EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS (COVERT HUMAN INTELLIGENCE SOURCES AND INTERCEPTION: CODES OF PRACTICE) REGULATIONS 2022

2022 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 Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to bring into force the revised Covert Human Intelligence Sources Code of Practice ("the CHIS Code") and the revised Interception Code of Practice ("the Interception Code").

2.2 The revised CHIS Code has been updated to reflect amendments made to the Regulation of Investigatory Powers Act 2000 ("RIPA") by the CHIS (Criminal Conduct) Act 2021 ("the CHIS Act") which gained Royal Assent in March 2021 and was subsequently commenced in stages during 2021.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Home Office has consulted with interested parties and the Investigatory Powers Commissioner ("IPC") regarding the changes brought about by the revised Codes of Practice. It is not considered that relevant public authorities or the IPC need to be provided with additional time to adopt different patterns of behaviour with a delayed commencement date, for the following reasons. The revised CHIS Code has been updated to reflect the new provisions in the CHIS Act covering the way that Criminal Conduct Authorisations ("CCAs") must be authorised and reflects the changes made to the use of children and vulnerable adults as CHIS, as conferred in the CHIS Act, which has been in force since 2021, and provides guidance in these areas. Similarly, the revised Interception Code provides guidance on the circumstances in which intercepting authorities should serve a warrant. As such, it is considered appropriate for the instrument to come into force on the day after the day on which it is made.

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. Where there are limits on the application to Scotland or Northern Ireland (or alternative domestic provision), this is stated in the revised CHIS and Interception Codes.

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. Where there are limits on the application to Scotland or Northern Ireland (or alternative domestic provision), this is stated in the revised CHIS and Interception Codes.

5. European Convention on Human Rights

5.1 The Security Minister has made the following statement regarding Human Rights:

"In my view the provisions of the Investigatory Powers (Covert Human Intelligence Sources and Interception: Codes of Practice) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 Part 2 of RIPA governs the use of Covert Human Intelligence Sources ("CHIS") by public authorities. The CHIS Act amended RIPA to provide explicit statutory power for the intelligence agencies, law enforcement agencies, and a limited number of wider public authorities, to authorise CHIS to participate in criminal conduct where it is necessary and proportionate to do so.

6.2 The Secretary of State is required by section 71 of RIPA to issue codes of practice relating to the exercise and performance of the powers and duties conferred or imposed by or under Part 2 of RIPA. The Secretary of State has previously issued such codes of practice, including the CHIS Code of Practice 2018, under RIPA.

6.3 The last SI to bring a CHIS Code into force was the Investigatory Powers Act (Codes of Practice and Miscellaneous Amendments) Order 2018 (SI 2018/905). The CHIS Code has been revised to reflect the new statutory provisions covering the way that CCAs must be authorised and other updates to the process, safeguards, and oversight of the authorisation of CHIS.

6.4 Section 72 of RIPA sets out the effect of the Code. A person must have regard to the Code when exercising powers and any function to which this Code relates. Failure to comply with the Code does not render that person liable in any criminal or civil proceedings. However, the Code is admissible in evidence in criminal and civil proceedings, and may be taken into account of any court, tribunal or supervisory authority when determining a question arising in connection with those powers and duties in those proceedings.

6.5 This SI will also bring into force the revised Interception Code of Practice, in accordance with the provisions of the Investigatory Powers Act 2016 ("IPA"). The revised Code provides guidance regarding Cloud-service providers and the enterprise services they provide to customers. The last SI to bring the Interception Code of Practice into force was the Investigatory Powers Act (Codes of Practice) Regulations 2018 (SI 2018/355).

6.6 Paragraph 6 of Schedule 7 to the IPA sets out the effect of a codes of practice issued pursuant to the Act. A person must have regard to a code when exercising any functions to which the codes relate. The code is admissible as evidence and a court or tribunal may take into account a failure to have regard to it.

7. Policy background

What is being done and why?

The revised CHIS Code:

Reflects the amendments made to RIPA by the CHIS Act on CCAs:

7.1 The revised CHIS Code has been updated to reflect the new provisions in the CHIS Act covering the way that CCAs must be authorised. Chapter 6 (a new chapter) of the revised Code: provides details on the authorisation criteria and procedures to be followed and stipulates the process for notifying CCA authorisations to Judicial Commissioners at the Investigatory Powers Commissioner's Office ("IPCO"). This includes the information to be provided in an application for CCA, and the criteria for the review, renewal, and cancellation of such authorisations.

Sets out the criteria for assessing the necessary and proportionate grounds that need to be considered before granting CCA:

7.2 Chapter 3 of the revised Code provides guidance on the criteria for assessing whether a criminal conduct authorisation under section 29B of RIPA is both necessary and proportionate. This includes listing the grounds on which an authorisation is necessary and the elements of proportionality that should be considered before granting an authorisation. There is also a requirement on public authorities to ensure that any criminal conduct to be authorised is compliant with the relevant Articles of the European Convention on Human Rights and the Human Rights Act 1998.

Provides guidance on the enhanced safeguards that are in place for the authorisation of children or vulnerable adults as CHIS:

7.3 The updates to Chapter 4 of the revised Code make clear that children or vulnerable adults can only be authorised in exceptional circumstances and provides additional detail on the safeguards that are in place. It also references the enhanced risk assessment process set out in the Regulation of Investigatory Powers Act (Juveniles) Order 2000. The revised CHIS Code provides that public authorities must inform IPCO within seven working days of a CHIS authorisation of a vulnerable adult or juvenile source.

Provides clarity on the authorisation process for the "use or conduct" of CHIS.

7.4 Chapter 5 includes further guidance on the granting, renewal, and cancellations of use or conduct authorisations. Provides guidance on how sensitive information must be handled, retained, and deleted: This includes legal privilege, applications to acquire material relating to confidential journalistic information and journalists' sources. Chapter 9 has been strengthened, with more effective safeguards than in the previous Code.

The revised Interception Code:

7.5 The proposed change covers HMG's position on Cloud-service providers and the enterprise services they provide to customers. Enterprise services are defined as companies, academic institutions, non-profit organisations, government agencies, and similar entities that pay cloud-service providers to store and/or process their organisation's electronic communications and other records. It also covers the

circumstances in which an Intercepting Authority[1] should serve a warrant on either the Cloud-service provider or the enterprise customer.

7.6 The Interception Code provides guidance for law enforcement agencies, the UK Intelligence Community ("UKIC") and public authorities who exercise such powers. It sets out additional safeguards as to how the powers already in primary legislation should be exercised.

7.7 The proposed changes to the Interception Code focus on Cloud-service providers and the enterprise services they provide to customers, and the circumstances in which an Intercepting Authority should serve a warrant on either the Cloud-service provider or the enterprise customer. These changes will bring much needed clarity for US Communications Service Providers ("CSPs") and UK Telecommunications Operators (TOs) who are impacted by enterprise service issues.

7.8 The revised Interception Code does not change existing departmental policy or the legislative provisions that underline the use and conduct of interception. As stated above, the Interception Code provides guidance for best practice and outlines additional safeguards to those set out in relevant legislation.

8. European Union Withdrawal and Future Relationship

8.1 These Regulations do not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

The revised CHIS Code

10.1 A public consultation was carried out between 13 December 2021 and 6 February 2022 to seek views on the revised CHIS Code of Practice, pursuant to section 71(3) of RIPA. In total, 10 separate responses were received from 9 respondents. These responses came from a range of stakeholders including members of the public, legal representative bodies, charities, and interest groups.

10.2 The Home Office considered all responses. The primary focus was on the special considerations for the use of children and vulnerable adults as CHIS, and the safeguards and oversight for CCAs, especially the necessity and proportionality test required for CCAs together with the considerations on the European Convention on Human Rights. The Government's response to the CHIS Code of Practice consultation was published on 17 October 2022. Link: https://www.gov.uk/government/consultations/revised-covert-human-intelligence-source-chis-code-of-practice. Many of the suggestions have been incorporated in the final draft revised CHIS Code of Practice. A copy of the revised CHIS Code of Practice as laid in Parliament can be found here: https://www.gov.uk.

[1] The Intercepting Authorities, as outlined in the IPA, are: • The Director-General of the Security Service. • The Chief of the Secret Intelligence Service. • The Director of the Government Communications Headquarters (GCHQ). • The Director-General of the National Crime Agency (NCA handles interception on behalf of law enforcement bodies in England and Wales). • The Chief Constable of the Police Service of Scotland. • The Commissioner of the Police of the Metropolis (the Metropolitan Police Counter Terrorism Command handles interception on behalf of Counter Terrorism Units, Special Branches and some police force specialist units in England and Wales). • The Chief Constable of the Police Service of Northern Ireland. • The Commissioners of Her Majesty's Revenue & Customs (HMRC). • The Chief of Defence Intelligence.

The revised Interception Code

10.3 On 1 July 2022 the Government published a consultation on the revised Interception Code which ran for eight weeks, concluding on 15 September 2022. The Home office received one response to the public consultation from one US CSP. The Home Office has carefully considered all comments and suggestions made. The primary focus was on clarifying the circumstances in which an Intercepting Authority should serve a warrant on the Cloud Service Provider or enterprise. The Government's response to the Interception Code of Practice consultation was published on 17 October 2022. Link: https://draft-origin.publishing.service.gov.uk/government/consultations/revised-interception-of-communications-code-of-practice?token=eyJhbGciOiJIUzI1NiJ9.eyJzdWIiOiJhMzhhMjM4ZS05ZGMyLTRlYjMtYWFhMS03ZjkyYjc4M2RmYzIiLCJjb250ZW50X2lkIjoiYzJjZTk1ZmUtN2VjYi00NmY3LTkxMWItNTA0OWVjNDcyOGJjIiwiaWF0IjoxNjY1NzQ4MDc5LCJleHAiOjE2Njg0MzAwNzl9.pIg15kE1wLLTekCMC2FWjwz-EHD8Bxy578Ywt88wzLk&utm_campaign=govuk_publishing&utm_medium=preview&utm_source=share. Many of the suggestions have been incorporated in the final revised Interception Code Of Practice. A copy of the revised Interception Code of Practice as laid in Parliament can be found here: https://www.gov.uk.

11. Guidance

11.1 The revised CHIS Code brought into force by these Regulations contain guidance on the authorisation for the conduct or use of covert human intelligence sources by public authorities specified Schedule 1 of RIPA.

11.2 The revised Interception Code contains guidance on use of interception, including guidance about the effect of the Code.

11.3 Additional guidance may be provided by the Investigatory Powers Commissioner, who has a statutory duty to oversee the authorisation of CHIS and the techniques under RIPA and the interception of communications under the IPA.

12. Impact

12.1 There is no impact on business, charities, or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 A full Impact Assessment has not been prepared for these Regulations because the costs are expected to be minimal and relevant staffing numbers are not put into the public domain to protect sensitive capabilities. Any costs to law enforcement/intelligence agencies and public authorities related to transferring existing authorisations to the new regime introduced under the CHIS Act and Investigatory Powers Act 2016 will already have been incurred and the revised Interception Code does not incur any cost on UK Telecommunications Operators or US CSPs.

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 Secretary of State will keep under review the operation of the CHIS Code of Practice and Interception Code of Practice.

14.2 Section 71(7) of RIPA states that the Secretary of State may from time to time revise the whole or part of a Code of Practice and provides the framework for how any such revisions to the Code should be made.

14.3 Schedule 7(5) of the IPA, states that the Secretary of State may from time to time revise the whole or part of a code. Section 260 of the IPA requires the Secretary of State to report on the operation of the IPA, after a period of five years and six months after Royal Assent. The report must be published and laid before Parliament. In preparing the report, the Secretary of State must take into account any report on the operation of the IPA produced by a Select Committee of either House of Parliament.

14.4 The Investigatory Powers Commissioner will continue to have oversight of the use of the powers to which these codes apply, and adherence to the practices and processes described in it.

15. Contact

15.1 The Investigatory Powers Unit at the Home Office can be contacted with any queries regarding this legislation (CHIS code: RIPA@homeoffice.gov.uk, Interception code: InterceptionCodeOfPractice@homeoffice.gov.uk). Alternatively, you may contact the Home Office switchboard on 020 7035 4848.

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

15.3 The Minister of State for Security at the Home Office, The Rt. Hon. Tom Tugendhat MBE MP can confirm that this Explanatory Memorandum meets the required standard.