

Investigatory Powers Act—will the new oversight regime be effective?

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Corporate Crime analysis: Lord Justice Fulford recently started a new role in overseeing the use of investigatory powers by the authorities. Ian Whitehurst, barrister at 6 Pump Court and 7 Harrington Street, explains the role of the new commissioner and considers some of the potential implications of the new regime.

What is the role of the new investigatory powers commissioner (IPC)?

The role of the IPC consolidates three former offices of supervision in a concerted attempt by the government to consolidate the existing powers of review in the UK.

The new IPC has 15 judicial commissioners and a staff of 50, including inspectors, to assist in overseeing the use and deployment of investigatory powers by public authorities and reviewing policy objectives via audit, inspection and investigation.

Furthermore, the commissioner has been empowered with a mandate to inform parliament on the use and deployment of surveillance powers as well as making recommendations for their improvement.

Will this new regime lead to improved powers of scrutiny and review?

The new statutory regime has instituted the IPC and the judicial commissioners' ability to perform a judicial 'double lock' whereby surveillance warrants issued by the Secretary of State require approval before they can be applied to the investigatory process.

In addition to approving the issuing of surveillance warrants, the IPC also has powers to approve 'technical capability notices' and 'data retention notices'.

By imposing this 'judicial double lock', the intention is to ensure that the issuing of warrants and notices is guided by the principles of necessity and proportionality, to ensure that the balancing exercise between protecting the rights of individuals with the policy objectives of protecting national security and preventing criminal conduct is addressed sufficiently to prevent the system falling into abuse. The perception is that judicial involvement will ensure greater rigour in the deployment of surveillance powers which will lead to greater protection of individual rights and more effective deployment of the powers to counter organised crime, terrorism and threats to national security.

Will the powers be successful?

The reforms have the primary advantage that the regulatory regime of investigatory supervision in this country is now on a clear, consolidated statutory footing. The reforms' primary purpose is to increase the compatibility of the powers of surveillance with basic human rights principles.

By importing a new requirement for judicial oversight and approval, it is hoped that it will prevent abuses of the existing powers by the prosecutorial and intelligence services.

However, the areas that the IPC and his staff are to supervise and review are vast and complex and one of the key issues is going to be whether they will be afforded sufficient levels of resources to police this area effectively and thoroughly.

In addition, while the key development is to introduce an independent 'judicial double lock' to the system to prevent misuse by politicians and overzealous public authorities in their use of their powers, there are still issues over whether the new system is truly independent as the IPC is appointed by the Prime Minister and funded by the Secretary of State, who the IPC is primarily going to review.

Furthermore, there are still on-going issues concerning the overall compatibility of the new regime with basic human rights principles. An illustration of this is the fact that, although the IPC can inform an individual that he has been the subject of erroneous or illegal surveillance, the commissioner can only do so if he believes that the individual has suffered 'serious prejudice' and that the other public policy considerations, national security for example, are not prejudiced by the disclosure of the unlawful surveillance to the affected citizen.

How this is compatible with Article 8 of the European Convention of Human Rights is just one of the questions that will no doubt be raised and subsequently addressed in the near future. The new commissioner faces a challenging time ahead.

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