

**Explanatory Memorandum to the Regulation of Investigatory Powers
(Directed Surveillance and Covert Human Intelligence Sources)
(Amendment) (Wales) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018.

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance and Local Government

21 February 2018

1. Description

- 1.1 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018 (“the Order”) amends the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (“the Principal Order”) by inserting an entry into Part 1 of the Schedule to the Principal Order in relation to the Welsh Revenue Authority (“WRA”).
- 1.2 This Order will come into force on 1 April 2018.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

- 2.1 None.

3. Legislative background

- 3.1 The Order is made pursuant to section 30(1) and (6A) of the Regulation of Investigatory Powers Act 2000 (“RIPA”). Section 187 of the Tax Collection and Management (Wales) Act 2016 (“TCMA”) amended section 30 RIPA to enable the Welsh Ministers to make an order designating persons exercising WRA functions as persons able to grant authorisations for the use of directed surveillance and covert human intelligences sources for the purposes of sections 28 and 29 RIPA.
- 3.2 This Order is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

- 4.1 The policy rationale in relation to these powers is that WRA should have proportionate investigation powers to tackle and deter criminality and devolved tax avoidance and evasion. HMRC are able to authorise the use of directed surveillance and covert human intelligence sources in Wales to tackle and deter avoidance and evasion. It is the policy intention that WRA should be in substantially the same position in this regard.
- 4.2 This amendment will enable an appropriately qualified person at civil service grade 7 or equivalent within WRA to grant authorisation for the use of directed surveillance and covert human intelligence sources.
- 4.3 Directed surveillance means, broadly, surveillance which is covert but not intrusive – for example, does not involve gaining access to a private dwelling or vehicle – and is undertaken for the purposes of a specific investigation or a specific operation, in such a manner as is likely to result in the obtaining of private information about a person. Surveillance is covert if, and only if, it is carried out in a manner that is calculated to

ensure that persons who are subject to the surveillance are unaware that it is or may be taking place.

- 4.4 A covert human intelligence source (CHIS) means a person who establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing the following: using the relationship to obtain information or to provide access to any information to another person; disclosing information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship, to another person.
- 4.5 Authorisation may not be granted by that person unless that individual believes it is necessary for (a) the purpose of preventing or detecting crime or preventing disorder, or (b) the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department.
- 4.6 Directed surveillance and the use of covert human intelligence sources under RIPA are important not just in a criminal law context (to investigate offences), but also in a civil law context (e.g. to identify the amount of tax that a person should pay). This means that, should the power to make these authorisations be conferred, the WRA would be able to use surveillance and covert human intelligence source powers for the purpose of assessing or collecting devolved tax.
- 4.7 The fundamental purpose of the RIPA framework is to protect the rights of individuals from unlawful intrusion into their personal or business affairs by law enforcement agencies; to ensure those agencies (and individuals within them) act lawfully; and so to ensure that any evidence gathered through these activities is used fairly and appropriately as part of lawful proceedings.
- 4.8 The framework provides that CHIS can only be used when authorised by an appropriately senior officer and, in some cases, by a judge. Those officers must be professionally trained and must undergo continuous professional development in line with RIPA requirements and to have regard to the RIPA codes of practice. Before authorising CHIS, for example, an officer would need to consider whether the information can be obtained by other means; the safety of the individuals involved; and whether the action is proportionate, necessary and reasonable.
- 4.9 Any public authority authorised under RIPA is subject to independent oversight and scrutiny by the Investigatory Powers Commissioner's Office (IPCO) (which took over the responsibility for oversight of investigatory powers from the Office of Surveillance Commissioners (OSC) in September 2017). The IPCO will scrutinise the WRA's processes and procedures in the use of investigatory powers, including directed surveillance and CHIS. IPCO considers the use of CHIS as immensely sensitive and as a result the use of these powers is very closely examined and inspected. Even where the WRA does not make

any CHIS authorisations, the WRA's records, processes and procedures will be scrutinised and reported on.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

- 2.1 If the Order were not introduced, the WRA would not be required to follow the framework procedures provided by RIPA when seeking to use covert surveillance or covert human intelligence sources (CHIS) to investigate tax evasion and tax avoidance, including under the new unauthorised disposals regime introduced by Part 4 of the Landfill Disposals Tax (Wales) Act 2017 (“LDTA”). Failure to follow the procedures in RIPA does not necessarily render action unlawful. The application of the RIPA framework is designed to ensure that WRA acts in a lawful way.
- 2.2 Without the application of the RIPA framework and the scope to authorise surveillance and use of covert human intelligence sources, the ability of the WRA to collect and manage devolved taxes could be hampered.
- 2.3 This could be particularly relevant in relation to Part 4 of LDTA, taxable disposals at places other than authorised landfill sites, where WRA will need to carefully manage information that may be provided by individuals.

Option 2: Introduce the Order

- 2.4 The Order would allow WRA to authorise the use of surveillance and covert human intelligence sources in a lawful way, ensuring that any activities authorised by the WRA are proportionate, reasonable and a fair use of those investigatory techniques.
- 2.5 The use of the RIPA framework provides a structured and lawful means for evaluating the need for the use of such intrusive techniques, and is a safeguard to protect the rights of citizens and the reputation and integrity of WRA. RIPA requires a senior authorising officer to be accountable for the decision making process and before that authorisation may be given the authorising officer must be satisfied that:

- the information can not be obtained by other means;
- balance and minimise the risks to individuals involved;
- the WRA will be able to maintain the safety of all involved;
- the action is proportionate, necessary and reasonable.

- 2.6 The application of the Order would require training, accreditation and continued professional development for authorising officers in order to provide the necessary authorisation framework under RIPA.
- 2.7 It is anticipated that the initial resource requirements stemming from RIPA can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.
- 2.8 The exercise of RIPA surveillance and CHIS in particular cases could imply further cost, for example, relating to the surveillance equipment, ensuring the safety of individuals and availability of officers to support this activity out of hours for example. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered and the appetite to pursue unauthorised disposals once WRA becomes operational and has access to protected tax payer information.
- 2.9 Information in relation to the cost of RIPA activity is not available although, the Investigatory Powers Commissioner's Office indicates that the use of these types of covert surveillance activities across the UK and Scotland are limited and are reducing year on year. In 2016/17 1,887 instances of directed covert surveillance were authorised by public authorities in the UK and Scotland, with the Department of Work and Pensions accounting for more than 64% of those authorisations. In relation to CHIS, 2,310 authorisations were made by public authorities in 2016/17 and these were usually used for trading standards type matters. Only 6.6% of public authorities authorised to use CHIS deployed the use of CHIS in 2016/17.¹
- 2.10 The Order is not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal or civil investigatory activity and the Order is not expected to have an adverse impact on competition in Wales.
- 2.11 Overall, the benefits of this option are:
- to ensure that the relevant investigatory powers are used in accordance with human rights;
 - to protect the rights of individuals from undue, unfair and unlawful intrusion into their personal life by law enforcement agencies;

¹Office of Surveillance Commissioners Annual Report, p.14 - <https://www.ipco.org.uk/docs/OSC%20Annual%20Report%202016%20-%202017%20with%20new%20page%20furniture.pdf>

- to apply independent scrutiny by the Investigatory Powers Commissioner's Office to the functions of the WRA;
- to place requirements on the WRA to train, develop and continuously review and maintain standards for all staff and senior officers;
- to provide a framework of authorisation for any use of covert surveillance or CHIS activity, including in some circumstances the authorisation of a judge; and
- consultation responses from other law enforcement agencies, including HMRC, the police and National Crime Agency were supportive of this option.

3. Consultation

- 3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a range of stakeholders from various sectors, all from within Wales.
- 3.2 A full Welsh Government response to the consultation can be viewed here: <https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime>
- 3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing this Order.