

MEMORANDUM

REGULATION OF INVESTIGATORY POWERS BILL

Purpose

1 To inform Members' consideration of the issues in advance of the proposed debate on the Sewel motion in relation to the Regulation of Investigatory Powers Bill on 6 April.

Background

2 The Regulation of Investigatory Powers (RIP) Bill, is currently being considered in Committee in the House of Commons. The main purpose of the Bill is to ensure that the relevant investigatory powers are used in a manner which is compatible with the European Convention on Human Rights and the Human Rights Act. These powers are:

- the interception of communications;
- 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);
- the acquisition of communications data (e.g. billing data);
- access to encrypted data.

3 For each of these powers, the Bill specifies:

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

4 The provisions of the Bill are intended to work in conjunction with existing legislation, in particular the Intelligence Services Act 1994, the Police Act 1997 and the Human Rights Act 1998.

5 The RIP Bill is in five parts.

Interception of Communications and the Acquisition and Disclosure of Communications Data

5.1 The existing arrangements for the interception of communications are established in the Interception of Communications Act 1985. Significant changes to that Act were proposed in the Consultation Paper "Interception of Communications in the United Kingdom" (Cm 4368) published on 22 June 1999. The RIP Bill repeals the 1985 Act and provides for a new regime for the interception of communications incorporating the changes proposed in the consultation paper. These changes go beyond what is strictly required for human rights purposes and provide also for the changed nature of the communications industry since 1985.

5.2 The provisions also implement Article 5 of Council Directive 97/66 of 15 December 1997, known as the "Telecommunications Data Protection Directive", which requires member states to safeguard the confidentiality of communications.

Surveillance and Covert Human Intelligence Sources

5.3 This Part provides a statutory basis for authorisation and use by the security and intelligence agencies, law enforcement and other public authorities of covert surveillance, agents, informants and undercover officers. It will regulate the use of these techniques and safeguard the public from unnecessary invasions of their privacy.

Investigation of Electronic Data Protected by Encryption etc

5.4 This Part contains provisions to maintain the effectiveness of existing law enforcement powers in the face of increasing criminal use of encryption. Specifically, it will introduce a power to demand access to protected (encrypted) data.

5.5 The first consultation on this subject was undertaken in March 1997. A broader consultation "Building Confidence in Electronic Commerce: A Consultation Document" was launched on 5 March 1999 (URN 99/642). Finally, provisions very similar to these were published as Part III of the draft Electronic Communications Bill issued for consultation on 23 July 1999 (Cm 4419).

Scrutiny of Investigatory Powers and Codes of Practice

5.6 This Part provides for independent judicial oversight of the use of the powers where necessary.

5.7 It also establishes a Tribunal as a means of redress for those who wish to complain about the use of the powers.

5.8 Finally, it provides for the Secretary of State to issue Codes of Practice covering the use of the powers covered by the Bill.

Miscellaneous and Supplemental

5.9 This Part makes minor amendments to Part III of the Police Act 1997 in the light of operational experience and extends those provisions to the Ministry of Defence Police, the British Transport Police and the Service Police.

5.10 Both the Police Act and the Intelligence Services Act 1994 are amended to ensure authority is given for interference with property or wireless telegraphy only where it is proportionate to do so.

Proposal

6 Much of the RIP Bill deals with matters that are clearly reserved. For example, the functions and activities of the intelligence services, most aspects of the interception of communications, telecommunications and wireless telegraphy, including electronic encryption are explicitly reserved under the Scotland Act (Schedule 5, paragraphs 2(4), B8

and C10 respectively). However there are other areas in the Bill where the precise boundaries between reserved and devolved matters are a matter for interpretation. In considering how to regulate these aspects in Scotland, the Executive is of the view that the priorities should be firstly to ensure that the legislation is in place as quickly as possible to minimise the risk of challenges to the work of law enforcement under human rights legislation, and secondly to ensure that the legislation is robust enough to ensure that it can withstand challenges to its competence to regulate the body or activity in question. Failure to achieve these objectives could mean law enforcement agencies not being able to rely on the use of methods which are vital in the fight against crime. In these circumstances, the Executive is of the view that the better course of action is to agree to the regulation of these bodies or activities in the RIP Bill, where there can be no question of legislative competence.

UK Public Authorities

7 Part II of the RIP Bill proposes to regulate the use of surveillance techniques and human intelligence sources. The approach adopted by the RIP Bill is to specify certain public authorities that use what is defined as “intrusive surveillance”. Although the primary function of some of these specified UK public authorities, are undoubtedly reserved in the Scotland Act, they are also involved to a greater or lesser extent in the use of the relevant techniques for the purpose of prevention and detection of crime in Scotland. This function of policing and the prevention and detection of crime generally is considered to be devolved. The public authorities in question are the Customs and Excise, the Ministry of Defence Police, British Transport Police and the Security Service.

8 In considering how best to deal with these UK public authorities, there are some operational practicalities to be taken into account. It is clearly desirable from the point of view of simplicity that a body that operates throughout the UK should be regulated by a single statute rather than being required to switch to a different regulatory regime when highly mobile criminals move from one part of the UK to another. Indeed it is the case that the UK legislation will cover some of the UK bodies wherever they operate world-wide, and so it would make little sense to exclude Scotland from this regime.

9 In view of the operational practicalities, as well as the more general considerations set out in paragraph 6 the Executive believes the most sensible course is for the RIP Bill to cover UK public authorities that employ the relevant techniques in Scotland and seeks the endorsement of Parliament for this approach. The Executive intends to introduce parallel Scottish legislation that will cover those bodies that operate primarily in Scotland, in particular, the Scottish police.

Access to Communications Data and Encryption

10 Chapter 2 of Part I of the RIP Bill makes provisions to allow law enforcement and other agencies to gain access to communications data for specified purposes. This is data such as the frequency, duration and destination of communications rather than the content of the communication itself. Part III of the RIP Bill contains provisions to allow law enforcement and other agencies to seek the decryption of encrypted material for specified purposes. These provisions place requirements on postal, telecommunications and internet companies.

11 Although these provisions, as drafted, are within the reservations in the Scotland Act, the Executive notes that a different approach to the issue, specifically an approach that focused on the use of these techniques by the police to prevent and detect crime, might have fallen within the Scottish Parliament's legislative competence. The Executive believes however that the interests of the Scottish police will be best served by their having access to the arrangements being put in place in the RIP Bill, in particular to the technical support services that are to be established. The Executive therefore seeks the agreement of the Parliament to these matters being dealt with in the RIP Bill as regards Scotland.

Tribunal

12 Part IV of the RIP Bill establishes a tribunal to hear complaints from individuals about the operation of the powers in the Bill or more generally about the use of surveillance techniques in the context of human rights. The Tribunal would replace existing remedies for complaints, including those provided under the Police Act 1997, the Intelligence Services Act 1994, and the Security Services Act 1989. The Executive believes that there are practical reasons for seeking to extend the jurisdiction of the tribunal to be established under the RIP Bill to also consider cases that are authorised or could have been authorised under the Scottish legislation. The primary reason is to allow the tribunal to develop a depth of expertise in what is a sensitive and specialised area. This would be difficult to do on the narrower base of cases that would be likely to be generated within Scotland. Secondly, there are cost considerations. It would be considerably more cost-effective to participate in a UK-wide arrangement than to set up a separate Scottish equivalent. On these grounds, the Executive seeks the consent of the Parliament to the RIP Bill extending the jurisdiction of the tribunal to cover cases within the scope of the Scottish legislation.

13 It is possible that the Scottish legislation will take effect before the RIP Bill. In these circumstances there may be a need for interim complaints and redress arrangements in Scotland so that the Scots Bill is compliant with the requirements of the ECHR. These arrangements would be superseded by the UK tribunal.

14 Closely connected to the redress arrangements provided by the tribunal, are the oversight arrangements. The Scottish Bill will propose that this element is provided by the Commissioners established by the Police Act 1997. These Commissioners currently operate on a UK-wide basis and have proved to be a flexible and efficient system of providing oversight for the powers under the Police Act. The RIP Bill also proposes the use of these Commissioners to oversee the use of specified powers in the UK Bill. The Commissioners are a cross-border public authority under the Scotland Act. The Scottish Bill is therefore also able to confer functions upon them and this is not a matter for the Sewel convention.

Cross-Border Surveillance

15 There is a requirement to allow police conducting surveillance operations authorised either by the UK or Scottish legislation to continue with the operation if a target moves from other parts of the UK to Scotland or vice versa. The intention is that Scottish police should be able to continue to conduct surveillance that was authorised in Scotland in other parts of the UK for a period of up to two days before they are required to seek authorisation under the UK legislation. Similarly police forces from other parts of the UK could continue with surveillance in Scotland for up to two days before seeking authorisation under the Scottish legislation. The requirement is that such cross-border operations should be lawful in the

jurisdiction in which they are taking place temporarily and in the jurisdiction in which the operation was initially authorised. This requirement must be met in the main in the UK legislation. It would not be competent for the Scottish Parliament to legislate other than as a matter of Scots law or in relation to police forces other than Scottish police forces. It would however be within the competence of the Scottish Parliament to make provisions to make it lawful as a matter of Scots law for the Scottish police to operate temporarily outside Scotland. It is the view of the Executive that as this is only a single element of the legislation needed to make cross-border surveillance operate successfully, it would be sensible to allow all the elements to be provided for in the RIP Bill.

Amendments to 1997 Police Act

16 The RIP Bill proposes to amend the 1997 Police Act to allow the authorisation by a chief constable of recovery or maintenance of a surveillance device attached to a vehicle that has moved out of his force area without having to seek authorisation from the chief constable into whose area the vehicle has travelled. Part III of the 1997 Police Act is devolved and it would be within the competence of the Scottish Parliament to make this amendment as regards Scotland. The Executive believes that this technical amendment would be best handled from the point of view of simplicity within the RIP Bill.

Scottish Executive
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