

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS
(DIRECTED SURVEILLANCE AND COVERT HUMAN INTELLIGENCE
SOURCES) (AMENDMENT) ORDER 2006

2006 No. 1874

1. This explanatory memorandum has been prepared by the Home Department and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The purpose of this Order is to ensure that the legislation which provides that public authorities having necessary and proportionate requirements to conduct directed surveillance or use covert human intelligence sources can do so within a statutory framework which requires explicit consideration of European Convention Human rights.

2.2 The Order provides powers for new public authorities; consistent with powers and functions they already have (in the case of the Gambling Commission) or will have (in the case of the Gangmasters Licensing Authority). It also provides for the withdrawal of powers from public authorities or from officials in public officials that no longer have such requirements.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative background

4.1 This Order is made in exercise of the powers conferred by section 30(1), (3), (5) and (6) and section 78(5) of the Regulation of Investigatory Powers Act 2000 (RIPA). This Order requires approval by resolution of each House of Parliament and will not come into effect until two weeks after it is made.

4.2 Part II of RIPA (Surveillance and Covert Human Intelligence Sources) provides a statutory framework regulating the conduct of covert surveillance and use of covert human intelligence sources by public authorities consistent with the Human Rights Act 1998. Within Part II of RIPA the duties and responsibilities placed upon each party involved in the process are explained and a system of safeguards, reflecting the requirements of Article 8 of the European Convention on Human Rights are included.

4.3 Part I of Schedule I of RIPA lists relevant public authorities for the purposes of section 28 (authorisation for carrying out directed surveillance) and section 29 (authorisation for the conduct and use of a covert human intelligence source) of RIPA. Part II of Schedule I of RIPA lists relevant public authorities for the purposes of section 28 of RIPA only.

4.4 Section 30(1) of RIPA provides the Secretary of State with the power to prescribe authorising officers for the relevant public authorities, whilst section 30(3) provides the power to impose restrictions.

4.5 Section 30(5) of RIPA provides the Secretary of State with the power to make an Order to add public authorities to Schedule 1 to RIPA or to remove public authorities from that Schedule.

Commentary on the draft Order

4.6 This Order amends Parts I and II of Schedule I to RIPA. It also amends Parts I and II of the Schedule to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (“the 2003 Order”)¹.

4.7 Article 2 to this Order has the effect of adding the Gangmasters Licensing Authority and the Commission for Healthcare Audit and Inspection to Part I of Schedule 1 to RIPA enabling them to conduct directed surveillance and use covert human intelligence sources within the regulatory framework.

4.8 Article 3 to this Order removes any National Health Service trust established under section 5 of the National Health Service and Community Care Act 1990, and Local Health Boards in Wales established under section 6 of the National Health Service Reform and Health Care Professions Act 2002 from Part II of Schedule 1 to RIPA disabling them from conducting directed surveillance within the regulatory framework.

4.9 The Schedule to this Order amends the Schedule to the 2003 Order.

Part I of the Schedule to the draft Order

4.10 Paragraphs 2 to 6 of the Schedule to the draft Order make amendments to Part I of the Schedule to the 2003 Order (relevant public authorities for the purposes of sections 28 and 29 of RIPA). Paragraph 2 inserts, amends and deletes from that Schedule entries which prescribe certain authorising officers holding positions in the Department for Environment, Food and Rural Affairs.

4.11 Paragraph 3 has the effect of amending the entry for the Home Office in Part I of the Schedule to the 2003 Order and the prescribed offices in directly managed prisons within HM Prison Service.

4.12 Paragraph 4 inserts an additional prescribed office relating to the Driving Standards Agency in the entry for the Department for Transport in Part I of the Schedule to the 2003 Order.

4.13 Paragraph 5 has the effect of substituting the entry for the Gaming Board for Great Britain in the 2003 Order with an entry for the Gambling Commission.

4.14 Paragraph 6 inserts, as a consequence of Article 2 of this Order, entries in Part I of the Schedule to the 2003 Order prescribed authorising officers in the Gangmasters Licensing Authority and the Commission for Healthcare Audit and Inspection.

¹ S.I. 2003 No. 3171

Part II of the Schedule to the draft Order

4.15 Paragraphs 7 to 10 of Schedule to the draft Order make amendments to Part II of the Schedule to the 2003 Order (relevant public authorities for the purposes of sections 28 of RIPA). Paragraph 8 amends the entry for a Special Health Authority established under section 11 of the National Health Service Act 1977, by deleting any Chief Executive as a prescribed authorising offices and restricting the power to authorise directed surveillance to a Senior Manager in the Counter Fraud and Security Management Services division of the NHS Business Services Authority.

4.16 Paragraph 9, as a consequence of Article 3 of this Order, deletes from Part II of the Schedule to the 2003 Order the entries which prescribed authorising officers in National Health Service trusts and Local Health Boards in Wales.

4.17 Paragraph 10 has the effect of amending the entry for Her Majesty's Chief Inspector of Schools in England. It amends the title of the prescribed office entitled to authorise the conduct of directed surveillance and deletes the provision in the 2003 Order for a prescribed offices in urgent cases.

4.18 Each of the entries being amended in or inserted into the Schedule to the 2003 Order prescribe the persons entitled to grant authorisations under sections 28 and 29 of RIPA (in column 2), prescribe, where relevant, persons entitle to grant authorisations in urgent cases (in column 3) and restricts the grounds for which authorisation can be given (in column 4). Those grounds are described by letters which refer to the paragraphs in sections 28(3) and 29(3) of RIPA.

5. Extent

5.1 This instrument applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 Liam Byrne, Minister of State for the Home Department, has made the following statement regarding Human Rights:

“In my view the provisions of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) Order 2006 are compatible with the Convention Rights”

7. Policy Background

7.1 Conduct of directed surveillance does not include covert surveillance of anything taking place on any residential premises or in any private vehicle. That would constitute intrusive surveillance. This Order does not confer any powers on any public authority to conduct intrusive surveillance.

7.2 National Health Service trusts and Local Health Boards in Wales sought and were given powers to conduct direct surveillance under RIPA, but have little or no experience of using those powers. Deletion of these health authorities from Part II of Schedule I of RIPA implements a recommendation made by the Chief Surveillance

Commissioner who has expressed concern in his annual reports to Parliament about the capability of officials in health authorities to conduct directed surveillance.

7.3 Within the Department for Environment, Food and Rural Affairs, the Plant Health and Seed Inspectorate, the Horticultural Marketing Inspectorate and the Egg Marketing Inspectorate, which regulate and set standards for agricultural produce, have concluded that its officials have no requirement to use their powers under RIPA to authorise the conduct directed surveillance or use of covert human intelligence sources. This Order deletes the prescribed officials in each of the Inspectorate from those able to grant RIPA authorisations. The Order also takes account of an organisational changes where the Defra Investigation Service is the new name for the former Defra Investigation Branch and the Marine Fisheries Agency has assumed functions of the former Sea Fisheries Inspectorate to prevent and detect offences of illegal marine fishing.

7.4 The Gangmasters Licensing Authority, established by the Gangmasters (Licensing) Act 2004, to curb the exploitation of workers in the Agriculture, Horticulture, Shellfish Gathering and Associated Processing and Packaging Industries by regulating the labour supply industry within those sectors. The new authority has a necessary and proportionate requirement to conduct directed surveillance and use covert human intelligence sources to investigate labour providers and labour users operating illegally which includes organised gangs involved in trafficking of people trafficking and exploitation of illegal migrant workers when its enforcement powers come into effect in October 2006.

7.5 The Commission for Healthcare Audit and Inspection (“the Healthcare Commission”) promotes and drives improvements in the quality of healthcare and public health in England with the principal aim of assuring standards for patients in their healthcare treatment. The Commission inspects, reviews and investigates certain activities within the NHS, and regulates private and voluntary healthcare through registration, inspection and enforcement under the Care Standards Act 2000. The Commission has a necessary and proportionate requirement to conduct directed surveillance and use covert human intelligence sources to investigate and regulate private and voluntary healthcare services, particularly "rogue providers", where poor practice puts public health at risk.

7.6 The Driving Standards Agency, an Executive Agency of the Department for Transport, is responsible under the Road Traffic Act 1988 for setting the accepted public standard for all driving tests in the UK. The Driving Standards Agency has a necessary and proportionate requirement to conduct directed surveillance and use covert human intelligence sources to investigate individuals suspected of taking multiple driving tests using bogus identities and to investigate and prevent unregistered driving instructors making profit from giving driving instruction (which is a criminal offence). The integrity of the driving test system ensures that the public is protected from untested and unqualified drivers thereby helping to reduce the number of fatalities on UK roads.

7.7 Her Majesty’s Prison Service is already listed as a relevant public authority that may conduct directed surveillance and use covert human intelligence sources. This Order amends and harmonises the authorising levels for both directed surveillance and

covert human intelligence sources in prison establishments directly managed by HM Prison Service which are inspected by HM Chief Inspectorate of Prisons.

7.8 Parliament has already approved in the 2003 Order that Her Majesty's Chief Inspector of Schools may conduct directed surveillance to investigate criminal offences under the Children Act 1989. When necessary and proportionate, it undertakes directed surveillance against people unlawfully childminding, and registered childminders contravening the terms of their registration by caring for more children than they are allowed. Surveillance is used to investigate whether children are being looked after illegally and where the safety of children may be at risk. As a result of reorganisation within the Inspectorate, which is also known as Ofsted, this Order reflects a change in the title of the prescribed authorising office.

7.9 Codes of practice on Covert Surveillance and Covert Human Intelligence Sources, which have been approved by Parliament by affirmative resolution, set out the procedures to be followed in the granting, renewal and cancellation of authorisations under RIPA to conduct directed surveillance or use a covert human intelligence source.

7.10 The Chief Surveillance Commissioner provides independent oversight of the exercise of powers and duties under Part II of RIPA, by virtue of section 62 of RIPA. The Investigatory Powers Tribunal established by section 65 of RIPA is the appropriate forum for all complaints to be addressed.

8. Regulatory Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument; it has no impact on business, charities or voluntary bodies.

8.2 The purpose of the Order is to regulate the conduct of directed surveillance and the use of covert human intelligence sources by the public authorities listed in it. RIPA requires that officials who grant authorisations to conduct directed surveillance or use covert human intelligence sources must properly consider the principles of necessity and proportionality and respect for Convention rights in each case and that these considerations are recorded at the time they are made. That means a decision to authorise conduct under RIPA will always entail a level of necessary bureaucracy.

9. Contact

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