

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”) and is supplemental to the memorandum shared with the Committee on the 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.
3. This memorandum covers the amendments to existing delegated powers made by the Government amendments tabled on 16 January 2024, for consideration at Report stage in the Lords – see Part B below. For completeness it also covers a corresponding new provision for Judicial Commissioner to make a direction – see Part C below.

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

Clause 17: Time period for the Secretary of State to complete review of notices

Power conferred on: Secretary of State

Power exercised by: regulations amended by statutory instrument.

Parliamentary procedure: Affirmative Procedure

Context and Purpose

1. Sections 90(1) and 257(1) of Investigatory Powers Act 2016 include regulation making powers in relation to a review of a notice by the Secretary of State. These provide that if an operator, on receipt of a notice, is dissatisfied with the terms of said notice, they have a statutory right to refer it (or part of it) to the Secretary of State for a review. Before deciding the review, the Secretary of State must consult the Technical Advisory Board and a Judicial Commissioner.
2. The Investigatory Powers (Review of Notices and Technical Advisory Board) Regulations 2018 (SI/2018/354), made pursuant to s.90(1) and s.257(1), set out the period and circumstances within which notices may be referred back to the Secretary of State for review. Reg. 2 of these Regulations specifies that a person may request a review within 28 days of the day on which the notice is given, if they consider that the requirements of the notice are unreasonable.
3. This existing power in the IPA 2016 does not give the Secretary of State the power to specify in regulations, the time period within which the review by the Secretary of State must be completed. The intent of the amendments to clause 17 tabled by the Government on 16 January are to place time limits on this process. It seeks to achieve this by introducing new regulation making powers in section 90 and 257 of the IPA, which will enable the Secretary of State to specify in regulations:
 - a. The length of time the Secretary of State can take to reach a decision on the review of a notice, upon receipt of the report by the Judicial Commissioner and the Technical Advisory Board.
 - b. The overall length of time a review of a notice can take, i.e. from when the initial request for a review is made to when the Secretary of State decides the review.
4. This power could be exercised by amending the existing regulations (SI/2018/354). These changes will provide clarity to both operators and operational partners over how long a review of a notice can take. It also provides assurance in relation to the introduction of Clause 17, whereby the operator must maintain the status quo whilst a review is conducted.

Justification for the Power

5. A new regulation making power is required as the existing power at section 90(1) and 257(1) does not include the ability for the Secretary of State to specify a review timeline. A review of a notice is a complex process, particularly considering the number of parties involved and two of the parties the Secretary of State must consult are independent bodies. It is therefore appropriate to amend the existing regulation making power to allow the Secretary of State to specify timelines within regulations, rather than primary legislation. This allows flexibility and ensures timelines can be amended in response to review requirements including increasing/decreasing time limits.

Justification for the Procedure

6. 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. The existing regulation making power require the affirmative procedure, it is therefore appropriate the affirmative procedure is maintained for consistency.

C. OTHER NEW PROCEDURES

Clause 17: Ability for Judicial Commissioners to issue directions in relation to a review of a notice by the Secretary of State

Power conferred on: Judicial Commissioner

Power exercised by: Direction

Parliamentary procedure: None

Context and Purpose

7. In order to give effect to the change set out at Part B above, it is necessary to make provision for a Judicial Commissioner to issue directions to the Secretary of State and the person seeking the review, as they see fit, to ensure the effective management of the notice review process. These amendments to clause 17 will therefore:
 - a. give a Judicial Commissioner the power to issue directions to both parties specifying the time period for providing their evidence or making their representations; and
 - b. Give a Judicial Commissioner the power to disregard any submissions provided outside of these timelines.

8. These amendments will help to clarify the notice review process for all parties.

Justification for the Power

9. These amendments are intended to ensure that Judicial Commissioners have the appropriate power to deal with non-compliance with the notice review process and the timeline. Ensuring Judicial Commissioners can issue directions in relation to the notice review will ensure the effective management for the review process.

Justification for the Procedure

Exercising the power via a direction by a Judicial Commissioner is the most appropriate procedure in this instance for expedience and ensures clarity for the Secretary of State and the person requesting the review regarding timelines and expectations.

**Home Office
January 2024**