
**Annual Report of the Chief
Surveillance Commissioner to
the Prime Minister and
Scottish Ministers for
2001–2002**

**UNDER PART III OF THE POLICE ACT 1997 AND
PARTS II AND III OF THE REGULATION OF
INVESTIGATORY POWERS ACT 2000 AND THE
REGULATION OF INVESTIGATORY POWERS
(SCOTLAND) ACT 2000**

Annual Report of the Chief
Surveillance Commissioner to
the Prime Minister and
Scottish Ministers for
2001–2002

Chief Commissioner:
SIR ANDREW LEGGATT

Presented to Parliament by the Prime Minister
pursuant to section 107 (3)
of the Police Act 1997

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Office of Surveillance Commissioners

The Right Honourable Tony Blair MP
10 Downing Street
London
SW1A 2AA

10 May 2002

Dear Prime Minister,

In accordance with my duty under section 107 of the Police Act 1997 ('the 1997 Act') (as amended by the Regulation of Investigatory Powers Act 2000) ('RIPA') I am sending you my annual report on the discharge of my functions under those Acts. As the provisions of Part II of RIPA and of the Regulation of Investigatory Powers (Scotland) Act 2000 ('the Scottish Act') are closely related, it is convenient once again to present a combined report covering my functions under those Acts and under Part III of the 1997 Act.

My main duty is to keep under review the covert surveillance conducted by public authorities. During the year I have been able to fulfil this duty by means of inspections carried out on my behalf by inspectors and by Assistant Surveillance Commissioners as well as by visits by Surveillance Commissioners and myself. I am happy to report a high standard of compliance with the statutory requirements relating to property interference and intrusive surveillance. The conduct by public authorities of directed surveillance and covert human intelligence sources is, however, of very uneven quality. During the coming year I shall do my best to secure improvement in these fields.

The statutes provide that before laying a copy of the report before both Houses of Parliament you may exclude matters from it, if it appears to you, after consultation with me, that their publication would be prejudicial to any of the purposes for which authorisations may be given or granted or to the discharge of the functions of the law enforcement agencies. The Scottish Act similarly empowers the Scottish Ministers to exclude matters from the report before laying it before the Scottish Parliament.

There is nothing in my report which in my judgment requires exclusion on any of the stipulated grounds.

The Right Honourable Sir Andrew Leggatt

Office of Surveillance Commissioners

The Right Honourable Jack McConnell MSP
Scottish Executive
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Edinburgh
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10 May 2002

Dear First Minister,

In accordance with my duty under section 22(3) of the Regulation of Investigatory Powers (Scotland) Act 2000 ('the Scottish Act') I am sending to you on behalf of the Scottish Ministers my annual report on the discharge of my functions under the Act. As the provisions of the Scottish Act and of Part II of the Regulation of Investigatory Powers Act 2000 are closely related, it is convenient once again to present a combined report covering my functions under those Acts and under Part III of the Police Act 1997.

My main duty is to keep under review the covert surveillance conducted by most public authorities. During the year I have been able to fulfil this duty by means of inspections carried out on my behalf by inspectors and by Assistant Surveillance Commissioners as well as by visits by Surveillance Commissioners and myself. I am happy to report a high standard of compliance with the statutory requirements relating to property interference and intrusive surveillance. The conduct by public authorities of directed surveillance and covert human intelligence sources is, however, of very uneven quality. During the coming year I shall do my best to secure improvement in these fields.

The statute provides that before laying a copy of the report before the Scottish Parliament the Scottish Ministers may exclude any matter from it, if it appears to them, after consultation with me, that its publication in the report would be prejudicial to the prevention or detection of serious crime or to the continued discharge of the functions of the relevant public authorities. The Prime Minister also has power to exclude matters from the report, if it appears to him that their publication would be prejudicial to any of the purposes for which authorisations may be given or to the discharge of the functions of the law enforcement agencies.

There is nothing in my report which in my judgment requires exclusion on any of the stipulated grounds.

The Right Honourable Sir Andrew Leggatt

CONTENTS

	Page
1. Introduction	1
2. Overview of the Year	1-2
3. The Statutory Provisions	2
4. Discharge of my Functions	2-3
Oversight	2-3
Appeals	3
Reporting to the Prime Minister and Scottish Ministers	3
5. Organisation of OSC Business	3
6. Property Interference and Intrusive Surveillance	3-5
Statistics	3
Common faults	4
7. Directed Surveillance and CHIS	5
8. Inspections	5-12
The inspection process	5-6
Police Forces	6-7
Government Departments and other bodies	7-8
Local authorities in England and Wales	8-10
Local authorities in Scotland	10
National Health Service in England and Wales	10-11
National Health Service in Scotland	12
Other public bodies	12
9. Codes of Practice	12-13
10. The Year Ahead	13
Annex A Authorisations given under Part III of the Police Act 1997 since implementation	14
Annex B Intrusive surveillance authorisations given under Part II of the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000 since implementation	15
Annex C Authorities subject to inspection by OSC	16-18

1. INTRODUCTION

1.1 This is my third report and covers the period from 1 April 2001 to 31 March 2002.

1.2 It is my duty to keep under review (a) the performance of functions under Part III of the Police Act 1997 ('the 1997 Act'), (b) (except in relation to the interception of communications and the Intelligence Services) the exercise and performance of the powers and duties conferred or imposed by or under Parts II and III of the Regulation of Investigatory Powers Act 2000 ('RIPA'), and (c) the exercise and performance of the powers and duties conferred or imposed by or under the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIP(S)A'). Part III of RIPA is not yet in force.

1.3 In performance of my duty under all three Acts to report annually, I have prepared a combined report.

2. OVERVIEW OF THE YEAR

2.1 Part III of the 1997 Act has now been in force for three years and Part II of RIPA (and the relevant provisions of RIP(S)A) for 18 months. Inspections have been undertaken by Assistant Commissioners and Inspectors since 14 May 2001.

2.2 Over the period authorisations for property interference have stayed at about 2,500 per year. Intrusive surveillance has been available for a shorter period, but it has been used at a lower monthly rate during the last 12 months than in the first 6 months after its introduction.

2.3. I am satisfied that the high level of attention which law enforcement agencies are obliged to give to these operations, coupled with the Commissioners' direct oversight, ensure that they are competently conducted. During inspections Commissioners and Inspectors are also able to examine individual cases retrospectively.

2.4. Records of the other two main types of covert activity, namely directed surveillance and the use and conduct of covert human intelligence sources (CHIS), are not routinely scrutinised by Commissioners but are sampled in the course of inspections.

2.5. Statistics suggest that at the end of March 2002 there were some 4,800 directed surveillance authorisations and some 5,400 CHIS in place for the law enforcement agencies, that is, the National Criminal Intelligence Service ('NCIS'), the National Crime Squad ('NCS'), the Scottish Drug Enforcement Agency (SDEA), Her Majesty's Customs and Excise ('HMCE') and police forces. In the exercise of these powers there are weaknesses upon which I comment later in this report. With the assistance of the inspections conducted on my behalf and of the Codes of Practice, when they are published, the quality of these activities may be expected to improve during the ensuing year.

2.6 The programme of inspections is most encouraging. It is fulfilling its main purpose, which is to assist those inspected by highlighting the main shortcomings in their practices and procedures. It has also raised questions, however, as to whether the significant number of NHS bodies should be authorised to exercise any of the RIPA and RIP(S)A powers.

2.7 Neither I nor any Surveillance Commissioner or Assistant Surveillance Commissioner was required to provide assistance to the Investigatory Powers Tribunal. The OSC was notified by it of 47 complaints about alleged surveillance.

2.8 Because my previous report was not presented to Parliament until the calendar year after that in which it was submitted, comments which I made there about my inability to carry out meaningful oversight of public authorities without the necessary resources were misunderstood. The Office of Surveillance Commissioners is properly resourced, and, as I indicated in that report, Assistant Commissioners and Inspectors were appointed and available to support me throughout most of the year 2001-02.

2.9 It seems unlikely that Part III of the 2000 Act will be brought into force before late summer 2002. The related Code of Practice has yet to be issued for consultation.

3. THE STATUTORY PROVISIONS

3.1 For convenience I set out in my Annual Report last year the purposes and main provisions of Part III of the the 1997 Act, Part II of RIPA, and RIP(S)A that are relevant to the oversight of covert surveillance, together with an account of the statutory functions of the Commissioners. I forbear to repeat this information.

4. DISCHARGE OF MY FUNCTIONS

Oversight

4.1 I look to the Secretary and the Chief Surveillance Inspector every week to report to me orally on the conduct of business. I also review all property interference and intrusive surveillance authorisations.

4.2 I have attended an ACPO seminar and visited the following public authorities:

- Consignia plc
- Department of Trade and Industry
- Devon and Cornwall Constabulary
- Dorset Police
- Hampshire Constabulary
- HMCE
- Inland Revenue
- Kent County Constabulary
- Lothian and Borders Police
- Metropolitan Police Service
- National High Tech Crime Unit
- National Technical Assistance Centre
- Police Service of Northern Ireland
- Prison Service
- Scottish Drug Enforcement Agency
- Scottish Executive
- Serious Fraud Office
- Strathclyde Police
- Units of Her Majesty's forces

4.3 There have been two meetings of Commissioners, Assistant Commissioners and Inspectors in the course of the year in order to review the Commissioners' oversight of property interference and intrusive surveillance authorisations, as well as to review all aspects of inspections of and visits to public authorities. The Commissioners also considered interpretational guidelines, in which we set out how we are likely to interpret particular statutory provisions.

4.4 It has now become necessary to hold three meetings a year, in order to reduce the weight of the agenda at each, and in order that less time should elapse between opportunities to make collective decisions.

Appeals by authorising officers

4.5 There have been no appeals by authorising officers during the period of this Report.

Reporting to the Prime Minister and to the Scottish Ministers

4.6 I have had no occasion to report to the Prime Minister on anything relating to any of the matters with which I am concerned. I did write, however, to the then First Minister for Scotland on 8th August 2001, expressing concern about the reaction of the Scottish Executive Health Department to RIP(S)A. As I describe later in this report, the response was immediate and positive.

5. ORGANISATION OF OSC BUSINESS

5.1 During the year Lord Sutherland was appointed to succeed Lord Davidson as a Surveillance Commissioner. Four Commissioners whose period of appointment came to an end were re-appointed. The Commissioners carry out their statutory functions across the whole of the United Kingdom. At any one time one Commissioner is on duty for each of England & Wales, Scotland and Northern Ireland. In addition to scrutinising authorisations which are required to be submitted to them, they assist me by visiting law enforcement agencies following inspections by Inspectors, in order to appraise progress in the implementation of recommendations made in the inspection reports and in order to afford to Chief Officers an opportunity to discuss the issues arising.

5.2 One of the three Assistant Commissioners is always on duty. They inspect public authorities other than the law enforcement agencies.

5.3 The five Inspectors, including the Chief Surveillance Inspector, undertake the inspection of all law enforcement agencies and share with the Assistant Commissioners the task of inspecting the other public authorities.

5.4 I am grateful to them all, and to the secretariat, for what they have achieved during the year under review. The Inspectors in particular deserve special commendation for the dedicated and helpful way in which the inspection process has been initiated.

6. PROPERTY INTERFERENCE AND INTRUSIVE SURVEILLANCE

6.1 In my Annual Report for last year I explained the powers and duties of the Commissioners in scrutinising, and in deciding whether to approve authorisations under the 1997 Act and under RIPA and RIP(S)A. I shall not repeat that information which is of course available in the Acts themselves.

Statistics

6.2 I set out in the tables at annexes A and B statistics for property interference and intrusive surveillance authorisations for the past year and previous years. I have not identified separately the number of authorisations given by each agency since this would give an impression of their operating practices which might be misleading. More authorisations were targeted at drugs offences than at all the other offences put together.

Property Interference

6.3 Excluding renewals, there were 2519 property interference authorisations in 2001–2002, which is marginally fewer than the previous year but in line with the first. Of this figure 306 required the prior approval of a Commissioner, somewhat less than the 375 which required approval in the previous year.

6.4 There have also been fewer cases where a Commissioner's prior approval would normally be required but where, because of urgency, it has been given by the Chief Officer for later review by a Commissioner. There were nine such cases in 2001–2002 compared with 21 and 29 respectively in previous years. This probably indicates that the law enforcement agencies are improving their planning for the exercise of these powers.

6.5 Similarly, there were fewer cases where authorisations were given in the absence of the Chief Officer: 14 this year compared with 25 last year.

6.6 Only two authorisations were quashed by Commissioners in 2001–2002 compared with seven in the previous year. In one an authorisation was given for property interference in an investigation into drugs offences outside the authorising officer's force area and the exceptional circumstances which would have rendered this permissible did not apply. In the other the interference and deployment of equipment was judged not to be proportionate to the gravity of the anticipated offence.

6.7 There were no appeals.

Intrusive Surveillance

6.8 There were 493 intrusive surveillance authorisations during 2001–2002. There is no comparison with the previous year, because the relevant legislation did not come into force until 25 September 2000. The monthly average of 52 for what remained of the year 2000–2001 fell to 41 in 2001–2002.

6.9 Use of urgency provisions fell from an average of over seven per month in 2000–2001 to less than three in 2001–2002. It is a mark of improved efficiency.

6.10 One authorisation was quashed by a Commissioner. It was linked to the quashing of the first of the two property interference authorisations previously referred to. Since that failed, so also did the intrusive surveillance authorisation.

6.11 There were no appeals.

Common faults

6.12 The Commissioners encounter faults in applications and authorisations for property interference and intrusive surveillance more commonly than they should. In the interests of helping those who have to complete the forms my Office have worked with the police and others to revise them. When the Codes of Practice have been published, I shall update the Procedures and Guidance issued by my Office, so as to explain and illustrate the proper way to complete the forms.

6.13 The commonest faults in applications are failure sufficiently to particularise the offence under investigation, and not answering all the questions in the form. In authorisations the commonest faults are failure to strike out whichever of two alternatives is inapplicable, failure to provide all the information required by statutory instrument, and

entering incorrect terminal dates (a three-month authorisation effective from '0815 on 10 January' should be expressed to expire at '9 April'). The commonest kind of fault in cancellations is the failure sufficiently to particularise technical equipment deployed, product obtained and the details required by statutory instrument. Commonest in renewals is the failure to particularise product obtained, changes since authorisation, and the reasons why it is necessary for surveillance to continue.

7. DIRECTED SURVEILLANCE AND CHIS

7.1 NCIS, NCS, SDEA, HMCE and UK Police Forces, have provided me with statistics on their use of directed surveillance and CHIS. This shows that for directed surveillance there were almost 27,800 authorisations in 2001-2002 with around 4,800 current at the end of the year. As for CHIS, some 5,400 were recruited during the same period; around 4,900 ceased to be used; and around 5,400 were active at the end of the year.

7.2 In the context of directed surveillance one case decided during the year deserves mention. In Regina v Sutherland and others Mr Justice Newman found that after defendants had been arrested in order to be questioned, police officers deliberately listened to privileged conversations between the defendants and their solicitors, but obtained no useful information. He nevertheless stayed the proceedings on the ground that the surveillance was unauthorised, holding that it was not necessary for the defendants to show either that the trial had been rendered unfair or that some use would be made of the relevant material. The surveillance was unauthorised because the only authorisation was for directed surveillance of the defendants' conversations by means of listening devices in the communal cell areas of a police station, whereas it was carried out in the exercise yards in relation to conversations with their solicitors.

7.3 It is a cautionary tale for all who are tempted to carry out surveillance in excess of what has been authorised. Unauthorised surveillance of that kind is often difficult to detect, and therefore represents a true test of the efficacy of internal monitoring systems. Every police force can usefully ask itself whether its own system would have detected the misconduct, and if not, what can be done to ensure that it would. The judge also remarked that those who carry out covert surveillance should be shown a copy of the authorisation; and this is obviously good practice.

8. INSPECTIONS

8.1 When RIPA and RIP(S)A first came into force the number of Assistant Commissioners and Inspectors that would be needed was a guess. It remains uncertain, because until I have a better idea of how much covert surveillance is undertaken by the public authorities that have not yet been inspected I cannot know (a) how long it will take to inspect them all or (b) how often each of them should be inspected.

8.2 Whilst this knowledge is being acquired, I have been obliged to arrange those inspections which I adjudge essential, and then to deploy our remaining resources as efficiently as possible. I have decided that the covert surveillance conducted by each of the law enforcement agencies must be inspected once a year. In future it may be necessary to inspect the NCS and HMCE more than once, because both are large and geographically diffuse organisations with many branches. In addition to the law enforcement agencies there are about 980 other public authorities which fall within my remit.

8.3 Having regard to my available resources, I must try to determine the priority in which, as well as the frequency with which, the other public authorities should be inspected. Those which conduct very little covert surveillance are probably in a majority. It will be a matter of judgement whether for such authorities communication short of inspection will suffice, especially if it is possible to send to all users of directed surveillance and CHIS guidance that will instruct them in the minimum requirements that all such users and prospective users must fulfil.

8.4 The formal inspection process began in May 2001 and by the end of March 2002 49 police forces and 109 other public authorities had been inspected consisting of 19 Government Departments and agencies, 69 local authorities, 18 health authorities and 3 other public bodies.

8.5 Almost all authorities have welcomed the inspections. The legislation is relatively new, they have been working without the assistance of Codes of Practice, and the inspections are intended to help rather than simply to criticise.

Police Forces

8.6 Forty-two forces in England and Wales, six in Scotland and the Police Service of Northern Ireland have been inspected. The inspection of the remainder will have been completed by June 2002.

8.7 The recommendations made by the inspection reports can conveniently be summarised under the headings of policy, procedure and training. Forces must have in place:

Policy

A policy for covert surveillance and CHIS activities, which includes formal reviews and a centralised system for the management, supervision and retention of records.

Procedure

Detailed procedures for the processing of all covert surveillance operations which ensure proper compliance with the legislation.

Training

The establishment of dedicated structured training, including refresher training.

Good and Bad Practice

8.8 There are many examples of good practice. They include:

- excellent, detailed force guidance
- first-rate central authorities bureaux giving oversight and quality control
- exemplary reviews of force practice
- frequent internal checking and dip-sampling
- adoption of the ACPO best practice model for management of CHIS
- detailed risk assessments
- extensive and imaginative training

8.9 Examples of bad practice include:

- inadequate or non-existent policy documents
- failure to review or cancel authorisations
- inadequate applications and authorisations
- authorisations which extend beyond their statutory limit
- poor risk assessment
- poor accountability for technical equipment
- persons identified as confidential sources who merit CHIS status
- inadequate training and poor knowledge of the legislation
- no central record of authorisations

Government Departments and other bodies

8.10 Fourteen government departments and other bodies have been inspected:

Department for Environment, Food and Rural Affairs (Investigation Branch, Centre for Environment, Fisheries and Aquaculture Science, Horticultural Inspectorate, Plant Health and Seed Inspectorate, Egg Marketing Inspectorate, Sea Fisheries Inspectorate)

Department of Health (NHS Counter Fraud Services, Welfare Foods Unit and the Medical Devices Agency)

Department of Trade and Industry (Directorate of Legal Services)

Department for Transport, Local Government and the Regions (Vehicle Inspectorate)

Department for Work and Pensions (Benefits Agency Investigation Service)

Environment Agency

Financial Services Authority

Food Standards Agency

Health and Safety Executive

Home Office (Immigration Service and Prison Service)

Inland Revenue

Intervention Board for Agricultural Produce (now the Rural Affairs Department)

National Assembly for Wales (NB treated as an exploratory visit)

Scottish Executive (Rural Affairs Department, Prison Service, Fisheries Protection Agency)

8.11 We have also inspected the RN Regulating Branch, Royal Military Police, RAF Police, and other units of the Armed Forces.

8.12 The inspections revealed a wide range of competence, effort and achievement. Some authorities had remained oblivious of the legislation and its important implications for their work. Others viewed the legislation with caution but had made steady progress in introducing the necessary procedures. Some have made considerable effort and yet failed so far to deliver the necessary organisational change. A few have been hindered by the difficulties of managing large bodies with a regional structure.

8.13 In every case I have sent the Inspector's report to the Chief Officer accompanied by a letter in which I have underscored what I regard as the most important points. Most recipients say that they have benefited by outside inspection. I am confident that further inspections will establish substantial compliance with the recommendations made by the reports.

Local Authorities in England and Wales

8.14 Forty-seven local authorities have been inspected in England and Wales. A pattern is emerging from inspections and correspondence.

County Councils

8.14.1 Seven inspections have taken place so far. Trading Standards departments have the most obvious need to use RIPA powers, though the need is shared in other areas such as social services, child employment and staff fraud. The Local Authorities Co-ordinators of Regulatory Services (LACORS) formerly LACOTS, supported by the Home Office (and in Scotland by the Scottish Executive), organised regional events between February and June 2001. Although the sessions focused on trading standards and environmental health, LACORS report that many officers from other local authority regulatory services, such as legal services, internal audit, housing, health, social services and planning, also attended.

8.14.2 Some of the County Councils we have inspected have been disappointing in their adoption of RIPA policies and procedures. All have a long way to go. Some are better motivated than others. Much of LACORS' work is nullified because information about RIPA often stays with specialists without reaching Chief Executives or other senior officers.

District Councils

8.14.3 Thirty-two inspections have been carried out so far. Relevant at District Council level are environmental health (noise nuisance, dog fouling, licensing of premises, unlicensed hire vehicles, clean air, cinema licensing, and food hygiene); investigation of benefit fraud; planning, including enforcement of building regulations; and health and safety.

8.14.4 In addition to inspections, we have written to all district councils in an attempt to judge the extent to which they use the legislation. So far almost 80% have responded. Of these, approximately:

- 68% have identified areas of responsibility which may require use of RIPA
- 60% have officers designated to give the necessary authorisations
- 30% have written policies covering the use of the powers
- 57% have procedures in place such as forms and arrangements for central records
- 58% have nominated a person to monitor authorisations centrally

- 38% have established or attended relevant training
- 45% have used their powers — the majority for directed surveillance

8.14.5 It is to be hoped that the enquiries have served as a useful prompt, because on the basis of the returns so far, most District Councils still have much to do.

Metropolitan and unitary authorities

8.14.6 Eight have been inspected in all. They raise issues about trading standards, environmental health, benefit fraud, and social services. The findings are much the same as for other authorities. Some authorities have produced good policies and procedures, while others have hardly started to think about them.

8.14.7 Across all authorities, progress tends to depend on the interest and enthusiasm shown by the Chief Executives. There is insufficient recognition of the need for corporate policies and procedures, backed up by training. Specialist areas are being left to develop their own practices without corporate oversight. This is impolitic. At one extreme, local authorities are making insufficient use of powers which exist to help them tackle fraud and other abuses. At the other, some authorities are doing things without regard to the legislation, and so are running the risk that their activities are unlawful.

8.14.8 My statutory duty is to keep the relevant powers and duties under review, not to instruct public authorities in the exercise of them.

8.14.9 I wrote to the Minister for Local Government and the Regions in December 2001, and again in January 2002 describing my findings from local authority inspections, and inviting him to consider whether his Department could do more to encourage good practice. I am pleased to record that he has undertaken that his Department will engage with others to increase local government awareness of the functions and responsibilities to which the legislation gives rise.

8.14.10 I also brought to the attention of his Department at official level the fact that the practice by some authorities of setting up Registered Social Landlords as companies limited by guarantee to handle housing matters means that in practice RIPA powers cannot be used in this field. I understand that the transfer of local authority housing stock to social landlords is in accordance with government policy and that over 100 whole or partial transfers have now been completed. I am assured that DTLR are examining the RIPA implications.

Parish Councils

8.14.11 Part I of Schedule 1 of RIPA lists relevant authorities for the purposes of ss. 28 and 29 of RIPA. They include “Any local authority (within the meaning of section 1 of the Local Government Act 1999).” Section 1(2) of that Act provides (so far as material) that:

“In relation to England “local authority” ... means:

(a) a county council, a district council, a London borough council, a parish council or a parish meeting of a parish which does not have a separate parish council;”

8.14.12 There are in England many thousands of parish councils and parish meetings. I have not identified any which conduct directed surveillance or CHIS. But even if any of them did, I would not have the resources to keep them under review. In practice, therefore, none of the parish councils or parish meetings has been inspected.

8.14.13 To regularise the position, I wrote to the DTLR suggesting that these bodies should be removed from Schedule 1. Although I received a reply which appeared sympathetic to the suggestion, nothing has been done about it.

Statutory Instrument 2000 No. 2417

8.15 The Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Order 2000 provides that an 'Assistant Chief Officer, Officer responsible for the management of an investigation' can authorise the use of directed surveillance or CHIS powers. I understand that some local authorities have construed this as entitling those in charge of investigations to authorise directed surveillance. If this construction is correct, it necessitates careful compliance with the imprecise description of a person responsible for the 'management', as distinct from 'conduct', of an investigation, and implies a senior, overseeing role.

Local Authorities in Scotland

8.16 Twenty-two Scottish authorities have so far been inspected. I reported the general effect of the findings when I met the Deputy First Minister Mr Jim Wallace QC MSP on 31 October 2001. There are examples of good practice in policies, forms and training, with evident support from the Council of Scottish Local Authorities. On the downside, however, in many cases the significance of the legislation was not grasped early enough. As a result the powers were not being used as effectively as they might be.

8.17 Scottish Statutory Instrument No. 343 of 2000 prescribes 'Assistant Head of Service; Investigation Manager' as the persons entitled to grant authorisations. Although this designation is clearer than in S.I. No. 2417 of 2000, referred to in paragraph 8.15, the term 'Investigation Manager' raises the same need to distinguish between management and conduct of an investigation, and similarly implies a senior overseeing role.

National Health Service in England and Wales

8.18 The complex and evolving nature of the NHS, the priorities which it must address and the pressures on Chief Executives and others in observing them are not to be underestimated. The requirements of RIPA can be difficult to reconcile with these pressures, but if the NHS is to take advantage of the powers which the legislation affords, it is essential that the relevant NHS staff should understand its implications.

8.19 The Department's Permanent Secretary and Chief Executive of the NHS took a useful initiative when he wrote to all Special Health Authorities and NHS Trust Chief Executives in August 2001, emphasising the importance of RIPA and the personal responsibility which lies with them.

8.20 I am told that the NHS Counter Fraud Service ('NHSCFS') has taken responsibility for the use of RIPA powers in cases of fraud and corruption in the NHS and for organising training for Chief Executives.

8.21 I summarise below the findings from inspections and enquiries so far carried out.

Trusts

8.21.1 Thirteen trusts have been inspected in England and Wales. They may need surveillance powers for the investigation of crime although, as I understand it, directed surveillance for corruption would be authorised and executed by NHSCFS. Despite the Department's efforts, few Chief Executives appear to have turned their minds to RIPA.

8.21.2 We wrote to all trusts in October 2001. By the end of March 2002 only about half had replied. It may be helpful to set out the matters that we sought to establish and the percentage of those responding who are complying with them:

(i) those who had a written policy on directed surveillance	25%
those who were developing policies	34%
(ii) those with training programmes in place	28%
those with training scheduled for the future	14%
(iii) whether there were procedures in place to authorise directed surveillance	26%
whether such procedures were being developed	23%
(iv) those who have authorised directed surveillance	14%

8.21.3 NHSCFS say that their training programme is intended to address these deficiencies. Clearly there is some way to go. They acknowledge that, certainly until recently, only 130 of some 400 Chief Executives have attended training.

8.21.4 Despite the express statutory provision and explicit guidance from the Permanent Secretary some Chief Executives still purport to delegate their power to authorise covert surveillance.

Health Authorities

8.21.5 Two have been inspected so far in England and Wales. The experience is much as for trusts. Again their need for surveillance relating to fraud is handled by NHSCFS.

8.22 The present system in England and Wales entrusts to NHS CFS covert surveillance relating to fraud and corruption, leaving to the individual NHS bodies a residual statutory power to use it for other crimes. In practice, the need to use it is uncommon. Yet so long as each body enjoys the power, it must prepare to use it by ensuring that the Chief Executive and relevant members of staff are trained in the use and conduct of both directed surveillance and (in Scotland) CHIS. Otherwise, should the need arise, the body will be found wanting and will be liable to carry out surveillance that is unlawful.

8.23 In practice, there is little likelihood that the need will arise. But short of removal from Schedule 1 of RIPA there is no mechanism for disclaiming the power to use covert surveillance and thereby avoid the need to be prepared to use it.

8.24 It is therefore my invidious duty to keep under review about 460 NHS bodies, most of which have no present intention of using covert surveillance, and no interest in preparing themselves to do so. In these circumstances the inspection of them is a waste of their time as well as that of the Assistant Commissioner or Inspector who undertakes the inspection. I am aware that the number of NHS bodies will change and may even increase as Primary Care Trusts and Strategic Health Authorities are established.

8.25 I accordingly recommend (a) that all covert surveillance (and not only such as involves fraud or corruption) should be undertaken on behalf of all NHS bodies in England and Wales by NHS CFS, and (b) that all NHS bodies should be removed from Part II of Schedule 1 of RIPA.

NHS Scotland

8.26 Three health trusts have been inspected.

8.27 I wrote to the then First Minister in Scotland in August 2001 because I was concerned about the lack of attention given by NHS Scotland to RIP(S)A issues. His response was to ensure that guidance was sent out, to which authorities were required to respond by 31 December 2001 specifying actions taken to comply.

8.28 From the responses I understand that 43 out of 45 NHS bodies (ie NHS Boards and Trusts) have RIP(S)A policies in place and have issued guidance to staff. Most NHS bodies plan to provide their own training though the Executive has offered further support.

8.29 There are also eight Special Health Boards. Of these, the State Hospital, the Scottish Ambulance Service and the Common Services Agency (Fraud Investigation Unit) have policies and guidance in place. The remaining Special Health Boards such as the Clinical Standards Board for Scotland, the Health Education Board for Scotland, NHS Education for Scotland, the Health Technology Board for Scotland have been advised of the need to consider their positions.

8.30 All this is highly creditable, but the question remains for Scotland as for England and Wales whether investigation which might rely on RIP(S)A powers could be differently organised so that these bodies could be removed from section 8(3) of the Act.

Other public bodies

8.31 The Serious Fraud Office, Consignia plc and the Royal Pharmaceutical Society of Great Britain have also been inspected.

9. CODES OF PRACTICE

9.1 In my Annual Report that was sent to the Prime Minister in June 2001 I said:

“All the public authorities, whose conduct of covert surveillance and use of CHIS I am responsible for keeping under review, have in my judgement been considerably and unfairly handicapped by the fact that there have not yet been issued under section 71(1) of the 2000 Act codes of practice relating to the exercise and performance of the powers and duties conferred or imposed on public authorities under the Act and the 1997 Act. The Scottish Ministers have elected to await the issue of those codes of practice before issuing their own under section 24(1) of the RIP (Scotland) Act.

As a result, for nearly nine months public authorities throughout the United Kingdom (including law enforcement agencies) have had to make do with drafts. But drafts cannot afford them the assistance and support that they will derive from codes having the effect prescribed by section 72 of the 2000 Act or section 26 of the RIP(Scotland) Act; and the drafts so far published are notably unhelpful as well as lacking Parliamentary approval.

In these circumstances a large number of responses to the consultation process on the codes was to be expected: and some of them may well have raised important legal issues. By now those issues have no doubt been thoroughly considered. But there continues to be a disappointing failure to indicate when the codes are to be laid before Parliament and when they are to be brought into force.”

9.2 Notwithstanding these entreaties, the codes have still not been published. Sporadically, drafts have been sent to my office, remarkable only for the inelegance of their drafting. I am dismayed to find that the Home Office has continued to maintain on its

website that draft of the Code of Practice relating to covert surveillance which was put out for consultation in October 2000 without paying any regard to the many revisions of the draft that have since been made. For public authorities dependent on the draft for guidance this has been extremely unhelpful and in some cases even misleading.

9.3 It is contrary to principle for those who are called upon to construe statutory provisions or codes of practice to take part in the formulation of them. I have therefore thought it improvident to do more myself than offer presentational suggestions about the language used.

9.4 I refrained from issuing fresh interpretational guidelines during the past year in order to ensure their compatibility with the Codes, the provisions of which I am by statute required to take into account. As it turns out, I could have issued guidelines and revised them if necessary, but I was beguiled by periodic promises that the Codes would be issued shortly.

10. THE YEAR AHEAD

10.1 As this report shows, there is throughout all public authorities, including the law enforcement agencies, a wide variation in the quality of the use and conduct of directed surveillance and CHIS. I shall do my best, by explaining the statutory requirements and by widespread dip-sampling on inspections, to secure improvements in both fields.

10.2 I shall continue to give priority to inspection of the law enforcement agencies. The more significant authorities such as the Inland Revenue, the Immigration Service and the Prison Service also merit, and will receive, annual inspections. I do not intend to repeat inspections of local authorities and NHS bodies if our findings show that further inspections would not be justified. It is obvious that if NHS bodies were removed from Schedule 1 of RIPA and from section 8(3) of RIPS(A) the inspection process would be eased.

10.3 Under my duty to keep under review the exercise of powers and duties relating to encryption under Part III of RIPA I shall arrange for those matters to be included in the inspection process as soon as Part III is brought into force.

10.4 When the codes of practice have been published, and it can be seen where further guidance would be helpful, I will issue any necessary further guidelines.

10.5 In the coming year I am confident that this year's achievement can be sustained of responding to 98% of property interference and intrusive surveillance authorisations within 16 working hours from the time that Commissioners receive the necessary information.

10.6 It is to be borne in mind that Parliament may approve the addition to Schedule 1 of RIPA of other public authorities, which will require inspection.

10.7 OSC will be establishing a web site to which public authorities can have access for information about covert surveillance and in particular about good and bad practice.

AUTHORISATIONS GIVEN UNDER PART III OF THE POLICE ACT 1997 SINCE IMPLEMENTATION

	1999-2000 ¹			2000-2001 ¹			2001-2002		
	England, Wales and N.I.	Scotland	Total	England, Wales and N.I.	Scotland	Total	England, Wales and N.I.	Scotland	Total
Total number of authorisations (not including renewals)	2,401	58	2,459	2,509	58	2,567	2,437	82	2,519

PRIOR APPROVALS²

	1999-2000			2000-2001			2001-2002		
	England, Wales and N.I.	Scotland	Total	England, Wales and N.I.	Scotland	Total	England, Wales and N.I.	Scotland	Total
Number of cases requiring approval	311	12	323 ³	367	8	375	299	7	306
Cases requiring prior approval by category:									
• Dwelling	198	7	205	238	7	245	204	3	207
• Office	60	1	61	45	0	45	37	2	39
• Hotel bedroom	50	4	54	77	1	78	56	2	58
• Matters subject to legal privilege	1	0	1	4	0	4	1	0	1
• Journalistic material	0	0	0	0	0	0	0	0	0
• Confidential personal information	4	0	4	3	0	3	1	0	1

¹Some minor corrections have been made to some figures previously reported for 1999-2000 and 2000-2001.

²This figure lies within the total number of authorisations.

INTRUSIVE SURVEILLANCE AUTHORISATIONS GIVEN UNDER PART II OF
THE REGULATION OF INVESTIGATORY POWERS ACT 2000 AND THE
REGULATION OF INVESTIGATORY POWERS (SCOTLAND) ACT 2000
SINCE IMPLEMENTATION

	2000-2001 ¹			2001-2002		
	<i>England, Wales and N.I.</i>	<i>Scotland</i>	<i>Total</i>	<i>England, Wales and N.I.</i>	<i>Scotland</i>	<i>Total</i>
Total number of authorisations (not including renewals)	302	10	312	480	13	493
Cases by category:						
● Private vehicle	112	5	117	178	7	185
● Residential premises	190	5	195	302	6	308

¹Some minor corrections have been made to some figures previously reported for 1999-2000.

Public Authorities subject to Review**Property interference, intrusive surveillance, directed surveillance and CHIS under section 107(1) of the 1997 Act, section 62(1) and Part I of Schedule 1 of RIPA, and sections 8 and 10 of RIP(S)A**

41	Police forces in England and Wales Metropolitan Police City of London Police
8	Police forces in Scotland Police Service of Northern Ireland Ministry of Defence Police Royal Naval Regulating Branch Royal Military Police Royal Air Force Police British Transport Police
	NCIS
	NCS
	HMCE
<u>sub total</u>	60

Directed surveillance and CHIS under section 62(1) and Part I of Schedule 1 of RIPA

Serious Fraud Office

Her Majesty's Forces in Northern Ireland

Inland Revenue

(MAFF) DEFRA
MoD
DETR (DTLR)
Department of Health
Home Office
DSS (Department for Work and Pensions)
DTI

National Assembly for Wales

409	<i>Local Authorities</i>	
	England	
	County Councils	34
	District Councils	238
	London Authorities	33
	Metropolitan Authorities	36
	Unitary Authorities	46
	[Parish Councils ¹]	
	Wales	
	Local Authorities	22
	<i>Other bodies</i>	
	Environment Agency	
	Financial Services Authority	
	Food Standards Agency	
	Intervention Board for Agricultural Produce	
	Personal Investment Authority	
	Consignia plc	

sub total 426

Directed surveillance and CHIS under RIP(S)A

	Scottish Administration (includes Prison Service, Scottish Fisheries and Protection, Rural Affairs Division, Animal Health and Welfare, Food Standards Agency)	
32	Councils	
	Commons Service Agency for the NHS (made up of two divisions)	
15	Health Boards	
6	Special Health Boards	
28	NHS trusts	
	Scottish Environment Protection Agency	
	Scottish Drugs Enforcement Agency	

sub total 85

¹An unknown number: see paragraph 8.14.12 of the Report.

Directed surveillance only under section 62(1) and Part II of Schedule 1 of RIPA

	Health and Safety Executive	
464	NHS bodies in England and Wales:	
	Health Authorities	99
	Special Health Authorities	15
	NHS Trusts	350
	Royal Pharmaceutical Society of Great Britain	

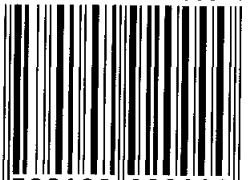
sub total 466

Authorisation of detection of television receivers

	British Broadcasting Corporation ²	
<u>TOTAL 1,038</u>		

²See SI 2001 No 1057.

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