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Incompatibility under the Human Rights Act 1998: A proposal for a Remedial Order to amend the journalistic safeguard at section 154 of the Investigatory Powers Act 2016

March 2023

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Presented to Parliament pursuant to paragraph 3(1) of Schedule 2 to the Human Rights Act 1998

March 2023

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Presented to Parliament pursuant to paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998.

Background

This paper presents a draft of a proposed Remedial Order to amend the Investigatory Powers Act 2016 (IPA) to introduce enhanced safeguards relating to the selection for examination and retention of confidential journalistic material and sources of journalistic material derived from material acquired through bulk interception. This is to implement the May 2021 judgment in *Big Brother Watch and Others v UK* (BBW), handed down by the Grand Chamber of the European Court of Human Rights (ECtHR), which found a violation of Article 8 and 10 of the European Convention on Human Rights (ECHR) in the previous bulk interception regime under the Regulation of Investigatory Powers Act 2000 (RIPA) due to the lack of prior independent authorisation. Whilst the IPA replaced much of RIPA and mostly addressed the issues identified in the case, the bulk interception regime requires additional safeguards for confidential journalistic material to be compatible with Articles 8 and 10. A Remedial Order is the most appropriate way to implement this change to primary legislation.

The Incompatibility

In the BBW judgment, the ECtHR Grand Chamber found that the bulk interception regime under RIPA had breached Article 10 ECHR, as it had not required prior independent authorisation before confidential journalistic material is sought or retained for a purpose other than its destruction, or a journalist is targeted. Presently, section 154 IPA (the journalistic safeguard for bulk interception) does not require independent authorisation for bulk interception regimes and only requires that the Investigatory Powers Commissioner is informed as soon as is reasonably practicable following the interception of any communication containing confidential journalistic material or where such material is retained for a purpose other than its destruction. The Interception Code of Practice also determines that a senior official must be notified in advance by an analyst intending to select any such content for examination.

The ECtHR therefore found that the IPA is not compatible with Article 8 and Article 10 ECHR. The proposed change to section 154 will remedy this breach by providing additional robust safeguards and further enhancements to the protections for journalists and sources.

Reasons for amending the IPA

Legislative change is required to address the findings in the judgment handed down in the BBW case in accordance with the rule of law and to ensure the ongoing lawful operation of our bulk interception regime. The ECtHR judgment found that in order to be compliant with Articles 8 and 10 ECHR, there must be prior independent authorisation for Security and Intelligence agencies to select for examination communications acquired under a bulk interception warrant where it was either the intent, or where it was highly likely, to result in the examination of confidential journalistic material or material which identifies or confirms a source of journalistic material. The Court also found that independent authorisation should be sought where such material is knowingly retained for a purpose other than its destruction. UK law must be brought into compliance with this judgment to ensure that the legislation under which the Security and Intelligence Agencies operate is compatible with the ECHR.

Presently, section 154 IPA (the journalistic safeguard for bulk interception) does not require such independent authorisation, and so the effect of this legislative change is to replace s.154 to bring the regime into compliance, with the Investigatory Powers Commissioner providing this independent authorisation.

We are required to make this change to the legislation in order to maintain the ability of the United Kingdom's Security and Intelligence agencies to carry out bulk interception under the IPA compliantly with the ECHR. Failure to amend this could result in applications for bulk interception warrants being refused by the Investigatory Powers Commissioner's Office (IPCO).

If these changes are not made, this will risk additional legal challenge as well as significant reputational damage.

Reasons for proposing a Remedial Order

A Remedial Order is an order made under section 10 HRA that amends primary or subordinate legislation that has been found by domestic courts to be incompatible with Convention rights under the HRA, or by the ECtHR in specified circumstances. Under section 10(2) HRA, Ministers are required to have compelling reasons for making an amendment by way of a Remedial Order. Ministers have considered the best way to do this taking into account likely timescales, the impact of any long delay and the nature of the breach identified by the ECtHR.

The decision to use a Remedial Order strikes an appropriate balance between the need to remedy the incompatibilities without further delay and the need to allow parliamentary scrutiny of the measures proposed.

A Remedial Order is the most appropriate legislative vehicle for implementing this judgment to make the necessary change to the IPA because it allows the changes to be made to primary legislation by way of a statutory instrument. Otherwise, primary legislation would have been required which would take significantly longer.

The terms of the Remedial Order

The proposed Remedial Order would make targeted amendments to the IPA to bring it in line with the terms of the judgment. The amendments are limited to the incompatibility identified by the ECtHR in BBW.

Currently, section 154 of the IPA requires that where a security and intelligence agency wishes to retain a communication which they know contains confidential journalistic material (CJM) intercepted under a bulk interception warrant, that agency must inform the Investigatory Powers Commissioner

The proposed amendments to section 154 include additional protections in relation to CJM and sources of journalistic material (SJM). The Remedial Order will replace the existing section 154 with a new version which comprises of sections 154(1) to 154(10).

The new section 154(1) and (2) would require the approval of the IPC before criteria are used to identify content or related data in material acquired under a bulk interception warrant for the purpose of identifying confidential journalistic material, to identify or confirm a source of journalistic information or the use of the relevant criteria is highly likely to identify such material or identify or confirm such a source.

The new section 154(3) would provide that the IPC may only give approval if a public interest test is met.

The new section 154(4) applies to material obtained under a bulk interception warrant which contains CJM or SJM, where that material is retained by the agency concerned.

The new section 154(5) requires that the agency inform the IPC about that retention referred to in subsection (4).

The new section 154(6) provides that, unless the IPC considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the IPC must either direct that such material be destroyed or impose conditions as to its retention.

The new section 154(7) provides that, if the IPC does consider that the public interest in retaining the material outweighs the public interest in its confidentiality, the IPC may impose conditions as to its retention.

The new section 154(9) gives the IPC the power to require the Secretary of State or the agency concerned to make representations about how the IPC should exercise their functions under subsection (6). Subsection (9) also provides that the IPC must have regard to any representations received from those persons.

The impact of the new section 154 will be to ensure that additional protections are in place in relation to CJM and SJM. It would also ensure that the UK meets its obligations under the ECHR and is able to protect confidential journalistic material or sources of journalistic material without any breaches of Article 8 and Article 10 of the ECHR.

Reasons for using the non-urgent procedure

The government does not consider it necessary to make use of the urgent procedure under paragraph 4 of Schedule 2 to the HRA to remedy the incompatibility more swiftly. The importance of the right affected by the incompatibility and the potential impact on individuals have been considered against the need to allow the opportunity for Parliamentary scrutiny and scrutiny by other interested groups of the proposed changes.

Remedial Order process

Schedule 2 to the HRA sets out the parliamentary process for Remedial Orders. Under the non-urgent procedure, a proposal for a draft order is laid before Parliament for 60 days during which time representations may be made. Following this the draft order, with any revisions the Government wishes to make, particularly in light of any representations received, must be laid for a further 60 days. It then needs to be approved by a resolution of each House of Parliament before it can be made.

Draft SI 'The Investigatory Powers Act 2016 (Remedial) Order 2023'.

Draft Order laid before Parliament under paragraph 2(a) of Schedule 2 to the Human Rights Act 1998 (c. 42) for approval by resolution of each House of Parliament.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2023 No.

INVESTIGATORY POWERS

The Investigatory Powers Act 2016 (Remedial) Order 2023

Made - - - -	***
Coming into force - -	***

It appears to the Secretary of State, following a finding of the European Court of Human Rights in proceedings against the United Kingdom(**a**), that section 154 of the Investigatory Powers Act 2016(**b**) is incompatible with an obligation of the United Kingdom arising from the Convention(**c**).

The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order(**d**) to make such amendments to section 154 of the Investigatory Powers Act 2016 as the Secretary of State considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998(**e**), a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes this Order, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a), (2)(a) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement and extent

1.—(1) This Order may be cited as the Investigatory Powers Act 2016 (Remedial) Order 2023 and comes into force on the day after the day on which it is made.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

Substitution of section 154 of the Investigatory Powers Act 2016

2. For section 154 of the Investigatory Powers Act 2016, substitute—

(**a**) *Big Brother Watch and Others v the United Kingdom* (application numbers 58170/13, 62322/14 and 24960/15) 25th May 2021.
(**b**) 2016 c. 25.
(**c**) See section 21(1) of the Human Rights Act 1998 (c.42) for the meaning of "the Convention".
(**d**) See section 21(1) of the Human Rights Act 1998 for the definition of "remedial order".
(**e**) 1998 c. 42. There are amendments to Schedule 2, to which there are amendments not relevant to this Order.

"154 Additional safeguards for confidential journalistic material etc

(1) Subsection (2) applies if, in a case where intercepted content or secondary data obtained under a bulk interception warrant is to be selected for examination—

(a) the purpose, or one of the purposes, of using the criteria to be used for the selection of the intercepted content or secondary data for examination ("the relevant criteria") is to identify any confidential journalistic material or to identify or confirm a source of journalistic information, or

(b) the use of the relevant criteria is highly likely to identify such material or identify or confirm such a source.

(2) The intercepted content or secondary data may be selected for examination using the relevant criteria only if the Investigatory Powers Commissioner has approved the use of those criteria.

(3) The Investigatory Powers Commissioner may give an approval under subsection (2) only if—

(a) the public interest in obtaining the information that would be obtained by the selection of the intercepted content or secondary data for examination outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information, and

(b) there are no less intrusive means by which the information may reasonably be obtained.

(4) Subsection (5) applies where—

(a) intercepted content or secondary data obtained under a bulk interception warrant ("the relevant material") is retained, following its examination, for purposes other than the destruction of the relevant material, and

(b) the person to whom the warrant is addressed considers that the relevant material contains confidential journalistic material or material that would identify or confirm a source of journalistic information.

(5) The person to whom the warrant is addressed must inform the Investigatory Powers Commissioner of the retention of the relevant material as soon as reasonably practicable.

(6) Unless the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner must—

(a) direct that the relevant material is destroyed, or

(b) impose one or more conditions as to the use or retention of the relevant material.

(7) If the Investigatory Powers Commissioner considers that subsection (8) applies to the relevant material, the Commissioner may nevertheless impose such conditions under subsection (6)(b) as the Commissioner considers necessary for the purpose of protecting the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(8) This subsection applies to material containing—

(a) confidential journalistic material, or

(b) material identifying or confirming a source of journalistic information,

if the public interest in retaining the material outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information.

(9) The Investigatory Powers Commissioner—

(a) may require an affected party to make representations about how the Commissioner should exercise any function under subsection (6), and

(b) must have regard to any such representations made by an affected party (whether or not as a result of a requirement imposed under paragraph (a)).

(10) "Affected party" has the meaning given by section 153(14).".

Minister of State
Date Home Office

EXPLANATORY NOTE

(This note is not part of the Order)

This Order replaces section 154 of the Investigatory Powers Act 2016 (c. 25) ("the IPA") with a new section 154, following a judgment from the European Court of Human Rights that certain aspects of the Regulation of Investigatory Powers Act 2000 (c. 23) ("RIPA") were in breach of Article 10 of the European Convention on Human Rights (freedom of expression). RIPA was the predecessor legislation to the IPA.

In the case of *Big Brother Watch and Others v the United Kingdom* (Application numbers 58170/13, 62322/14 and 24960/15) delivered on 25th May 2021, the European Court of Human Rights held that RIPA and the associated code of practice did not protect sufficiently Article 10 rights relating to confidential journalistic material ("CJM) or sources of journalistic material ("SJM").

The IPA has now replaced the relevant parts of RIPA and makes express provision for bulk interception. Existing section 154 of the IPA requires that where a security and intelligence agency wishes to retain a communication which they know contains CJM intercepted under a bulk interception warrant, that agency must inform the Investigatory Powers Commissioner ("the Commissioner").

New section 154 includes additional protections in relation to CJM and SJM.

New section 154(1) and (2) requires the approval of the Commissioner before criteria are used for certain purposes to select for examination material acquired under a bulk interception warrant.

New section 154(3) provides that the Commissioner may only give approval if a public interest test is met.

New section 154(4) applies to material obtained under a bulk interception warrant which contains CJM or SJM, where that material is retained by the agency concerned. New subsection (5) requires that the agency inform the Commissioner about that retention.

New section 154(6) provides that, unless the Commissioner considers that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner must either direct that such material be destroyed or impose conditions as to its retention.

New section 154(7) provides that, if the Commissioner does consider that the public interest in retaining the material outweighs the public interest in its confidentiality, the Commissioner may impose conditions as to its retention.

New section 154(9) gives the Commissioner the power to require the Secretary of State or the agency concerned to make representations about how the Commissioner should exercise their functions under subsection (6). Subsection (9) also provides that the Commissioner must have regard to any representations received from those persons.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

Explanatory Memorandum to the Proposed Remedial Order

EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS ACT 2016 (REMEDIAL) ORDER 2023

2023 NO. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by command of His Majesty.

2. Purpose of the instrument

2.1 This statutory instrument (SI) replaces section 154 of the Investigatory Powers Act 2016 (IPA) to introduce enhanced safeguards relating to the selection for examination and retention of confidential journalistic material and sources of journalistic material derived from material acquired through bulk interception. The permission of the Investigatory Powers Commissioner (IPC) is required before such material can be purposefully selected for examination or knowingly retained for a purpose other than destruction. This is in response to the May 2021 judgment in *Big Brother Watch and Others v UK* (*BBW*), handed down by the Grand Chamber of the European Court of Human Rights (ECtHR), which found a violation of Article 10 of the European Convention on Human Rights (ECHR) in the previous bulk interception regime under the Regulation of Investigatory Powers Act 2000 (RIPA) due to the lack of prior independent authorisation.

3. Matters of special interest to the Joint Committee on Human Rights

3.1 This Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Secretary of State for the Home Department has made the following statement regarding Human Rights:

"In my view the provisions of the Investigatory Powers 2016 (Remedial Order) 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 In May 2021, the Grand Chamber ECtHR handed down its judgment in *BBW*, a challenge to the bulk interception regime under RIPA (predecessor to the IPA), finding various violations of Article 8 and Article 10 ECHR. Many of the incompatibilities found in that regime had already been removed by the time of the judgment, following the introduction of the IPA. This SI makes a legislative change to

the IPA to resolve one remaining incompatibility. The Grand Chamber found that, where an intelligence agency seeks to select for examination confidential journalistic material obtained under a bulk interception warrant or identify the source of journalistic information, the selection criteria used should be subject to prior independent authorisation. Similarly, where material acquired under a bulk interception warrant is retained following its examination, and where it is known to contain confidential journalistic material or confidential journalistic source material, it may only continue to be retained for a purpose other than its destruction where this has been independently authorised.

6.2 Presently, s.154 IPA only requires that where confidential journalistic material is retained, following its selection for examination, for a purpose other than its destruction that the Investigatory Powers Commissioner must be informed. This SI therefore replaces s.154 IPA with the effect described above to make s.154 compatible with the ECHR.

6.3 Section 10 HRA provides that if it appears to a Minister of the Crown that, having regard to a finding of the ECtHR, a provision of legislation is incompatible with an obligation of the UK arising under the ECHR, and there are compelling reasons for doing so, the Minister may amend the legislation with the use of a Remedial Order to remove the incompatibility.

7. Policy background

What is being done and why?

7.1 The judgment in *BBW* was clear that in order to be compliant with Article 10 ECHR, there must be prior independent authorisation for Security and Intelligence agencies to select for examination communications acquired under a bulk interception warrant where it was either the intent, or where it was highly likely, to result in the examination of confidential journalistic material or material which identifies or confirms a source of journalistic material. The Court also found that independent authorisation should also be sought where such material is knowingly retained. The judgment in this case is final, and UK law must be brought into compliance to ensure that the legislation under which the Security and Intelligence Agencies operate is compatible with the ECHR. This change has been made as soon as reasonably practicable following an appropriate period of consultation with the relevant organisations including the security and intelligence agencies and the Investigatory Powers Commissioners Office (IPCO).

7.2 This SI is a remedial order under section 10 of the Human Rights Act 1998 with the express purpose of bringing the IPA into ECHR compliance. It therefore has the effect of fulfilling this requirement of the judgment. This SI also makes clear, in new s.154 that the independent body that will consider applications for the selection and retention of confidential journalistic and source material is the Investigatory Powers Commissioner. IPCO is best placed to discharge this function as it already provides oversight of the use of investigatory powers as well as authorisation for other powers under this Act.

7.3 The use of a remedial order is the most efficient way to make the necessary change to the IPA because it allows the necessary changes to be made to primary legislation by way of a statutory instrument. Otherwise, primary legislation would have been required which would have taken significantly longer. The use of a remedial order

therefore enables us to make the IPA compliant with the ECHR faster than any other alternative.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument is limited to making changes that are necessary to remove an incompatibility with the ECHR and it is not considered to be an appropriate point to consolidate the legislation.

10. Consultation outcome

10.1 Consultation took place between the Home Office, Foreign Commonwealth and Development Office, Security and Intelligence Agencies, and IPCO on how to implement the judgment. It was decided to follow existing approaches already in the IPA as closely as possible (such as section 153) in the interests of consistency with existing safeguards.

11. Guidance

11.1 Appropriate changes to the interception code of practice will be made in due course to reflect the changes made by this SI.

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 A full Impact Assessment has not been prepared for this instrument because of the low level of any potential operational impact on those affected by the changes made by the SI.

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 effect of this legislation will be kept under review by the Home Office, the policy owners, the security and intelligence agencies through their use of this provision, and the Investigatory Powers Commissioner's Office through their inspections of the security and intelligence agencies.

15. Contact

15.1 Interception and Equipment Interference Policy at the Home Office email: InterceptionandEquipmentInterferencePolicy@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 The Deputy Director for Investigatory Powers Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

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