

These notes relate to the Regulation of Investigatory Powers (Scotland) Act 2000 (asp 11) which received Royal Assent on 28 September 2000

REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Authorisation of surveillance and human intelligence sources

Section 5: Lawful surveillance etc.

25. This section provides that all conduct defined in section 1 will be lawful, provided it is carried out in accordance with the authorisation to which it relates.
26. Furthermore, no civil liability will arise out of conduct which is incidental to the authorised conduct. However, this does not apply in the case where the incidental conduct is conduct which itself should have been separately authorised either under this Act or under Part III of the Police Act 1997 (which relates to authorisation of interference with property and wireless telegraphy).

Sections 6, 7 and 8: Authorisation of directed surveillance; Authorisation of covert human intelligence sources; and Persons entitled to grant authorisations under sections 6 and 7

27. These sections deal with the scheme of authorisations for directed surveillance and the conduct and use of covert human intelligence sources. Section 10 deals with the authorisation of intrusive surveillance (see paragraphs 38 to 40 below).
28. [Section 8](#) provides that such authorisations may be granted by such persons within the relevant public authorities holding such offices, ranks or positions as the Scottish Ministers prescribe. The “relevant authorities” are:
 - a police force;
 - the Scottish Administration;
 - a council constituted under section 2 of the [Local Government etc. \(Scotland\) Act 1994 \(c.39\)](#);
 - the Common Services Agency for the Health Service;
 - a health board;
 - a special health board;
 - a National Health Service trust established under section 12A of the [National Health Service \(Scotland\) Act 1978 \(c.29\)](#);
 - the Scottish Environment Protection Agency.
29. Police authorisations may only be granted an application from within the force in question (see section 11(1) and paragraphs 41 to 45 below).

30. Sections 6 and 7 provide that authorisations cannot be granted unless specific criteria are satisfied, namely, that the person granting the authorisation is satisfied that:
- the authorisation is necessary on specific grounds; and
 - the authorised activity is proportionate to what is sought to be achieved by it.
31. The specific grounds are that the authorisation is necessary:
- for the purpose of preventing or detecting crime or of preventing disorder;
 - in the interests of public safety; or
 - for the purpose of protecting public health.
32. Section 7(4) confers a power on the Scottish Ministers to make an order which imposes certain constraints on authorisations which may be made in relation to covert human intelligence sources. The order may prohibit the giving of authorisations in relation to certain descriptions of conduct or use of covert human intelligence sources. An order may also impose requirements, in addition to those provided for by section 7(2), that must be satisfied before an authorisation may be granted in relation to certain descriptions of the conduct or use of covert human intelligence sources.
33. There is a further criterion in relation to covert human intelligence sources, which is set out in section 7(6), namely that specific arrangements exist to ensure that, amongst other things, the source is independently managed and supervised and that records are kept of the use made of the source. The responsibility for such tasks falls to specified individuals within the organisation benefiting from the use of the source. As there may be cases where a source carries out activities for more than one organisation, it is provided that only one organisation will be identified as having responsibility for such arrangements and record-keeping.
34. Subsection (2) of section 8 provides that Scottish Ministers may impose, by order, restrictions on the types of authorisations granted and on the circumstances or purpose for which such authorisations may be granted.
35. Sections 6(4) and 7(5) set out the conduct that is authorised by the authorisation. Broadly speaking, it covers any conduct that occurs whilst carrying out the specified surveillance or is comprised in the activities involving the specified conduct or use of a covert human intelligence source, provided it is carried out or takes place in the manner and for the purposes described.

Section 9: Special provision for the Scottish Crime Squad

36. This section makes special provision for the activities of the Scottish Crime Squad to be covered by the Act. It provides that sections 6 to 8 and 19 to 32 of the Act apply to the Scottish Crime Squad as they do to the public authorities listed in section 8(3) of the Act.
37. Subsections (3) to (5) detail the provision for authorisations for activities undertaken by the Scottish Crime Squad under the remit of the Act. Subsection (3) provides that those offices, ranks or positions within the Scottish Crime Squad able to authorise the use of directed surveillance or covert human intelligence sources under the Act will be prescribed in the Order provided for in section 8(1) of the Act.

Section 10: Authorisation of intrusive surveillance

38. This section deals with authorisations for intrusive surveillance. Such authorisations may only be granted by chief constables in the police forces.
39. By virtue of subsection (2), intrusive surveillance authorisations cannot be granted unless specific criteria are satisfied, namely that the chief constable is satisfied that:

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- the authorisation is necessary for the purpose of preventing or detecting serious crime (which is defined in section 31(6)); and
 - the authorised activity is proportionate to what is sought to be achieved by it.
40. An additional factor which must be taken into account is specified in *subsection (3)*. The chief constable must be satisfied that the information which it is thought necessary to obtain by the authorised conduct could not reasonably be obtained by other means.

Section 11: Rules for grant of authorisations

41. **Section 11** sets out rules for granting authorisations for surveillance by police forces.
42. *Subsection (1)* provides that a person who is a designated person within a police force for the purposes of section 6 or 7 (which relate respectively to the authorisation of directed surveillance and the authorisation of the conduct and use of covert human intelligence sources) should not grant an authorisation except on an application made by a member of the same police force.
43. *Subsection (2)* restricts an authorisation for intrusive surveillance involving residential premises to being granted only where the premises are within the area of operation of that force. The area of operation is defined in *subsection (5)*.
44. *Subsection (3)* provides that authorisations for the use of intrusive surveillance by the Scottish Crime Squad may be granted by a chief constable of a police force only if the operation relates to premises within the area of operation of that chief constable's police force or, if the operation relates to a vehicle, the operation will begin in that area.
45. *Subsection (3)* enables a single authorisation to combine both an authorisation granted under the Act and an authorisation given by, or on the application of, a member of a police force under Part III of the Police Act 1997 (which relates to the authorisation of interference with property and wireless telegraphy). Nevertheless, subsection (3) also provides that the provisions of the Act or the 1997 Act that are applicable in the case of each of the authorisations shall apply separately in relation to the part of the combined authorisation to which they are applicable.

Section 12: Grant of authorisations in cases of emergency

46. Where an application is made for an intrusive surveillance authorisation and the case is urgent but it is not reasonably practicable for the application to be considered by a chief constable in the police force or his designated deputy, an authorisation may be granted by a person entitled to act in his/her absence. *Subsection (4)* details the officers entitled so to act and *subsection (5)* sets down those officers entitled to act as "designated deputies".
47. *Subsection (3)* provides that in the case where a person considers an application for an authorisation for the carrying out of intrusive surveillance where the case is urgent, the person concerned shall have the same power to grant an authorisation as the person for whom he is entitled to act. The person concerned would be a person who is entitled under section 12(4) to act for the chief constable.

Section 13: Notification of authorisations for intrusive surveillance

48. Where an intrusive surveillance authorisation is granted or cancelled, except where it is cancelled under section 15(2), written notification must be given to an ordinary Surveillance Commissioner as soon as reasonably practicable. *Subsection (2)* requires that notification to be in accordance with arrangements made by the Chief Surveillance Commissioner and must specify the matters prescribed by order of the Scottish Ministers.

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49. By virtue of *subsection (3)*, such a notice must indicate that the authorisation or renewal requires the approval of an ordinary Surveillance Commissioner before it takes effect (see section 14) or that the case is one of urgency, together with the grounds for that belief.
50. *Subsection (4)* provides that the ordinary Surveillance Commissioner must, as soon as practicable, scrutinise the notice and decide whether or not to approve the authorisation in those cases where his approval is required.
51. *Subsection (5)* specifies that the Scottish Ministers must not make an order under section 13(2)(c) unless a draft of the order has been laid before and approved by resolution of the Scottish Parliament.
52. *Subsection (9)* provides that any notice that is required by any provision of section 13 to be given in writing may be given, instead, by being transmitted by electronic means.

Section 14: Approval required for authorisations to take effect

53. *Subsection (1)* provides that, except in urgent cases, authorisations granted for intrusive surveillance will not take effect until they have been approved by an ordinary Surveillance Commissioner and written notice of the Commissioner's decision has been given to the person who granted the authorisation.
54. *Subsection (2)* provides that where the person who granted the authorisation is satisfied that the case is one of urgency, the authorisation will take effect from the time of grant, provided the appropriate notice is given to the ordinary Surveillance Commissioner, as described in section 13(3).
55. *Subsection (3)* provides that an ordinary Surveillance Commissioner shall give his approval only if he is satisfied that there are reasonable grounds for being satisfied that the authorisation is necessary and that the surveillance is proportionate to what is sought to be achieved.
56. If an ordinary Surveillance Commissioner decides not to approve an authorisation, *subsection (4)* requires him to make a report of his findings to the "most senior relevant person" (as defined in *subsection (5)*). This will be a chief constable.
57. *Subsection (6)* specifies that any notice that is required by any provision of section 14 to be given in writing may be given, instead, by being transmitted by electronic means.

Section 15: Quashing of authorisations etc.

58. This section gives Surveillance Commissioners the power to quash or cancel an authorisation for intrusive surveillance.
59. Under *subsection (1)*, an ordinary Surveillance Commissioner may quash an authorisation, with effect from the time of the grant of the authorisation or renewal, if he is satisfied that the criteria for authorisation in section 10 were not met at the time the authorisation was granted or renewed.
60. Alternatively, he may, under *subsection (2)*, cancel an authorisation if he is satisfied that there are no longer any reasonable grounds for being satisfied that the criteria in section 10 are met. In such a case, he may cancel the authorisation from the time that the criteria, in his opinion, ceased to be met.
61. *Subsection (3)* provides that if an authorisation was granted or renewed by way of the urgency procedure, and the ordinary Surveillance Commissioner is not satisfied that, at the time of grant or renewal, there were reasonable grounds for being satisfied that the case is one of urgency, he may quash the authorisation.

62. He may also, under *subsections (4) and (5)*, order the destruction of records. Where an authorisation is cancelled, he may order the destruction of records only from the time the authorisation no longer meets the criteria specified in section 10.
63. *Subsection (6)* provides that no order may be made under section 15 for the destruction of any records which are required for pending criminal or civil proceedings.
64. *Subsection (7)* provides that where an ordinary Surveillance Commissioner exercises a power conferred by this section, he must make a report of his actions, together with his reasons, as soon as reasonably practicable, to the most senior relevant person and to the Chief Surveillance Commissioner.
65. *Subsection (8)* provides that an order to destroy records does not become operative until after the period allowed for appealing against the decision or the dismissal of such an appeal.

Section 16: Appeals against decisions by Surveillance Commissioners

66. *Subsections (1) and (2)* provide that a senior authorising officer, or a designated deputy or other person granting an intrusive surveillance authorisation in the absence of the chief constable may appeal to the Chief Surveillance Commissioner against:
- a refusal of a Surveillance Commissioner to approve an authorisation or renewal;
 - a decision by a Surveillance Commissioner to quash or cancel an authorisation; or
 - a decision to make an order for the destruction of records.
67. *Subsection (3)* imposes a time limit of 7 days for making an appeal.
68. *Subsection (4)* provides that the Chief Surveillance Commissioner must allow an appeal if:
- he is satisfied that the criteria set out in section 10 were met at the time in question; and
 - he is not satisfied that the urgency procedure has been abused.
69. By virtue of *subsection (5)*, in relation to appeals against decisions to quash or cancel authorisations, the Chief Surveillance Commissioner may modify the decision if he considers that there were grounds for the action which the Surveillance Commissioner has taken but such action should have taken effect at a different time. In such cases, he may modify the Surveillance Commissioner's decision to that which he considers should have been made.
70. Where an appeal against a decision to quash or cancel an authorisation is allowed, *subsection (6)* provides that the Chief Surveillance Commissioner shall quash any related order for the destruction of records.

Section 17: Appeals to the Chief Surveillance Commissioner: supplementary

71. Where the Chief Surveillance Commissioner has determined an appeal under section 16, *subsection (1)* requires him to give notice of his determination to:
- the person who brought the appeal; and
 - the ordinary Surveillance Commissioner whose decision was appealed against.
72. *Subsection (2)* provides that where the appeal is dismissed, he will report his findings to the appellant, the ordinary Surveillance Commissioner and to the Scottish Ministers.
73. *Subsection (3)* provides that the Chief Surveillance Commissioner shall not, other than as mentioned in *subsection (2)*, give any reasons for his determination.

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Section 18: Information to be provided to Surveillance Commissioners

74. **Section 18** imposes a duty on every member of a police force and every member of the Scottish Crime Squad to comply with certain requests of a Surveillance Commissioner. This relates to requests for documents or information required by the Commissioner concerned for the purpose of enabling him to carry out the functions of a Commissioner under sections 13 to 17.