

INVESTIGATORY POWERS (AMENDMENT) BILL 2023

Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Investigatory Powers (Amendment) Bill 2023 (“the Bill”). The Bill was introduced in the House of Lords on 08 November 2023.
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

3. The Investigatory Powers (Amendment) Bill updates elements of the Investigatory Powers Act 2016 (IPA 2016) to ensure the United Kingdom’s (UK) investigatory powers framework remains fit for purpose in the face of evolving threats.
4. The introduction of this Bill follows the publication of the Home Secretary’s statutory report on the IPA 2016 in February 2023¹, and a subsequent independent review by the former Independent Reviewer of Terrorism Legislation, Lord Anderson of Ipswich KBE KC, published in June 2023². These reports set out the urgent operational case for change and Lord Anderson’s report broadly endorsed the proposed policy approaches.
5. The key objective of the Bill is to make targeted reforms to the IPA 2016 to ensure that it remains fit-for-purpose for the intelligence services, law enforcement and other public authorities.
6. The main elements of the Bill are:
 - a. 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).
 - b. 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 IPA 2016 would apply.

¹ [Home Office report on the operation of the Investigatory Powers Act 2016 \(accessible version\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117111/home-office-report-on-the-operation-of-the-investigatory-powers-act-2016-accessible-version.pdf)

² [Independent review of the IPA 2016 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117111/independent-review-of-the-ipa-2016.pdf)

- c. 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 – in order to reduce the risk of the most serious offences such as child sexual exploitation and abuse or terrorism.
 - d. Creating a new condition for the use of Internet Connection Records by the intelligence services and the National Crime Agency (NCA).
 - e. Improvements to the oversight regime to support the Investigatory Powers Commissioner (IPC) to effectively carry out their role, including powers to enable the IPC to delegate some of their functions to Judicial Commissioners (JCs), appoint deputies and putting certain functions on a statutory basis.
 - f. Measures to increase resilience of the warrant authorisation processes for the intelligence services as well as for the NCA.
 - g. Changes to the Communications Data regime to provide greater certainty on the circumstances for lawful data acquisition.
7. The Bill has been drafted in a way which minimises the use of delegated powers, with as much detail as possible contained on the face of the Bill. **The Bill therefore creates only one substantive new power, with two further powers to make consequential amendments (within a narrow scope) and to commence the Bill.** Details of these are set out at Section C below.
8. The Bill also contains a relatively small number of other measures related to delegated powers, details of which are set out at Section D. These are either amendments to existing IPA 2016 powers, changes to existing codes of practice, new codes of practice to be issued under existing powers in the IPA 2016 or concern Prime Ministerial delegation rather than a specific delegated power (and has therefore been included for completeness). This includes several cases where multiple provisions are required to implement the same change across multiple codes of practice. For example, four delegated powers are needed to amend details about the definition of a Telecommunications Operator (TO) in four codes of practice: those for Communications Data, Interception of Communication, Equipment Interference, and National Security Notices. For the purposes of this Memorandum, powers of this nature – which replicate the same change across multiple codes of practice – have been grouped to aid the Committee’s scrutiny.
9. For many of these measures, it is appropriate to use codes of practice – either new or existing, but created or amended under existing powers in the IPA 2016 – to lay out the detail of how the measures contained in this Bill will work operationally. This allows a greater level of detail to be provided than would be found on the face of a Bill and provides the necessary ability to be able to update the codes of practice in an agile and responsive manner to keep pace with changes in technology, threat types, criminal behaviour, and related legislation. Updating existing codes of practice where possible also helps maintain a simpler and “cleaner” statute book

that is easier to understand for those who need to have regard to it, including operational teams and private sector organisations.

10. The measures relating to delegated powers in the Bill are:

- a) Use of existing powers in the IPA 2016 to bring into force two new Codes of Practice on Low or No Expectation of Privacy BPDs and on Third Party BPDs, and to amend the existing Code of Practice on BPDs.
- b) Amendments to the Interception of Communications and Equipment Interference Codes of Practice, to provide indicative examples of circumstances in which the Prime Minister may be considered unavailable for the operation of the amended Sections 26 and 111 IPA 2016.
- c) A power to expand the list of public authorities that the Prime Minister can direct IPC oversight of.
- d) Amendments to Codes of Practice to take into account changes to the notice review process.
- e) Amendments to four of the existing Codes of Practice to reflect the amended definition of a TO.
- f) A new power and amendments to four of the existing Codes of Practice to include further detail on the changes to the notification process and associated thresholds brought by this Bill.
- g) Amendments to four of the existing Codes of Practice to provide further detail on the new notice renewal process and statutory oversight roles of Judicial Commissioners and Investigatory Powers Commissioner within this process.
- h) Two “General” new powers to allow the Secretary of State to make consequential provisions in connection with the Bill, and to appoint different commencement dates for different purposes.

C. NEW DELEGATED POWERS

Clause 20: Notification of proposed changes to telecommunications services etc

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary procedure: Affirmative procedure

Context and Purpose

11. Relevant telecommunications operators (TOs) who are already subject to a notice are required to inform the Secretary of State of any changes that may impact their existing notice obligations. However, there is no such obligation on TOs that have not already been issued with a notice but may provide lawful access. Clause 20(2), therefore, introduces a notification requirement that will require relevant operators to inform the Secretary of State of any upcoming changes that will negatively impact existing lawful access. Without mitigation, significant changes could lead to an irreversible loss of data that would have an impact on the ability of law enforcement and the intelligence services to keep people safe.
12. Early engagement between operators and government would ensure that any negative impact on investigatory powers, and therefore public safety, is fully considered to ensure continuity of lawful access to data against a background of changing technology. If an TO is required to give prior notification of changes under this requirement, the Secretary of State will formally notify the operator (i.e. in writing). This approach will ensure that the requirement does not affect relevant operators, as defined in section 258A(11), who do not hold any operationally relevant data, and avoids the notification regime being disproportionate in its effects.

Justification for the Power

13. The specific, technical details regarding the notification process, including thresholds that the Secretary of State must consider before initiating the notification requirement, will be set out in regulations. It is appropriate that details of these thresholds as applicable to services provided by TOs or their systems, to which the relevant change applies, is contained in secondary rather than primary legislation. This is because the thresholds will contain technical detail that is more appropriate to set out in Regulations that can be adapted in the future. This will ensure the arrangements continue to accurately reflect proportionate, applicable thresholds in response to changes in technology and operational requirements.

Justification for the Procedure

14. Clause 20(2) introduces a regulation making power that will be used to set clear thresholds that will define the factors the Secretary of State will consider before placing a TO under the notification requirement. The thresholds will ensure the

notification requirement does not disproportionately affect operators who do not hold operationally relevant data. Given the nature of the obligations to be imposed on operators, it is important that the affirmative Parliamentary procedure applies to regulations made under this clause.

Clause 28 Power to make consequential provision

Power conferred on: Secretary of State

Power exercised by: regulations made by Statutory Instrument

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

Context and Purpose

15. This clause enables the Secretary of State by regulations to make provision that is consequential on this Bill. Consequential provisions may amend, repeal, or revoke primary legislation passed before this Bill or later in the same legislative session as the Bill.

Justification for taking the power

16. The power to make consequential provision is necessary to ensure that other provisions on the statute book properly reflect and refer to the provisions in this Bill once it is enacted.

17. The Department accepts that the power to make consequential provision may, on the face of it, appear wide. However, any consequential amendment made under this power must be genuinely consequential on the provisions in the Bill. As far as possible, the Government will make necessary amendments to primary legislation on the face of the Bill rather than relying on this power, and it is more usual for consequential amendments to secondary legislation to be made by statutory instrument.

18. The Government considers it appropriate to enable true consequential amendments to be made by regulations in order to ensure that the changes effected by this Bill can be effectively delivered.

Justification for the procedure

19. If regulations under this clause do not amend primary legislation, they will be subject to the negative resolution procedure. If regulations under this clause do amend primary legislation, they will be subject to the affirmative resolution procedure. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 30: Commencement

Power conferred on: Secretary of State

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: none

Context and Purpose

20. Clause 30 of the Bill confers on the Secretary of State a regulation-making power to bring into the force the provisions of this Bill, including to make transitional and saving provision and to make different provision for different purposes.

Justification for taking the power

21. This is a standard clause for commencing the provisions of an Act, and making saving and transitional provisions related to commencement, by regulations.
22. This will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.
23. For example, a statutory requirement to issue a code of practice may need to be brought into force before, or at the same time as, the new powers to which the code relates.

Justification for the procedure

24. It is standard practice for the power to bring into force the provisions of an Act on a specified day not to require any further Parliamentary procedure.

D. AMENDMENTS TO, OR MEASURES RELATING TO, EXISTING DELEGATED POWERS

Clause 2: Bulk Personal Datasets - Low or no reasonable expectation of privacy

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

25. Clause 2 of the Bill inserts new Part 7A into the IPA 2016 to create a new regime for the retention and examination of bulk personal datasets for which there is no, or only a low, reasonable expectation of privacy. It is necessary recalibrate the safeguards to improve the agility of the intelligence services.
26. The insertion of new Part 7A will require an accompanying Code of Practice. Schedule 7 to the IPA 2016 makes provision in relation to Codes of Practice issued under that Act. The Bill does not amend the relevant powers in Schedule 7 to the IPA 2016, however, the existing powers will be exercised in relation to a new Part of the IPA 2016 (Part 7A), and to make amendments to the relevant Code of Practice to take account of changes to Part 7 made by the Bill.

Justification for taking the power

27. To implement these changes, it will be necessary to issue a new Code of Practice to set out the operational guidance for the new provisions, in order to: (i) explain the technical minutiae of the regime, which is not appropriate for this largely technology-neutral primary legislation; (ii) to ensure those using the powers and those responsible for its oversight are doing so on a clear and legal understanding; and (iii) to provide appropriate foreseeability of the regime.
28. For these reasons, and in line with the framework established by the IPA 2016 and with the other provisions in this Bill, it is therefore appropriate that these details should be contained in Codes of Practice brought into force by secondary legislation – under existing powers in the IPA 2016 – rather than via new provisions on the face of the Bill. Given the pace of technological change and shifts in the nature of threats faced, codes of practice will also need to be revised regularly and responsively.

Justification for the procedure

29. These provisions will be made using the existing powers in Schedule 7 of the IPA 2016, which sets out that the Secretary of State must issue codes of practice about the exercise of functions under the Act.
30. Paragraphs 4 and 5 of Schedule 7 set out the procedural requirements that must be followed when bringing into force new codes of practice or revising existing ones. This includes the requirement for a consultation on the code of practice (or revised code) to be undertaken and provision for a Statutory Instrument to be laid with the code (or revised code) which must be approved by a resolution of both Houses of Parliament before it can be made. Paragraph 5(5) of Schedule 7 also permits a revised code to be laid before Parliament along with a statutory instrument relating to that code.
31. Paragraph 6 of Schedule 7 sets out the effect of codes of practice, including that a person exercising functions to which a code relates must have regard to that code, and that it is admissible in evidence in criminal or civil proceedings.
32. It is therefore appropriate that regulations under this power should be subject to the affirmative procedure for the laying of a new code, in accordance with existing codes of practice issued for other powers under the IPA 2016.

Clause 5: Third party bulk personal datasets

Power conferred on: The Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

33. Clause 5 inserts a new Part 7B into the IPA 2016 in order to create a new regime for the intelligence services' examination in situ of BPDs held by third parties.
34. The examination of third party held BPDs is a vital tool for the intelligence services to use in the exercise of their functions. New Part 7B of the IPA 2016, inserted by the Bill, provides a statutory basis for this examination.
35. Insertion of new Part 7B will require an accompanying Code of Practice. Schedule 7 to the IPA 2016 makes provision in relation to Codes of Practice issued under that Act. The Bill does not amend the relevant powers in Schedule 7 to the IPA 2016, however, the existing powers will be exercised in relation to a new Part of the IPA 2016 (Part 7B).

Justification for taking the power

36. It will be necessary to issue a new code of practice to set out the operational guidance for these new provisions, in order to: (i) explain the technical operation of the regime, which provides a guide to the operation of the scheme, which is not appropriate for this largely technology-neutral primary legislation; (ii) provide a guide to those using the powers and those responsible for its oversight to ensure that they are doing so on a clear and legal understanding; and (iii) to enhance the foreseeability of the operation of the regime.
37. For these reasons, and in line with the framework established by the IPA 2016 and with the other provisions in this Bill, it is therefore appropriate that these details should be contained in codes of practice brought into force by secondary legislation using existing powers in the IPA 2016 rather than creating a duplicative power in this Bill. Given the pace of technological change and shifts in the nature of threats faced, codes of practice will also need to be revised regularly and responsively, with the Code brought into force by secondary legislation.

Justification for the procedure

38. Schedule 7 of the IPA 2016 sets out that the Secretary of State must issue codes of practice about the exercise of functions under the Act.
39. Paragraphs 4 and 5 of Schedule 7 set out the procedural requirements that must be followed when bringing into force new codes or revising existing ones. This includes the requirement for a consultation on the code (or revised code) to be undertaken and provision for a Statutory Instrument to be laid with the code (or revised code) which must be approved by a resolution of both Houses of Parliament before it can be made. Paragraph 5(5) of Schedule 7 also permits a revised code to be laid before Parliament along with a statutory instrument relating to that code.
40. Paragraph 6 of Schedule 7 sets out the effect of codes of practice, including that a person exercising functions to which a code relates must have regard to that code, and that it is admissible in evidence in criminal or civil proceedings.
41. It is therefore appropriate that regulations under this power should be subject to the affirmative procedure for the laying of a new code, in accordance with existing codes of practice issued for other powers under the IPA 2016.

Clause 3 and 4: Minor and technical changes (bulk personal datasets) to the existing code of practice for Part 7

Power conferred on: The Secretary of State

Power exercised by: Amendment to existing Code of Practice via regulations.

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

42. The Bill makes some minor and technical amendments to the existing IPA 2016 Part 7 regime for the retention and use of BPDs by the intelligence services. These changes are broadly covered by two themes.
43. It will extend the duration of a warrant from six to 12 months (Clause 3). Extending the duration of a warrant will enable the intelligence services to better assess the utility of the dataset. BPD data is often used to support long-term strategic intelligence activities rather than short-term tactical actions. A 12-month duration of warrants would enable the value of the BPD to be more appropriately and accurately demonstrated, which in turn would provide the relevant Secretary of State with a more accurate picture of the necessity and proportionality of the continued retention of a BPD when an application for renewal is made.
44. The Bill will also enable the head of an intelligence service to delegate certain functions to another crown servant (Clause 4), whilst remaining accountable for the exercise of those functions. Under Part 7 of the IPA 2016 there are certain provisions that are not drafted with any explicit provision to enable them to be delegated to, or carried out by, another crown servant acting on the Agency Head's behalf. As currently worded, these provisions arguably require the Agency Head personally to exercise these functions, for example to personally take decisions or undertake technical examinations of datasets. These functions include those provided for at Sections 202, 206 219, 220 and 225.

Justification for taking the power

45. It will be necessary to update the existing code of practice to ensure that operational practitioners and those responsible for oversight are working from guidance that accurately reflects amendments made to the Act. This in turn will reduce opportunities for errors or inefficiencies by practitioners from happening.

Justification for the procedure

46. The Bill does not introduce a new code of practice, but rather relies on an existing power to make codes of practice that is already in Schedule 7 to the IPA 2016. Therefore, it is appropriate to maintain existing procedures and levels of oversight.

Clause 21 and 22: Members of Parliament etc [Section 26/111 of the IPA 2016]

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

47. Clauses 21 and 22 of the Bill will allow the Prime Minister, in instances where they are unavailable, to delegate their authorisation powers for warrants under Sections 26 and 111 IPA 2016 to a Secretary of State.
48. This change will increase resilience and ensure critical intelligence gathering opportunities are not missed in situations where the Prime Minister is unavailable or incapacitated.
49. Extracts from codes of practice will be published to provide indicative examples of circumstances in which the Prime Minister may be considered unavailable for the operation of the new Sections 26 and 111.

Justification for taking the power

50. In order to provide clarity to warrant requesting agencies regarding the unavailability condition, it is appropriate that some examples of circumstances which are likely to come within the statutory provision of the Prime Minister being “unavailable” need to be laid out in codes of practice. Setting the instances out on the face of the Bill would be unnecessarily restrictive, and would prevent agencies from being able to act with the necessary speed if a change to primary legislation were required to account for a novel circumstance of the Prime Minister being unavailable. In all circumstances, operational partners will be required to have due regard to the codes of practice.

Justification for the procedure

51. The Bill does not introduce a new code of practice, but rather amends two existing Codes (Interception of Communications and Equipment Interference). Therefore, it is appropriate to maintain existing procedures and levels of oversight.

Clause 10: Main functions of the Investigatory Powers Commissioner

Power conferred on: The Prime Minister

Power exercised by: Direction

Parliamentary Procedure: None

Context and Purpose

52. Currently, under the IPA 2016, there are two mechanisms by which the IPC's oversight functions can be amended. This is either by regulations made by the Secretary of State under s.239 IPA 2016 to amend s.229 IPA 2016 or by a direction issued by the Prime Minister under s.230. Such directions under s.230 are currently limited to the activities of the intelligence agencies and the MoD, in so far as engaging in intelligence activities. This has caused disparity in how the Government can direct the IPC to oversee the activities of public authorities whose activities fall within the remit of the IPA 2016, as some activity can be placed onto a statutory footing through either means, while some activity can only be addressed via regulations.
53. Clause 10(3) of the Bill will amend this power to expand the list of public authorities that the Prime Minister can direct IPC oversight of to include other public authorities which are subject to the IPA 2016, so far as engaging in intelligence activities.

Justification for taking the power

54. The power of direction is necessary to enable other public bodies in so far as they engage in intelligence activities to be included within the scope of a s.230 direction, with the flexibility that would allow a rapid response to emerging oversight requirements and ensures clear parameters in the IPC's oversight. While a Prime Minister direction or regulations made under s.239 of the IPA 2016 achieve the same outcome, the process for issuing a Prime Minister direction is inherently quicker (as they do not require Parliamentary time) and therefore this will provide greater agility to the system to ensure the oversight regime can respond to rapid developments.

Justification for the procedure

55. The Home Office's view is that expanding s.230 to include public authorities, in so far as they are engaging in intelligence activities, will ensure that that the IPA 2016 is consistent in how the Prime Minister can direct the IPC to oversee the activities of public authorities that fall within the remit of the IPA 2016 and ensure that such oversight is placed on a statutory footing.

Clause 17: Review of notices by the Secretary of State

Power conferred on: Secretary of State

Power exercised by: Amendment to Existing Codes of Practice

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

56. The Communication Data, Interception of Communications, Equipment Interference, and National Security Notice Codes of Practice outline the circumstances in which a relevant operator (i.e. a TO), postal operator or a person proposing to become either can refer a notice back to the Secretary of State for review.
57. Under existing provisions in the IPA 2016 [Section 88(2) and 255(2)], when giving a notice for the first time, the Secretary of State has a statutory obligation to engage in a consultation period with the relevant TO. Following this consultation, the Secretary of State then considers whether to formally give the notice. Should they decide to do so, the notice must then be approved by a JC and formally given to the company before its obligations become binding on them. If at this point the operator is dissatisfied with the terms of the notice, they have a statutory right to refer the notice (or part of it) to the Secretary of State for review.
58. If a review is requested by the operator, the Secretary of State must then consult the Technical Advisory Board (TAB) and a JC. As it stands, during a review period the operator is not required to comply with the notice, so far as referred, until the Secretary of State has determined the review. Where an operator is seeking to make significant changes to their system that would have a detrimental effect on a current lawful access capability; this could create a capability gap during the review period.
59. This clause will strengthen the notice review process and ensure that if an operator has requested a review of their notice by the Secretary of State, existing lawful access provided by that operator is maintained during the review period and any changes implemented by the operator do not negatively impact that access. Therefore, amendments to each Code of Practice are required to reflect the amendment to the legislation, requiring the operator to maintain the status quo.

Justification for taking the power

60. The statutory circumstances in which a TO can refer a notice back to the Secretary of State for review are elaborated on in the relevant Code of Practice. An amendment to the Code is required to ensure there is a clear explanation of the updated process.
61. Amendments to the IPA 2016 will ensure TOs do not make changes during the review period that will negatively impact existing lawful access and public safety, and amendments to the Code of Practice will help TOs to understand their obligations in this respect. TOs will not be required to make changes to specifically comply with the notice in this respect, however they will be required to maintain the status quo, ensuring changes made in the review period do not irreversibly affect existing lawful access and exceptional lawful access to data is maintained during the review period.

Justification for the procedure

62. The Bill does not introduce a new code of practice, but rather relies on existing powers to amend current Codes of Practice. Therefore, it is appropriate to

maintain existing procedures and levels of oversight in relation to the creation or revision of Codes of Practice.

Clause 18: Meaning of “telecommunications operator” etc

Power conferred on: Secretary of State

Power exercised by: Amendment to Existing Codes of Practice

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

63. An amendment to each of the Communication Data, Interception of Communications, Equipment Interference, and National Security Notice Codes of Practice is required to reflect the amended TO definition.
64. Clause 18(2) seeks to clarify the scope of the IPA 2016 to ensure that its provisions continue to apply to the relevant operators. This will require amending the definition of the term ‘telecommunications operator’ at section 261(10) out of an abundance of caution, to ensure that obligations imposed by the IPA 2016 apply to all entities of a company, irrespective of where the entity providing the “telecommunications service” is based or the entity controlling the “telecommunications system” is based.
65. Clause 18(3) further clarifies that a notice may be given to one entity in relation to another entity’s capability by amending section 253(1)(a) IPA 2016.

Justification for taking the power

66. The updates to codes are necessary to ensure that the notice regime continues to apply to those it was intended to. These updates to codes will be made out of an abundance of caution and the intention is not to bring additional companies within scope but rather to clarify that large companies are covered in their totality by the IPA 2016, not just specific parts of a larger corporate structure. This avoids the need to understand complex corporate structures and will improve the effectiveness and efficiency of the regimes and issuing notices.
67. It is necessary to provide additional guidance in the Codes of Practice rather than setting out on the face of the Bill, both because it will ensure that requirements on TOs are clearly set out in one place and so that government can remain responsive and adapt to the ever-changing nature of corporate structures globally.

Justification for the procedure

68. The Bill does not introduce a new code of practice, and existing powers will be relied on instead in order to make new codes. Therefore, it is appropriate to maintain existing procedures and levels of oversight.

Clause 20: Notification of proposed changes to telecommunications services etc

Power conferred on: Secretary of State

Power exercised by: Amendment to Existing Code of Practice

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

69. Relevant TOs who are already subject to a notice are required to inform the Secretary of State of any changes that may impact their existing notice obligations. However, there is no such obligation on TOs that have not already been issued with a notice. Clause (20), therefore introduces a notification requirement that will require relevant operators to inform the Secretary of State of any upcoming changes that will negatively impact existing lawful access. Without mitigation, significant changes could lead to an irreversible loss of data that would have an impact on the ability of law enforcement and the intelligence agencies to keep people safe.

70. Early engagement between TOs and the Government would ensure that any negative impact on investigatory powers, and therefore public safety, is fully considered to ensure continuity of lawful access to data against a background of changing technology. If a TO is required to give prior notification of changes under this requirement, the Secretary of State will formally notify the operator (i.e. in writing). This approach will ensure that the requirement does not affect relevant operators, as defined in clause 258A(11), who do not hold any operationally relevant data, and avoids the notification regime being disproportionate in its effects.

71. The Communication Data, Interception of Communications, Equipment Interference, and National Security Notice Codes of Practice will each require amendment to include further details regarding the notification process.

Justification for taking the power

72. Further details regarding the notification process will be set out in the associated Codes of Practice, details regarding associated thresholds will be set out in new Regulations. It is necessary to provide additional guidance in the Codes of Practice rather than setting out on the face of the Bill, this ensures requirements on

operators are clearly set out and the notification requirement remains proportionate in response to changing technology.

Justification for the procedure

73. The Bill does not introduce a new code of practice, instead existing powers to create or amend Codes will be relied upon. Therefore, it is appropriate to maintain existing procedures and levels of oversight.

Clause 19: Renewal of notices

Power conferred on: JC/IPC

Power exercised by: Codes of practice

Parliamentary Procedure: Affirmative regulations are required for the laying of a new code of practice. A consultation is also required ahead of laying any new or revised code. If a revised code is laid without affirmative regulations, that code must be laid before Parliament along with an accompanying statutory instrument specifying when the code comes into force.

Context and Purpose

74. A new notice renewal process is being created with statutory oversight roles for the JCs and the IPC. An amendment to each of the Communication Data, Interception of Communications, Equipment Interference, and National Security Notice Codes of Practice are required to provide further detail regarding the renewal process.
75. This measure will create a notice renewal process, with statutory oversight by the IPC and JCs, to be conducted where a period of two years has elapsed since one of the following: a notice was first given; a notice was varied (as each variation requires a full necessity and proportionality assessment to be made, thereby creating a pseudo-renewal process); a notice was renewed (that is once this new renewal process is introduced).
76. The introduction of a statutory role for the IPC within a notice renewal process would help ensure the notices remain necessary and proportionate.

Justification for taking the power

77. This power will provide additional oversight to the notices regimes process. It is appropriate to update existing codes of practice to reflect changes to the regime made by the Bill.
78. The change would apply the existing oversight and scrutiny arrangements for the notice issuing procedure as set out in the current codes of practice – that is, that renewal of the notice would require the double lock whereby it would be issued by the Secretary of State and then approved by a JC. In addition, where a JC refuses to approve a decision to renew a notice, the JC must give reasons; and where a JC, other than the IPC, refuses to approve a decision to give a notice, the Secretary

of State may ask the IPC to decide whether to approve the decision to give the notice.

79. The introduction of a statutory role for the IPC within a notice renewal process would help ensure the notices remain necessary and proportionate.

Justification for the procedure

80. The Bill does not introduce a new Code of Practice, but rather relies on existing powers to make and amend codes. Therefore, it is appropriate to maintain existing procedures and levels of oversight.

Home Office
November 2023