

**EXPLANATORY MEMORANDUM TO**  
**THE REGULATION OF INVESTIGATORY POWERS (AUTHORISATIONS**  
**EXTENDING TO SCOTLAND) (AMENDMENT) ORDER 2009**

**2009 No. 3403**

1. This explanatory memorandum has been prepared by the Home Department and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
  - 2.1 This Order amends the Schedule to the Investigatory Powers (Authorisations Extending to Scotland) Order 2007 (“the 2007 Order”) by substituting “The UK Border Agency” for “The Immigration Service”. The purpose of this amendment is to ensure that the UK Border Agency (which is an executive agency of the Home Office) may grant or renew authorisations under Part II under the Regulation of Investigatory Powers Act 2000 (“RIPA”) where all the conduct to be authorised is likely to take place in Scotland.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 Part II of RIPA provides a statutory framework regulating the carrying out of directed surveillance and the conduct or use of covert human intelligence sources by public authorities consistent with the Human Rights Act 1998. Authorisations granted under Part II are subject to all the existing safeguards considered necessary by Parliament to ensure that investigatory powers are exercised compatibly with the ECHR. In particular, the substantive protections of Article 8 (right to respect for private and family life) are guaranteed by the express terms of RIPA which only permit the exercise of the Part II powers if the tests of necessity, proportionality and legitimate aim are satisfied.
  - 4.2 The 2007 Order, as amended by this Order, directs that the Home Office, insofar as the UK Border Agency is concerned, is a relevant public authority for all parts of the United Kingdom. Under section 46(4) of RIPA, the effect of this direction is that the authorities specified in section 46(3) are to be treated as including the Home Office.
  - 4.3 The effect of a public authority specified in Schedule 1 to the 2000 Act being included in the list of public authorities in section 46(3) is that authorisations may be granted or renewed under sections 28 and 29 of the 2000 Act, by or in relation to that authority, where all the conduct to be authorised is likely to take place in Scotland.
  - 4.4 The amendments made by this Order will therefore ensure that the UK Border Agency may grant or renew authorisations under sections 28 and 29 of the 2000 Act where all the conduct to be authorised is likely to take place in Scotland.

## **5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The Home Office UK Border Agency is responsible for the prevention and detection of immigration and customs (pertaining to the smuggling of restricted and prohibited goods) criminality at the border. This includes the trafficking and smuggling of human beings, as well as the smuggling of drugs, firearms and other prohibited goods and commodities.

7.2 The UK Border Agency has a national remit to investigate crimes throughout the UK and, as such, there is an operational need to develop lines of enquiry in Scotland as well as all other areas of the country. This requirement was acknowledged in S.I. 2007 No. 934 when the Home Office Immigration Service was specified as a public authority for all parts of the United Kingdom. Following the creation of the UK Border Agency, which incorporated the Immigration Service, it is recognised that the UK Border Agency has retained a national remit and that this now includes responsibility for the prevention and detection of customs criminality at the border. As such, this Order amends the existing Home Office Immigration Service entry to reflect the UK Border Agency's broader responsibilities for investigating customs criminality as well as immigration offences.

## **8. Consultation outcome**

8.1 The proposals setting out the Home Office UK Border Agency's requirements under RIPA were included in a three month consultation paper entitled 'Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice'. The consultation paper was published in April 2009 and received broad support. The Government's Summary of Responses was subsequently published in November 2009. This Order reflects that as a national Agency with an accepted operational need to conduct activities under RIPA, the UK Border Agency's requirements extend to the whole of the UK.

## **9. Guidance**

9.1 The Home Office is currently revising the statutory Codes of Practice on Covert Surveillance and Covert Human Intelligence Sources under RIPA. Additional guidance is provided directly to relevant public authorities by the Office of Surveillance Commissioners and the Intelligence Services Commissioner, which have statutory responsibility for overseeing the proper authorisation of these techniques under RIPA.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation applies only to public authorities.

## **12. Monitoring & review**

12.1 The Government will keep under review the operation of these measures, including:

a) through the independent inspection and oversight by the Office of Surveillance Commissioners and the Intelligence Services Commissioner, who have statutory oversight responsibility for keeping under review the use by public authorities of covert techniques under Part II of RIPA and who report to the Prime Minister on an annual basis; and,

b) through the Investigatory Powers Tribunal which is made up of senior members of the judiciary and is independent of Government and has full powers to investigate and determine any proceedings or complaints falling within its jurisdiction.

## **13. Contact**

13.1 Tony Cooper of the Covert Investigation Policy Team at the Home Office, 2 Marsham Street, London SW1P 4DF (telephone 020 7035 1218; e-mail [tony.cooper3@homeoffice.gsi.gov.uk](mailto:tony.cooper3@homeoffice.gsi.gov.uk)) can answer any queries regarding the instrument.