

## EXPLANATORY MEMORANDUM

### THE REGULATION OF INVESTIGATORY POWERS (COVERT HUMAN INTELLIGENCE SOURCES: MATTERS SUBJECT TO LEGAL PRIVILEGE) ORDER 2009

2009 No. 3404

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 statutory instrument makes provision in relation to the authorisation of the use or conduct of covert human intelligence sources under the Regulation of Investigatory Powers Act 2000 (RIPA) to obtain, provide access to or disclose matters subject to legal privilege. The Order prohibits the granting or renewal of such authorisations unless they have been approved either by a Surveillance Commissioner or the Secretary of State
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 This instrument is made under the exercise of powers conferred on the Secretary of State by section 29(2)(c) and (7)(b) and 43(8) of RIPA. It is part of the Government's response to a recent House of Lords' judgment earlier this year (*In re McE*). In determining an appeal from the Divisional Court in Northern Ireland, the House of Lords confirmed that covert surveillance of legally privileged consultations in prisons and police stations could in principle be authorised under RIPA, but said that enhanced authorisation procedures were necessary in order for such surveillance to be lawful<sup>1</sup>. The Government undertook to remedy the defects identified by the Divisional Court and the House of Lords by assimilating this description of directed surveillance to intrusive surveillance for the purpose of prior authorisation under RIPA. The Government is bringing forward a statutory instrument under section 47 of RIPA to fulfil this undertaking. This instrument introduces an enhanced regime of prior approval with equivalent safeguards in respect of the authorisation of the use or conduct of covert human intelligence sources to obtain knowledge of matters subject to legal privilege (although authorisations of this nature were not considered in the House of Lords' judgment).
5. **Territorial Extent and Application**
  - 5.1 This instrument applies to all of the United Kingdom.

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<sup>1</sup> *In re McE (Appellant) (Northern Ireland), In re C (AP) and another (Appellants) (Northern Ireland), In re M (Appellant) (northern Ireland)* [2009] UKHL 15.

## **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 Government is introducing this statutory instrument in order as part of its response to a House of Lords judgment, *In re McE*. The judgment set out how public authorities can be authorised to carry out covert surveillance of legal consultations compatibly with the European Convention on Human Rights. A separate statutory instrument has been brought forward to respond directly to this judgment. It requires that directed surveillance that is carried out in places ordinarily used for legal consultation, at a time when they are being used for such consultations, is to be treated as intrusive surveillance for the purposes of Part II of RIPA.
- 7.2 Although the House of Lords' judgment *In re McE* concerned covert surveillance of legally privileged consultations, the Government has decided to apply the principles set out in that case to the authorisation of covert human intelligence sources to acquire legally privileged material. This instrument does this by creating an enhanced regime of prior approval in respect of the authorisation of the use or conduct of a covert human intelligence source to obtain knowledge of matters subject to legal privilege.

## **8. Consultation outcome**

- 8.1 The proposals 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 the Government's Summary of Responses in November 2009. No public respondents commented on the proposals relating to legal privilege, but the Home Office has continued working with the law enforcement and intelligence agencies to prepare these Orders.

## **9. Guidance**

- 9.1 The Home Office is currently revising the statutory Code of Practice on Covert Human Intelligence Sources under RIPA, partly in response to the House of Lords' judgment in the case of *Re McE*. 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, including allegations that covert human intelligence sources have been deployed unlawfully to obtain knowledge of matters subject to legal privilege.

## **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.