

EXPLANATORY MEMORANDUM

THE REGULATION OF INVESTIGATORY POWERS (EXTENSION OF AUTHORISATION PROVISIONS: LEGAL CONSULTATIONS) ORDER 2010

2010 No. 461

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 directed surveillance under the Regulation of Investigatory Powers Act 2000 ('RIPA') that is carried out in relation to anything taking place on so much of any specified premises as is, at any time during the surveillance, used for the purpose of legal consultations. The Order provides that this description of directed surveillance is to be treated for the purposes of Part II of RIPA as intrusive surveillance.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 This statutory instrument is made in exercise of powers conferred on the Secretary of State by section 47(1)(b) of RIPA. It is part of the Government's response to a House of Lords' judgment earlier this year (*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 lawful¹. 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. This instrument fulfils this assurance.
5. **Territorial Extent and Application**
 - 5.1 This instrument applies to all of the United Kingdom.
6. **European Convention on Human Rights**
 - 6.1 David Hanson, Minister of State for the Home Department has made the following statement regarding Human Rights:

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

“In my view, the provisions of the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 is compatible with the Convention rights.”

7. Policy background

- 7.1 The Government is introducing this statutory instrument in order to comply with a House of Lords judgment, *Re McE*. The judgment considered the circumstances in which public authorities could authorise covert surveillance of the sort described in this statutory instrument compatibly with the European Convention on Human Rights. This statutory instrument 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 This has the effect of reducing the number of public authorities able to authorise such surveillance to those already able to authorise intrusive surveillance, principally the police and intelligence agencies. It will also make authorisations in respect of such surveillance subject to prior approval by either an independent Surveillance Commissioner (for the law enforcement agencies) or the Secretary of State (for the intelligence agencies).
- 7.3 Although the use of covert human intelligence sources was not considered by the House of Lords in *Re McE*, the Home Office is bringing forward a related statutory instrument under section 29 RIPA which creates an equivalent set of safeguards in respect of the use or conduct of covert human intelligence sources.

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 Surveillance 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 the power to authorise surveillance which is to be treated as intrusive surveillance as a result of this statutory instrument has been exercised unlawfully.

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) can answer any queries regarding the instrument.