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.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 This statutory instrument (SI) replaces section 154 of the Investigatory Powers Act 2016 (IPA) and creates a new s.154A to introduce enhanced safeguards relating to the use of criteria for the selection for examination of, and retention of, items subject to protections for confidential journalistic material (CJM) and sources of journalistic material (SJM) derived from material acquired through bulk interception. The permission of the Investigatory Powers Commissioner (IPC) is now required before criteria can be used to select such material 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 Parliament

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 (HRA). A first draft proposal was laid on 20 March 2023 and the Remedial Order has been updated in line with the Committee's recommendations.

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, the Rt Hon. Suella Braverman, has made the following statement regarding Human Rights:

"In my view the provisions of the Investigatory Powers Act 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 (right to respect for private and family life) and Article 10 (freedom of expression) 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 CJM obtained under a bulk interception warrant or identify SJM, 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 CJM or SJM, 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 requires that where a communication is retained which contains confidential journalistic material, following its examination, for a purpose other than its destruction, the IPC must be informed. This SI replaces s.154 IPA with the effect that the new s.154 requires prior approval from the IPC before criteria are used where the purpose of using those criteria is to select communications for examination which contain CJM or SJM or where the use of those criteria make it highly likely that such material would be selected for examination. This SI additionally introduces a new s.154A setting out urgency provisions. S.229(8) has been amended consequentially so that it expressly mentions the new functions of the Judicial Commissioner (JC) under the amended s.154 and s.154A.

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* provided that there must be prior independent authorisation for the Security and Intelligence agencies to use criteria in order 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 CJM or SJM. The Court also found that independent authorisation should 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 following an appropriate period of consultation with the relevant organisations including the security and intelligence agencies and the Investigatory Powers Commissioner's Office (IPCO).

7.2 This SI is a remedial order under section 10 of the HRA with the express purpose of bringing the IPA into compliance with the ECHR, as specified in the *BBW* judgment. This SI makes clear in the new s.154 that the independent body that will consider applications for the selection and retention of CJM and SJM is the IPC and the other

JCs who are supported by IPCO. The IPC is best placed to discharge this function as he and the other JCs already provide oversight of the use of investigatory powers as well as authorisations for other powers under this Act. The new s.154A creates an urgency process for dealing with requests for clearance to use certain criteria to select data for examination which needs to be approved out of hours. The amendment to s.229(8) is a consequential amendment and includes the new functions of the JCs which have been created under s.154 and s.154A in that subsection in order to disapply the duties on JCs under s229(6) and (7) just as those duties are disapplied for other JC functions.

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 relevant amendments 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.

10.2 The Remedial Order lay in Parliament for 60 sitting days after it was first laid on 20 March 2023. We received two representations during this time, one from the Joint Committee on Human Rights (JCHR) and the other from the United Kingdom Intelligence Committee (UKIC). A summary of the representations received and responses to those representations will be laid in a Statement alongside this draft Remedial Order.

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 An 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 IPCO through their inspections of the security and intelligence agencies.

15. Contact

15.1 Interception and Equipment Interference Policy at the Home Office can be contacted with any queries regarding the instrument via 03001046066 or InterceptionandEquipmentInterferencePolicy@homeoffice.gov.uk.

15.2 Lucy Montgomery-Pott, the Deputy Director for Investigatory Powers Unit at the Home Office can confirm that this explanatory memorandum meets the required standard.

15.3 Tom Tugendhat, the Minister for Security at the Home Office can confirm that this explanatory memorandum meets the required standard.