

REGULATION OF INVESTIGATORY POWERS ACT 2000

EXPLANATORY NOTES

OTHER AUTHORISATIONS

Part V: Miscellaneous and Supplemental

Section 73: Conduct in relation to Wireless Telegraphy

341. This section amends Section 5 of the Wireless Telegraphy Act 1949 and is intended to ensure that the interception provisions of that Act comply with the Human Rights Act 1998.
342. *Subsection (1)* transfers the words of the existing section 5 of the Wireless Telegraphy Act to a new subsection 5(1). It also has the effect of removing the general authority to intercept wireless telegraphy which existed for persons acting in their duty as a servant of the Crown, and of changing the authority level which is required to authorise interception of wireless telegraphy from “under the authority of the Secretary of State” to “under the authority of a designated person”.

“Designated person” is defined in the inserted section 5(12)

343. *Subsection (2)* creates new subsections 5(2) to 5(12) to the Wireless Telegraphy Act 1949 as follows:
- 5(2) restricts the ability of a designated person to authorise interception of wireless telegraphy to activity which cannot be warranted or authorised under this Act;
 - 5(3) requires that where the an authorisation is granted under the Wireless Telegraphy Act 1949, consideration must be given to both the necessity and proportionality of the interception in the context of what is sought to be achieved through it;
 - 5(4) explains the purposes for which an authorisation under the Wireless Telegraphy Act 1949 may be granted;
 - 5(5) requires that where a requirement exists to intercept wireless telegraphy which would not meet one of the tests in 5(4) above but would fit within the criteria of this subsection, a separate authority must be sought;
 - 5(6) requires a designated person to consider whether that which is sought to be achieved through the interception could be done in another way;
 - 5(10) follows on from subsection (2) and explains that where interception of wireless telegraphy is required to be authorised under the Regulation of Investigatory Powers Act, the fact that the applicant cannot be authorised in this way because he is not mentioned as one of the bodies to which the Act applies does not mean that he can rely upon section 5 to obtain authorisation;

- 5(11) explains the meaning of “separate authority”.

Section 74: Warrants under the Intelligence Services Act 1994

344. This section changes the test which must be satisfied before a warrant is issued under section 5 of the Intelligence Services Act 1994. Instead of “likely to be of substantial value”, the test is now that the Secretary of State must be satisfied that:
- the action is necessary for the purpose of a function of the intelligence agency;
 - the action is proportionate to what it seeks to achieve;
 - the action authorised by the warrant could not reasonably be achieved by other means.
345. *Subsection (3)* amends the urgent provisions so that a senior official of any department may sign an urgent warrant issued on the oral authority of the Secretary of State. Such a senior official will be a member of the Senior Civil Service or its equivalent in the Diplomatic Service.

Section 75: Authorisations under Part III of the Police Act 1997

346. This Section makes amendments to Part III of the Police Act 1997.
347. *Subsections (2) and (3)* amend section 93 of the Police Act to allow a police authorising officer to authorise interference with property outside his force area solely for the purpose of maintenance or retrieval of equipment. This will allow a chief constable to authorise action to maintain or retrieve a tracking device from a vehicle that has travelled outside the force area, without having to seek authorisation from the chief constable into whose area the vehicle has travelled. In addition it removes the restriction on where a customs officer may act.
348. In the same way that Section 74 amends the Intelligence Services Act 1994, *subsections (4) and (5)* introduce the new tests in the Part III authorisation process. These again require that the action authorised must be necessary and proportionate to what it seeks to achieve and that the action could not reasonably be achieved by other means.
349. *Subsection (5)* provides for an authorising officer of the Royal Ulster Constabulary to authorise interference with property or wireless telegraphy where it is necessary in the interests of national security as well as for the prevention or detection of serious crime. This is required because of the particular responsibilities of the Chief Constable of the RUC in relation to counter-terrorism.
350. *Subsections (6), (7) and (8)* extend the provisions of Part III to allow the chief constables of the British Transport Police and the Ministry of Defence Police and the Provost Marshals of the three service police forces to be authorising officers and to authorise interference with property or wireless telegraphy within their own jurisdictions. It also allows the Deputy Director General of the National Crime Squad to be an authorising officer in his own right and for the Commissioners of Customs & Excise to designate more than one customs officer to act as an authorising officer.
351. *Subsection (7)* makes an amendment to section 93(6) to provide that "relevant area" for the MOD police means the places described in section 2 of the Ministry of Defence Police Act 1987.
352. *Subsection (8)* makes provision about where the Service Police forces may exercise powers under the 1997 Act.

Section 76: Surveillance operations beginning in Scotland

353. This section provides that surveillance operations which properly begin in Scotland under the Regulation of Investigatory Powers (Scotland) Act can be continued in England under the original authorisation should circumstances arise which make that necessary. But the section stipulates that such authorisations can only be valid for three weeks outside the Scottish jurisdiction.

Section 79: Criminal liability of directors etc

354. This Section provides for personal criminal liability on the part of certain individuals in companies and other bodies corporate.

Section 80: General saving for lawful conduct

355. **Section 80** ensures that nothing in this Act makes any actions unlawful unless that is explicitly stated. The availability of an authorisation or a warrant does not mean that it is unlawful not to seek or obtain one. In this respect, the Act must be read with section 6 of the Human Rights Act, which makes it unlawful to act in a way which is incompatible with a Convention right.

Schedule 1: Relevant Public Authorities

356. Part I of Schedule 1 lists those public authorities entitled to use the powers of directed surveillance and covert human intelligence sources under sections 28 and 29 of this Act. Part II of Schedule 1 lists those public authorities entitled to use the power of directed surveillance only, under section 28 of this Act

Schedule 2: Persons Having the Appropriate Permission

357. **Schedule 2** deals with the duration and types of appropriate permission which may empower a person to serve a notice under section 49 of this Act requiring disclosure of information. The authority required to grant such permission varies depending on the powers under which unintelligible information is or is likely to be obtained.

Paragraph 1: Requirement that appropriate permission is granted by a judge

358. This paragraph states that subject to the provisions of the paragraphs below, authority to serve a notice must be given by a judge as described in Sub-paragraph (1).
359. The effect of Sub-paragraph (2) is that where a judge's permission has been obtained under this paragraph, no further authority is required to serve a notice.

Paragraph 2: Data obtained under warrant etc

360. This paragraph deals with unintelligible information which is or is likely to be obtained under a statutory power exercised in accordance with:

- a warrant issued by the Secretary of State or a person holding judicial office; or
- an authorisation under Part III of the Police Act 1997.

Examples of legislation under which the Secretary of State may issue a warrant include Chapter I of Part I of this Act and the Intelligence Services Act 1994. Examples of legislation under which a person holding judicial office may issue a warrant include the Police and Criminal Evidence Act 1984 and the Drug Trafficking Act 1994.

361. *Sub-paragraph (2)* states that the warrant or authorisation may empower a person to serve a notice requiring disclosure if:

- the warrant or authorisation gave explicit permission for the notice to be given; or

These notes refer to the Regulation of Investigatory Powers Act 2000 (c.23) which received Royal Assent on 28 July 2000

- written permission has been given by the authority since the warrant or authorisation was issued.
362. *Sub-paragraphs (3) to (5)* describe those persons who are capable of having the appropriate permission to serve a notice in relation to material to which this paragraph applies. And *Sub-paragraphs (6) to (8)* describe those persons who may issue a warrant or authorisation in relation to such material.
363. The effect of this paragraph is that where, for example, protected material has been obtained under an interception warrant, the authorisation to serve a disclosure notice may be granted by the Secretary of State.
364. *Sub-paragraph (9)* excludes from this paragraph unintelligible information:
- which has been obtained under a statutory power without a warrant; but
 - which has been obtained in the course of, or in connection with, an exercise of another power for which a warrant was required.
365. This might include, for example, cases where a constable has a right to enter premises under a warrant and while on the premises uncovers matter which he suspects to be evidence of a crime unrelated to the warrant itself, in accordance with e.g. section 19 of the Police and Criminal Evidence Act 1984 (PACE).

Paragraph 3: Data obtained by the intelligence services under statute but without a warrant

366. This paragraph deals with unintelligible information which is, or is likely to be, lawfully obtained by the intelligence services but not under a warrant issued by the Secretary of State. This might include, for example, material obtained under a directed surveillance authorisation given under Part II of this Act.
367. *Sub-paragraph (2)* enables the Secretary of State to give authority for a notice to be served in such instances.

Paragraph 4: Data obtained under statute by other persons but without a warrant

368. This paragraph deals with unintelligible information which is or is likely to be obtained by certain agencies (other than the intelligence services) under statutory powers but not under a warrant issued by the Secretary of State or judicial authority. This includes, for example, material obtained by the police under powers conferred by section 19 of PACE.
369. The effect of *Sub-paragraph (2)* is that senior officers of the police, customs and excise and armed forces (as described in Paragraph 6) may authorise the service of a written notice in relation to material to which this paragraph applies.
370. The effect of *sub-paragraph (3)* is that where material to which this paragraph applies is obtained by agencies other than those described in *Sub-paragraph (2)*, authority to serve a written notice is to be given by a judge, provided that the stipulations set out in *Sub-paragraph (4)* are complied with.

Paragraph 5: Data obtained without the exercise of statutory powers

371. This paragraph deals with unintelligible information which is or is likely to come into the possession of an intelligence service, the police or customs and excise by any other lawful means not involving the exercise of statutory powers (e.g. material which has been voluntarily handed over).

372. The effect of Sub-paragraph (2) is to enable the Secretary of State to give his permission to serve a notice in relation to material, obtained by an intelligence service, falling under this paragraph.

Paragraph 6: General requirements relating to the appropriate permission

373. This paragraph makes some further stipulations about the categories of person who may be empowered to require disclosure. It also makes some stipulations about the permissions that may be given by members of the police, customs and excise and the armed forces.
374. *Sub-paragraph (3)* states that in the case of information which has come into the police's possession by means of powers to stop and search vehicles and pedestrians under the Terrorism Act 2000 or the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA), those able to authorise the serving of notice must be an officer of police of or above the rank specified in section 44 and section 13A of those Acts respectively.

Section 13A of the PTA, for example, specifies such ranks as:

- *commander of the metropolitan police, as respects the metropolitan police area;*
- *commander of the City of London police, as respects the City of London; or*
- *assistant chief constable for any other police area.*

Paragraph 7: Duration of permission

375. This paragraph provides for the duration of the validity of authorisations to serve a notice and prevents the issue of a notice after the authorisation has expired.

Paragraph 8: Formalities for permissions granted by the Secretary of State

376. This paragraph states that any permissions granted by the Secretary of State in accordance with Schedule 2 may only be granted:
- if signed by him personally; or
 - if signed by a member of the Senior Civil Service (or Diplomatic Service equivalent) and expressly authorised by the Secretary of State. The express authorisation must be in relation to that particular warrant (i.e. there can be no standing authorisation).

Schedule 3: The Tribunal

377. This Schedule provides for the constitution of the Tribunal established under Section 65.

Paragraph 1: Membership of the Tribunal

378. This paragraph determines the membership of the Tribunal.
379. *Sub-paragraph (1)* ensures that members of the Tribunal may be drawn from the legal profession in all parts of the United Kingdom.

“High Judicial Office” is defined in Section 25 of the Appellate Jurisdiction Act 1876 as follows:

“‘High Judicial Office’ means any of the following offices; that is to say

The office of Lord Chancellor of Great Britain... or of Judge of one of Her Majesty’s superior courts of Great Britain and Ireland:

‘Superior courts of Great Britain and Ireland’ means and includes

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As to England, Her Majesty's High Court of Justice and Her Majesty's Court of Appeal; and

As to Northern Ireland, Her Majesty's High Court of Justice in Northern Ireland and Her Majesty's Court of Appeal in Northern Ireland; and

As to Scotland, the Court of Session."

The Appellate Jurisdiction Act of 1887 amended the term 'High Judicial Office' in Section 5 to include the office of a Lord of Appeal in Ordinary and the office of a member of the Judicial Committee of the Privy Council.

The requirement of ten years' standing means that only those eligible for appointment to the judiciary can serve.

The Courts and Legal Services Act 1990 states that a person has a "general qualification" if he has a right of audience in relation to any class of proceedings in any part of the Supreme Court, or all proceedings in county courts or magistrates' courts.

380. Sub-paragraph (3) limits the term of office to five years. A member whose term of office expires is eligible for reappointment. Were he to serve a second time he would have to be re-appointed by further Letters Patent. There is no retirement age.
381. Sub-paragraph (4) provides the means whereby a member may resign.

Paragraph 2: President and Vice-President

382. This paragraph establishes the positions of President and Vice-President who will be members of the Tribunal.

Paragraph 3: Members of the Tribunal with special responsibilities

383. This paragraph requires the President of the Tribunal:
- to give one or more members of the Tribunal special responsibility for matters involving the intelligence services; and
 - to ensure that in the consideration or hearing of any complaints or proceedings considered by the Tribunal which relate to an allegation against any of the intelligence services or their members or to conduct by or on behalf of any of those services or their members, the Tribunal on that occasion includes one or more of the members with such special responsibility.

Paragraph 4: Salaries and expenses

384. This paragraph deals with the payments of the members of the Tribunal and of its expenses.

Paragraph 5: Officers

385. *Sub-paragraph (1)* provides for the appointment of officers of the Tribunal by the Secretary of State, after consultation with the Tribunal. The Secretary of State may not therefore proceed unilaterally to make appointments. The provision itself places no limitation on the number of officers and (subject to Treasury approval as numbers) allows flexibility over the numbers, grades and individuals.
386. *Sub-paragraph (2)* enables an officer who is so authorised by the Tribunal to obtain documents or information on the Tribunal's behalf.

Paragraph 6: Parliamentary disqualification

387. The parts of the Schedules referred to in this paragraph list the bodies whose members are disqualified from membership of the House of Commons and the Northern Ireland Assembly respectively. They include Tribunals and public Boards, Commissions and Councils. Members of this Tribunal (as people paid for adjudicating in a quasi-judicial capacity on the decisions of Ministers, and able to overturn those decisions) clearly fall within the category of those who are normally disqualified.

Schedule 4

Paragraph 8: The Police Act 1997 (c.50)

388. This makes necessary consequential changes in the light of the amendments to Part III of the Police Act 1997. These take account of the extension of authorising powers to the Ministry of Defence Police, the British Transport Police, the Service Police, the three service police forces, the Deputy Director General of the National Crime Squad and additional designated customs officers.
389. *Sub-paragraph (10)* extends the functions of the Chief Surveillance Commissioner so that he reports annually to the Prime Minister and at any other time on any matters arising from his functions in relation to Part III of the Police Act 1997 or Part II of this Act.
390. *Sub-paragraph (11)* imposes a duty on those exercising functions under these provisions to disclose or provide the Chief Surveillance Commissioner with any documents or information he requires to enable him to carry out his functions. It also imposes a duty on every Commissioner to give the Tribunal established under section 65 of this Act all such assistance as may be required.