

EXPLANATORY MEMORANDUM TO
THE INVESTIGATORY POWERS TRIBUNAL RULES 2018

2018 No. [XXXX]

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 instrument updates the rules governing procedure in the Investigatory Powers Tribunal, including procedures for a new right of appeal.

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 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 83(3) of the Regulation of Investigatory Powers Act 2000 and section 272 (4) to (7) of the Investigatory Powers Act 2016) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

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

5. European Convention on Human Rights

- 5.1 The Minister of State for Security and Economic Crime, the Rt Hon Ben Wallace MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Investigatory Powers Tribunal Rules 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Investigatory Powers Act 2016 amends the Regulation of Investigatory Powers Act 2000 to introduce a right of appeal from decisions and determinations of the Investigatory Powers Tribunal on a point of law. Accordingly, these rules include rules concerning the making and determination of applications to the Tribunal for leave to appeal. In addition, as the rules governing proceedings in the Investigatory Powers Tribunal have not been changed since the Investigatory Powers Tribunal’s establishment by the Regulation of Investigatory Powers Act 2000, the Government is taking the opportunity to update the rules more broadly, to reflect the development of

procedures by the Investigatory Powers Tribunal, pursuant to the Tribunal's power to determine their own procedure.

7. Policy background

What is being done and why?

- 7.1 The Investigatory Powers Tribunal was established in October 2000 under Part 4 of the Regulation of Investigatory Powers Act 2000. It is a court that investigates and determines complaints which allege that public authorities have used covert techniques unlawfully and have infringed the right to privacy, as well as complaints against the security and intelligence agencies for conduct which breaches a wider range of human rights.
- 7.2 The Investigatory Powers Act 2016 amended the Regulation of Investigatory Powers Act 2000 to introduce a right of appeal from decisions and determinations of the Investigatory Powers Tribunal. Appeals will be heard in the Court of Appeal in England and Wales and the Court of Session in Scotland. The Act includes power to add, by regulations, the Court of Appeal in Northern Ireland to the courts in which an appeal from the Investigatory Powers Tribunal may be heard. Such regulations may be made only with the consent of the Northern Ireland Assembly.
- 7.3 Appeals may be made on a point of law against any determination, or final decision of a preliminary issue, made by the Investigatory Powers Tribunal. Leave to appeal will be granted only where the appeal raises an important point of principle or practice, or where there is another compelling reason for leave to be granted. The test for being able to appeal is consistent with the test for being able to appeal from the Upper Tribunal to the Court of Appeal or Court of Session.
- 7.4 The decision to introduce an appeals route was for the purpose of increasing access to justice, and these rules introduce the process for that. The Investigatory Powers Tribunal, as is necessary, often undertakes its work behind closed doors, and most of its judgments are not published in full. Therefore, the introduction of an appeals route allows for greater transparency and greater levels of reassurance that justice is done.
- 7.5 The Investigatory Powers Tribunal rules are being updated to:
- Provide that further functions of the Investigatory Powers Tribunal may be exercised by a single Member of the Investigatory Powers Tribunal. Members of the Investigatory Powers Tribunal are senior lawyers, appointed by HM The Queen – the current President is a Court of Appeal judge. The existing rules provide that certain of the Investigatory Powers Tribunal's functions can be exercised by a single Member. To assist the effective operation of the Investigatory Powers Tribunal, these rules will additionally provide that the following functions can be exercised by a single Member:
 - The power to grant or refuse an application for a stay or the extension or lifting of a stay;
 - The power to grant or refuse an application for an extension of time to comply with any orders or directions;
 - The power to strike out or refuse a complaint for a wilful or persistent failure to comply with an order or direction; and
 - The power to strike out (or refuse to strike out) complaints that do not comply with the rules surrounding the bringing of a complaint.

- Add a process for when a respondent refuses to consent to disclosure but the Tribunal considers disclosure is required;
 - Reflect the existing practice that Investigatory Powers Tribunal hearings are held in open where possible; and
 - Set out a non-exhaustive list of the functions the Tribunal may request Counsel to the Tribunal to perform, as well as functions that Counsel to the Tribunal must perform.
- 7.6 This instrument will strengthen the operation of the Investigatory Powers Tribunal by enabling its rules to reflect current practice and to improve proceedings in the Investigatory Powers Tribunal as a whole. This will allow for greater clarity with regards to process which will be of benefit to both complainants and respondents.
- 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 No consolidation is required.
- 10. Consultation outcome**
- 10.1 The Home Office held a six week public consultation on the changes to the Investigatory Powers Tribunal rules. Three substantive responses were received.
- 10.2 The responses to the consultation were mixed. Responses centred around:
- The functions which can be exercised by a single Member of the Tribunal;
 - The ability of the Investigatory Powers Tribunal to disclose information to the Investigatory Powers Commissioner;
 - The power of the Investigatory Powers Tribunal to enforce its directions for disclosure;
 - The role of Counsel to the Tribunal and Special Advocates; and
 - The Investigatory Powers Tribunal providing reasoning behind its decisions and appeal applications.
- 10.3 Seventeen amendments were proposed in total, of which the Home Office accepted five. The five accepted amendments were incorporated into the updated rules. The amendments:
- (i) Remove one of the functions that was to be exercised by a single Member of the Tribunal – that of the ability to decide on preliminary issues;
 - (ii) Provide the Investigatory Powers Tribunal with the power to make directions if, following a direction from the Tribunal, the respondent elects not to disclose to a complainant documents or information or a gist or summary of the documents or information. This includes the power to direct that the respondent must not rely on anything the Tribunal directed the respondent to disclose;
 - (iii) Provide that where an arguable error of law is identified by Counsel to the Tribunal in relation to any decision or determination made by the

Investigatory Powers Tribunal, consequent upon a hearing held in the absence of a complainant, Counsel to the Tribunal must notify the Investigatory Powers Tribunal and the Investigatory Powers Tribunal must then disclose to the complainant the arguable error of law;

- (iv) Require the Investigatory Powers Tribunal, where it makes a determination that is not in favour of the complainant, to provide the complainant and respondent with a summary of its determination, if it considers it necessary in the interests of justice to do so; and
- (v) Remove the requirement for an application for leave to appeal to state the ground of appeal where the Counsel to the Tribunal has notified the Investigatory Powers Tribunal of an arguable error of law and the Investigatory Powers Tribunal has not disclosed to the complainant the arguable error of law.

The full consultation response will be available on GOV.UK on 11 October 2018.

11. Guidance

- 11.1 There will be guidance setting out the revisions to the rules governing Investigatory Powers Tribunal procedure on the Investigatory Powers Tribunal website: www.ipt-uk.com. The Investigatory Powers Tribunal secretariat will ensure that complainants and respondents in cases are signposted to this guidance.

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 no impact on business is foreseen.

13. Regulating small business

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

14. Monitoring & review

- 14.1 There are plans to monitor this instrument by reviewing the rules again after a period of five years – this will be in 2023. A review will allow for an accurate and tangible assessment of how the rules are working, as well as gauging whether the changes have brought positive benefits to proceedings in the Investigatory Powers Tribunal. This review will be qualitative in nature and will be carried out by the Home Office, consulting with the Investigatory Powers Tribunal and organisations and individuals who have regular involvement with the Investigatory Powers Tribunal.
- 14.2 In addition, Section 260 of the Investigatory Powers Act 2016 requires the Secretary of State to report on the operation of that Act after a period of 5 years and 6 months starting with Royal Assent. That will include the operation of the appeal route from the Investigatory Powers Tribunal introduced by the Investigatory Powers Act 2016. The report must be published and laid before Parliament. In preparing the report the Secretary of State must take into account any report on the operation of the Act produced by a Select Committee of either House.

15. Contact

- 15.1 Investigatory Powers Tribunal Rules at the Home Office Email: IPTRules@homeoffice.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Henry Hirsch at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Ben Wallace MP at the Home Office can confirm that this Explanatory Memorandum meets the required standard.