

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS (CRIMINAL CONDUCT
AUTHORISATIONS) (AMENDMENT) ORDER 2021

2021 No. 601

1. Introduction

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

2. Purpose of the instrument

2.1 This statutory instrument makes consequential amendments to various Orders and Regulations made under the Regulation of Investigatory Powers Act 2000 (RIPA). These amendments are necessary to reflect changes made to the authorisation of covert human intelligence sources (CHIS) participation in criminal conduct by the CHIS (Criminal Conduct) Act 2021 (“the CHIS Act”). It will amend the following statutory instruments:

2.1.1 The Regulation of Investigatory Powers (Source Records) Regulations 2000 to provide record-keeping requirements for criminal conduct authorisations granted under the Act.

2.1.2 The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 to apply the enhanced safeguards already in place for CHIS use and conduct authorisations in relation to obtaining matters subject to Legal Privilege, to authorisations for criminal conduct under the Act.

2.1.3 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 to designate the rank of the person able to grant an authorisation within a public authority and the statutory grounds upon which an authorisation can be granted by that public authority.

2.1.4 This instrument also makes other minor changes to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 which are not directly related to the CHIS Act. The rank of authorising officer for certain public authorities will be amended to reflect organisational changes and to ensure that the authorisation level for all surveillance authorisations under RIPA is consistent.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The instrument makes changes which are consequential amendments required as a result of the CHIS Act, which received Royal Assent on 1 March 2021. The instrument also makes minor changes which are not consequential to that Act, but which are necessary to reflect organisational changes in certain public authorities.
- 6.2 That Act amends Part II of RIPA to provide a statutory power for the security and intelligence agencies, law enforcement agencies and a limited number of other public authorities to authorise CHIS to participate in criminal conduct, where it is necessary and proportionate to do so for a set of specified purposes.
- 6.3 The CHIS Act will be brought into force by the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (Commencement and Transitional Provisions) Regulations 2021.

7. Policy background

What is being done and why?

- 7.1 The CHIS Act provides a clear and consistent statutory footing for the authorisation of CHIS participation in criminal conduct. Under the Act, an authorisation for participation in criminal conduct may only be granted where necessary (i) in the interests of national security, (ii) for the purpose of preventing or detecting crime or of preventing disorder, or (iii) in the interests of the economic well-being of the United Kingdom. A criminal conduct authorisation may only be granted where it is proportionate to what is sought to be achieved by that conduct.
- 7.2 The use of CHIS is key to protecting national security and fighting serious crime. It allows investigators to gain an insight into the criminal and terrorist organisations they are targeting. For decades, CHIS have played a crucial role in preventing, and securing prosecutions for, serious crimes including terrorism, drugs and firearms offences, as well as child sexual exploitation and abuse. This has included helping to identify and disrupt many of the terrorist plots that have been prevented.
- 7.3 There will be occasions where CHIS may need to participate in criminality, in carefully managed circumstances, in order to be deemed credible or gain the trust of those under investigation.
- 7.4 This instrument will make consequential and minor amendments to existing secondary legislation to reflect changes made to the authorisation of CHIS participation in criminal conduct by the CHIS Act.
- 7.5 The Regulation of Investigatory Powers (Source Records) Regulations 2000 is being updated to add a requirement for certain information to be recorded when a criminal conduct authorisation has been granted, such as the parameters to the authorised

criminal conduct and confirmation that those parameters have been explained to, and understood by, the CHIS.

- 7.6 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 is amended to designate the rank of the person able to grant CHIS criminal conduct authorisations and on which statutory grounds. The level of seniority will be the same as for general CHIS authorisations.
- 7.7 Minor updates are also being made to the job titles of those able to grant authorisations for surveillance within some public authorities, to reflect organisational or process changes. These changes are being made for the Police Service of Northern Ireland; the Food Standards Agency; the Environment Agency; and the Ministry of Justice.
- 7.8 The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 is amended to extend the safeguards in that Order (which relate to the acquisition or disclosure of matters subject to legal privilege) to authorisations for CHIS criminal conduct. Before an authorising officer grants or renews an authorisation to which this Order applies, they must give notice to and seek approval from the relevant “approving officer”. The relevant approving officer will be the Secretary of State for intelligence services, the Ministry of Defence, Her Majesty’s Prison and Probation Service or the Northern Ireland Prison Service. In all other cases, the relevant approving officer will be a Judicial Commissioner.
- 7.9 The CHIS Act extends to Scotland, but only confers powers on public authorities to exercise the powers created by that Act in relation to matters that are reserved within the meaning of the Scotland Act 1998.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The Home Office has no plans to consolidate the legislation at this time.

10. Consultation outcome

- 10.1 No separate consultation has been carried out in respect of this instrument, as it makes minor consequential amendments following passage of the parent Act. Consultation took place on the changes brought about by the parent Act and given recency of this being enacted, no separate consultation was deemed necessary.

11. Guidance

- 11.1 The CHIS Code of Practice provides detailed guidance on the use of CHIS and the relevant safeguards that must be in place. A draft Code of Practice was published to support the passage of the CHIS Act and the formal process to update the Code is under way. The updated Code will be subject to Parliamentary scrutiny upon the laying of an additional SI in due course

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the relevant changes will not impact the wider public or businesses. The changes made by the instrument will impact the public authorities that will have the power to grant criminal conduct authorisations under the CHIS Act. Once the legislation is in force, the operational practices of those public authorities are expected to broadly stay the same, however, there may be some costs associated with:
- Public authorities familiarising themselves with the new legislation in the short term;
 - Training and administration to support public authorities' implementation of the legislation in the short term; and
 - Short term costs in relation to transferring existing authorisations to the new regime,
- but these are not expected to be significant.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Investigatory Powers Commissioner (IPC) provides independent oversight of the public authorities that use this power; all authorisations made under the CHIS Act must be notified to Judicial Commissioners at the Investigatory Powers Commissioner's Office within seven days of being granted. The IPC also carries out regular inspections of all public authorities using this power. The outcome of those inspections, including any recommendations, are included in the IPC's annual report which is laid before Parliament.
- 14.2 The Home Office will also keep the operation of the new power under review.

15. Contact

- 15.1 Officials at the Home Office can be contacted with any queries regarding the instrument at RIPA@homeoffice.gov.uk.
- 15.2 Jonathan Emmett, Deputy Director for the Investigatory Powers Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Williams of Trafford at the Home Office can confirm that this Explanatory Memorandum meets the required standard.