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Margaret Mitchell MSP
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The Scottish Parliament
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Dear Margaret,

INVESTIGATORY POWERS BILL – FURTHER UPDATE ON LEGISLATIVE CONSENT MOTION

Further to my letter of 21 September, I am writing to make you aware of a late development which has a bearing on the Legislative Consent Motion for the Investigatory Powers Bill.

The Scottish Government learned on the afternoon of 23 September that the UK Government intended to make amendments to the Bill in order to implement the single recommendation (a copy of this is attached at Annex B) made in David Anderson's review of bulk powers that a Technology Advisory Panel (TAP) be set up to advise the Investigatory Powers Commissioner (IPC). David Anderson QC is the Independent Reviewer of Terrorism Legislation who was asked by the UK Government to carry out a review the operational case for bulk powers.

The TAP will be appointed by the IPC, who must in turn consult the Secretary of State when making an appointment. The Scottish Government received sight of the Home Office's policy instructions on Friday 24 September. Having considered these, it is our view that the new provisions should extend to Scottish Ministers and will therefore require the legislative consent of the Scottish Parliament.

The TAP will be able to advise the IPC and the Secretary of State. I have asked that it also be able to advise the Scottish Ministers and for the Scottish Ministers to be consulted on the matter of appointments to the TAP.

The purpose of the TAP, as set out in David Anderson's recommendation, is "to advise the IPC and the Secretary of State on the impact of changing technology on the exercise of investigatory powers and on the availability and development of techniques to use those powers while minimising interference with privacy.". In essence, this provides a further layer of safeguard and I am keen that it applies to Scotland.

The amendment has not yet been tabled but Scottish Government officials are being consulted on the drafting and, as mentioned above, have had sight of the Home Office policy instructions to Parliamentary Counsel. In the unlikely event that the amendment were drafted in such a way that contradicted the information that the Scottish Government are giving to the Parliament then we would reject such an amendment extending to Scotland and update the Parliament accordingly.

It is unfortunate that I am only able to bring this matter to the Committee at this late stage, but, as you will understand, I too have only just become aware of the proposed UK Government amendment and have informed you immediately so as to inform consideration by the Committee.

I will be happy to speak further on this matter at the Committee's evidence session, tomorrow.

With Best Wishes



MICHAEL MATHESON

Revised Motion

“That the Parliament supports the principle of modernising the law in the area of investigatory powers, believes protection of civil liberties, transparency and independent oversight must be at the heart of this process; supports law enforcement in having necessary powers to keep Scotland’s communities safe, subject to the most stringent checks and safeguards; agrees that the relevant provisions of the Investigatory Powers Bill, introduced in the House of Commons on 1 March 2016, relating to the interception of communications in places of detention, decisions relating to the issue, renewal, modification, cancellation and approval of interception warrants, targeted examination warrants and functions relating to mutual assistance warrants; the subject matter of Part III of the Police Act 1997 and other equipment interference provisions; the safeguards relating to the use and retention of material obtained by investigative techniques under the Investigatory Powers Bill; oversight arrangements and functions; the functions of, and rights of appeal from, the Investigatory Powers Tribunal; the creation of a Technology Advisory Panel; and amendments to the Regulation of Investigatory Powers (Scotland) Act 2000 in consequence of the Investigatory Powers Bill; so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament; recognises that many of the provisions are necessary to ensure that law enforcement operates within an updated and robust legislative framework; supports powers that are demonstrably operationally necessary to counter terrorism and prevent and detect serious crime; and recognises the concerns that have been raised about potential impingement on civil liberties and the privacy of individuals in relation to internet connection records and bulk data collection, but notes that these issues are reserved to the UK Parliament and are not matters that the Scottish Ministers or Scottish Parliament can determine.”

Recommendation from David Anderson's bulk powers review

9.16. The making of recommendations in relation to safeguards is specifically excluded from the remit of the Review.

9.17. I have reflected on whether there might be scope for recommending the “*trimming*” of some of the bulk powers, for example by describing types of conduct that should never be authorised, or by seeking to limit the downstream use that may be made of collected material. But particularly at this late stage of the parliamentary process, I have not thought it appropriate to start down that path. Technology and terminology will inevitably change faster than the ability of legislators to keep up. The scheme of the Bill, which it is not my business to disrupt, is of broad future-proofed powers, detailed codes of practice and strong and vigorous safeguards. If the new law is to have any hope of accommodating the evolution of technology over the next 10 or 15 years, it needs to avoid the trap of an excessively prescriptive and technically-defined approach.

9.18. I do however venture to make one major recommendation, again prompted by the speed with which technology can change. It is as follows:

The Bill should be amended to provide for a Technology Advisory Panel, appointed by and reporting to the IPC, to advise the IPC and the Secretary of State on the impact of changing technology on the exercise of investigatory powers and on the availability and development of techniques to use those powers while minimising interference with privacy.