operate on both sides of the border and who have to deal with highly mobile and sophisticated criminals. It would clearly be undesirable if criminals were able to exploit differences in the regulatory regimes to their advantage. Both Scottish and UK Bills have been produced in close co-ordination between the Scottish Executive, the Home Office and law enforcement agencies.

ALTERNATIVE APPROACHES

19. Given the policy objectives set out in the paragraphs above, the only serious alternative approach would have been to have sought the consent of Parliament to the RIP Bill in Westminster covering the use of these techniques by the Scottish police. This would have had the advantage of ensuring consistency of approach so as to minimise cross-border policing problems. Further, it would have maintained the UK regulatory framework which has developed with Interception of Communications Act and Part III of the Police Act 1997. However, such an approach would have deprived the Scottish Parliament of the opportunity to scrutinise legislation that protects the rights of individuals and is important in the fight against crime in Scotland.

CONSULTATION

20. No formal consultation has been undertaken on the Bill. The policy objectives of producing a regime that is compatible with the ECHR in order to protect the rights of the individual, while safeguarding the use of these techniques by law enforcement; and ensuring that there are similar regimes north and south of the border mean that there is very little room for manoeuvre. There was clearly a risk that consultation would have been likely to give rise to expectation that changes could be made to the Bill that were not in practice deliverable. In the circumstances, Scottish Ministers believe that consultation while useful in giving notice of the legislative proposals would not have been genuine
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

in the sense that they would only have wished to make minor drafting changes prior to the Bill’s introduction in the Cabinet. The codes of practice which will be given statutory effect by the Bill following consultation as part of a UK-wide process.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT, ETC.**

21. The Bill will have no impact on equal opportunities, island communities, local government or sustainable development.

22. The Bill will have a positive impact in terms of Human Rights, in making the use of covert investigation techniques compatible with the ECHR.
This document relates to the Regulation of Investigatory Powers (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 25 May 2000

REGULATION OF INVESTIGATORY POWERS (SCOTLAND) BILL

POLICY MEMORANDUM

© Copyright The Scottish Parliamentary Corporate Body 2000

EDINBURGH: THE STATIONERY OFFICE

Printed in the United Kingdom by The Stationery Office Limited

£1.90

Applications for reproduction should be made in writing to the Copyright Unit, Her Majesty’s Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ. Fax 01603 723000.

Produced and published in Scotland on behalf of the Scottish Parliament by The Stationery Office Ltd.

Her Majesty’s Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliament publications.