

## EXPLANATORY MEMORANDUM

### THE REGULATION OF INVESTIGATORY POWERS (DIRECTED SURVEILLANCE AND COVERT HUMAN INTELLIGENCE SOURCES) (AMENDMENT) ORDER 2012

2012 No. 1500

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 restricts the circumstances in which local authorities may authorise directed surveillance under the Regulation of Investigatory Powers Act 2000 ('RIPA'). Such authorisations may not now be granted except for the purpose of preventing or detecting crime that is punishable by a maximum term of at least six months of imprisonment. It provides for an exception to allow local authorities to continue to grant authorisations for the purpose of preventing or detecting specified criminal offences relating to underage sales of alcohol and tobacco.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Context**
  - 4.1 Part II of RIPA ('Surveillance and Covert Human Intelligence Sources') provides a statutory framework for regulating the carrying out of covert surveillance and the conduct or use of covert human intelligence sources by 'relevant public authorities' to ensure it is consistent with the Human Rights Act 1998. 'Relevant public authorities' for these purposes are specified in Schedule 1 to RIPA.
  - 4.2 Designated persons in the public authorities specified in Part I of Schedule 1 to RIPA are entitled to authorise directed surveillance and the conduct or use of covert human intelligence sources. Designated persons in the public authorities specified in Part II of Schedule 1 to RIPA are only entitled to authorise directed surveillance.
  - 4.3 Articles 3 and 4 and columns (2) and (3) of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 ('the 2010 Order') identify the designated persons holding offices, ranks and positions within the relevant public authorities who may authorise the use of directed surveillance and the use or conduct of covert human intelligence sources. This is subject to the restrictions which are imposed by articles 5 to 7 of the 2010 Order.
  - 4.4 Article 5 and column 4 of the Schedule to the 2010 Order impose restrictions on the 'grounds' for which directed surveillance or covert human intelligence sources may be authorised by the public authorities identified in column 1. An individual holding an office, rank or position with any county council or district council in England, a

London borough council, the Common Council of the City of London in its capacity as a local authority, the Council of the Isles of Scilly, or any county council or county borough council in Wales may only grant an authorisation under section 28(3) or 29(3) RIPA for the purpose of preventing or detecting crime or of preventing disorder.

- 4.5 This statutory instrument amends the 2010 Order to impose a further restriction (in article 7A) on the purposes for which an authorisation under section 28 for directed surveillance may be granted by an individual holding an office, rank or position with any county council or district council in England, a London borough council, the Common Council of the City of London in its capacity as a local authority, the Council of the Isles of Scilly, or any county council or county borough council in Wales. Such an authorisation may not now be granted except for the purpose of preventing or detecting conduct that constitutes or would constitute an offence punishable, whether on summary conviction or on indictment, by a maximum term of at least six months of imprisonment, or for preventing or detecting specified criminal offences relating to underage sales of alcohol and tobacco. These local authorities may not authorise directed surveillance for any other purposes. The changes do not extend to the use or conduct by these local authorities of covert human intelligence sources.

## **5. Territorial Extent and Application**

- 5.1 This instrument applies to England and Wales. A separate statutory instrument will apply an equivalent restriction in Northern Ireland.

## **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 Directed surveillance authorisations under Part II of RIPA may be granted in relation to covert surveillance undertaken in relation to a specific investigation or operation which is likely to result in the obtaining of private information about a person. This type of surveillance is other than by way of an immediate response to events or circumstances, the nature of which is such that it would not be reasonably practicable for an authorisation under Part II to be sought. Directed surveillance is surveillance that is covert but not intrusive i.e. it excludes surveillance of anything taking place on any residential premises or in any private vehicle which involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device. Local authorities are not permitted to authorise intrusive surveillance under RIPA and this statutory instrument does not relate to that technique. Pursuant to the 2010 Order, designated individuals within local authorities are only able to authorise directed surveillance under section 28 for the purposes of preventing or detecting crime or preventing disorder.
- 7.2 The additional restriction that is imposed through this statutory instrument on authorisations of directed surveillance by local authorities is imposed in response to public concern that some local authorities have used directed surveillance in trivial

cases such as littering, dog control and school admission. This statutory instrument discharges a Government commitment to prevent local authority use of directed surveillance under RIPA unless required for the purposes of preventing or detecting the more serious kinds of criminal offences which local authorities investigate. It makes an exception in the case of the prevention or detection of specified criminal offences relating to underage sales of alcohol and tobacco because of the potentially damaging social and health effects of the use of these substances by minors and the importance of maintaining a local authority capability to investigate these offences.

- 7.3 In considering how best to give effect to its commitment, the Government considered alternatives to legislation, such as improving training and guidance for local authorities. However, it believes that providing a clear legislative basis for the limitation on local authority use of directed surveillance and issuing related guidance is a better way of ensuring that individual rights to respect for private and family life are properly balanced against local enforcement action.
- 7.4 As an alternative to applying a threshold which the crimes to be prevented or detected by local authorities must meet, the Government considered introducing a simple list of relevant offences for the prevention or detection of which local authorities might seek an authorisation under section 28. However, this effectively would introduce a threshold by another route, and such a list would be lengthy, might require frequent amendment and would potentially be less accessible to local authorities. The Government also considered setting the threshold at a higher level. Requiring offences instead to attract a maximum sentence of 12 months or more, however, would effectively prevent local authorities from preventing or detecting the majority of the crimes that fall within their investigative remit.

## **8. Consultation outcome**

- 8.1 The proposals result from a Government review of counter-terrorism and security which was announced on 13 July 2010. The RIPA-related measures received broad support from those who commented on them and the threshold level and creation of an exception for underage sales of alcohol and tobacco are a direct Government response to the comments received. The results were announced in Parliament on 26 January 2011.

## **9. Guidance**

- 9.1 The Home Office will reflect the requirements of this statutory instrument in the statutory RIPA Code of Practice on Covert Surveillance the next time this is updated. Additional guidance will be provided directly to relevant local authorities by the Chief Surveillance Commissioner, who has statutory responsibility for overseeing the proper authorisation of covert surveillance under RIPA.

## **10. Impact**

- 10.1 The impact on business, charities or voluntary bodies is nil.

- 10.2 The legislation limits the circumstances in which a local authority may use directed surveillance under RIPA but any financial impact on the public sector will be minimal.
- 10.3 An Impact Assessment has not been prepared for this instrument, as there is no impact on the private or voluntary sectors.

**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 Chief Surveillance Commissioner, who has statutory oversight responsibility for keeping under review the use by public authorities of covert techniques under Part II of RIPA and who reports 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, is independent of Government and has full powers to investigate and determine any proceedings or complaints falling within its jurisdiction, including allegations of unlawful directed surveillance under RIPA.

**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.x.gsi.gov.uk](mailto:tony.cooper3@homeoffice.x.gsi.gov.uk)) can answer any queries regarding the instrument.