

EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (TEMPORARY JUDICIAL COMMISSIONERS AND MODIFICATION OF TIME LIMITS) REGULATIONS 2020

2020 No. 360

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument allows the Investigatory Powers Commissioner to directly appoint temporary Judicial Commissioners to perform the functions of a Judicial Commissioner. It also varies the urgent warrant and urgent modifications procedure to extend the timelines for *after the event* approval by a Judicial Commissioner and the lifespan of the urgent warrant. These measures are required to alleviate the strain Covid-19 has placed on the warrantry process.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument will commence on the day after the day on which it is made. This is necessary because the Investigatory Powers Commissioner has already written¹ to the Home Secretary stating that there is an immediate requirement for these measures. The main reason for this immediate requirement is that all but two of the existing Judicial Commissioners are part of an at-risk demographic and are therefore more vulnerable to serious effects from this virus than the general population. Any further delay risks undermining the resilience of the warrantry process, which is critical to the ability of the intelligence and law enforcement agencies to protect national security and investigate serious crime.
- 3.2 The Home Office has written to the Speaker in the House of Commons and the Lord Speaker in the House of Lords to apologise for omitting to comply with the requirements in section 4(1) of the Statutory Instruments Act 1946. Under that section the Home Office should have invited the attention of the Speaker and the Lord Speaker to the fact that the instrument was going to come into effect on 27 March 2020 before it was laid in Parliament that day. The Speaker and Lord Speaker were informed by the Home Office that the reason for this omission was that this requirement was overlooked due to the pressing need to implement the powers in sections 22 and 23 of the Coronavirus Act 2020. The two changes made by the instrument were urgently required in order to ensure the resilience of the investigatory powers warrantry process for dealing with National Security and serious crime during

¹<https://www.ipco.org.uk/docs/26032020%20Letter%20to%20Home%20Secretary%20requesting%20emergency%20powers%20to%20be%20exercised.pdf>

the coronavirus epidemic. As a result of the significant pressure to make these changes, the instrument was drafted to a very truncated timetable and this omission occurred. The Home Office regrets this omission.

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)

3.3 The extent of this instrument is the whole of the United Kingdom.

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 The Minister of State for Security, Rt. Hon. James Brokenshire MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Investigatory Powers Act (Temporary Judicial Commissioners and Modification of Time Limits) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument is being made to give a power to the Investigatory Powers Commissioner to appoint temporary judicial commissioners which is not available under the Investigatory Powers Act and to extend the timeframes for approval by judicial commissioners of urgent warrants and modifications in that Act.

7. Policy background

What is being done and why?

7.1 The Investigatory Powers Act 2016 (IPA) is the one of the critical pieces of domestic legislation for national security. It creates the statutory basis for the use of the investigatory powers by the intelligence and law enforcement agencies, using warrants issued under the Act. These warrants provide the agencies with the capability they need to protect national security and investigate and prevent serious crime. The Investigatory Powers Commissioner is the independent overseer of almost all investigatory powers. He is supported in this role by 15 Judicial Commissioners, all of whom have held, or do hold, high judicial office. The IPA created the ‘double lock’ for all warrants sought for its powers. A warrant under the IPA has to be signed by the relevant Secretary of State and then approved by a Judicial Commissioner for it to be lawful (other than urgent warrants, which need to be approved by a Judicial Commissioner within three working days of being issued).

7.2 The Investigatory Powers Act provides that a Judicial Commissioner cannot be appointed by the Prime Minister unless jointly recommended by the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland and the Investigatory Powers Commissioner.

7.3 The Coronavirus Act 2020 created a regulation-making power to allow the Home Secretary to vary the appointment process for Judicial Commissioners at the request

of the Investigatory Powers Commissioner where there are too few judicial commissioners available to exercise their functions as a result of the effects of Covid-19.

- 7.4 This instrument gives effect to the variation and provides the ability to increase the number of Judicial Commissioners should the effects of coronavirus mean that there is a shortage of Judicial Commissioners. Having a sufficient number of Judicial Commissioners is critical in protecting national security and preventing serious crime, given their vital role in the ‘double lock’ for warrants.
- 7.5 Additionally, provisions in the IPA create a procedure for urgent warrants. This allows for *ex post facto* authorisation by a Judicial Commissioner within three working days of the warrant being issued. Such urgent warrants only last for a maximum period of five working days unless renewed.
- 7.6 The Coronavirus Act 2020 created a second regulation-making power to allow the Home Secretary to vary the timespan of an urgent warrant at the request of the Investigatory Powers Commissioner.
- 7.7 This instrument gives effect to this, altering the time period for *ex post facto* review by a Judicial Commissioner from 3 working days to 9 working days and the lifespan of the urgent warrant from 5 working days to 12 working days.
- 7.8 This will ensure impacts on the warrant process from the coronavirus can be mitigated and will ensure the safeguard of judicial approval within the lowest possible time frame after a warrant is issued continues, and the warrant-issuing agencies are able to maintain their ability to protect national security and prevent serious crime during this period.

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.

9. Consolidation

- 9.1 This is not an instrument in which it is appropriate to consolidate enactments.

10. Consultation outcome

- 10.1 We have consulted with the Investigatory Powers Commissioner’s Office on the instrument and they are content with the approach. Both they and the Devolved Administrations were previously consulted at the time of the Coronavirus Act 2020 and are therefore aware of the issue.

11. Guidance

- 11.1 Guidance is not required.

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 there is no impact on business as the instrument relates to the process of approving warrants, in

which businesses have no role. This instrument, in itself, is not expected to lead to any increases in warrants approved compared to normal levels and so no impact on businesses 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 The approach to monitoring of this legislation is that the Home Office will monitor the effectiveness of this instrument and whether it needs to be replaced when it ceases to have effect in 12 months or if it is proportionate to repeal it earlier. The Home Office will also seek the views of the Investigatory Powers Commissioner on this matter.

15. Contact

- 15.1 The Investigatory Powers Unit at the Home Office email: OSCTIPU@homeoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jonathan Emmett, Deputy Director for Investigatory Powers, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister of State for Security, Rt. Hon James Brokenshire MP, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.