EXPLANATORY MEMORANDUM TO

THE INVESTIGATORY POWERS COMMISSIONER (OVERSIGHT FUNCTIONS) REGULATIONS 2022

2022 No. 1299

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 This instrument will amend the functions of the Investigatory Powers Commissioner ("IPC") as set out under section 229 of the Investigatory Powers Act 2016 ("IPA") to place on a statutory footing two areas where the IPC currently exercises oversight on a non-statutory basis. This will ensure that the IPC's activities are properly underpinned by statute, formalising these areas of oversight will ensure that the remit of the IPC is clearly established, as well as increasing public accountability.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Home Office has been working closely with IPCO (Investigatory Powers Commissioner's Office) regarding the drafting of this instrument. Given that the relevant oversight functions are already being carried out by the IPC on a non-statutory basis, there is no need to provide additional time for the IPC or Judicial Commissioners ("JCs") to adopt different patterns of behaviour with a delayed commencement date and so it is 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.

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 Minister of State, The Rt. Hon. Tom Tugendhat MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Investigatory Powers Commissioner (Oversight Functions) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 The issue of the IPC's oversight functions has been raised as part of the ongoing statutory review into the operation of the IPA. The IPC has made a specific request for

areas of non-statutory oversight to be formally placed on a statutory footing. Formalising these areas of oversight will ensure that the remit of the IPC is clearly established, as well as increasing public accountability.

6.2 These areas of oversight have been established and currently operate by way of agreement between the IPC and the organisations being overseen. In the 2020 Annual Report of the IPC, Sir Brian Leveson noted that "It is an important principle for me that my oversight responsibilities should clearly be defined and underpinned by statute. It is understandable that, exceptionally, interim positions do have to be found." It is appropriate that the IPC's functions are properly defined in law and that there is a clearly defined legal basis for the totality of the IPC's activities.

6.3 Section 239 of the IPA creates provision for the Secretary of State to make regulations to modify the functions of the IPC or any other JC. This allows for functions to be added to the main oversight functions as set out under section 229 of the IPA.

7. Policy background

What is being done and why?

7.1 The purpose of these Regulations is to amend the oversight functions of the IPC to include the responsibility for keeping under review (including by way of audit, inspection, and investigation) the exercise by public authorities in the two areas described below, where oversight was previously conducted on an agreed, non-statutory basis.

7.2 The areas of informal oversight that the IPC has identified as requiring formalising in statute include:

(a) oversight of the process operated by the Government Communications Headquarters (GCHQ) for determining whether information about vulnerabilities in technology should be disclosed ("The equites process"); and

(b) oversight of compliance by members and civilian staff of the Metropolitan Police Service and officers of the National Crime Agency with the guidance referred to as "The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees" ("The Principles1").

7.3 The equities process is the means through which decisions are taken on the handling of vulnerabilities found in technology. These vulnerabilities may represent a risk to the security of the UK or its allies. The equities process is operated by GCHQ on behalf of His Majesty's Government.

7.4 On 19 December 2019, the Prime Minister issued a Direction (the Investigatory Powers Commissioner (Directed Oversight Function) (the Principles) Direction 2020) ("the 2020 Direction") to the IPC to keep under review the compliance of certain persons with the Principles. In accordance with section 230(1) of the IPA, those persons included the UK's intelligence and security agencies and any part of His Majesty's Armed Forces, or of the Ministry of Defence, so far as engaging in intelligence activities. The 2020 Direction also gave the IPC similar oversight

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818306/20190718_The_Principles_relating_to_the_detention_and_interviewing_of_detainees_overseas.pdf

functions in respect of officers and staff of Counter-Terrorism Command (SO15), the Metropolitan Police Service and officers of the National Crime Agency, to be conducted on an agreed, non-statutory basis.

7.5 The purpose of the IPC (Oversight Functions) Regulations is to place these informal oversight functions on a statutory footing.

Explanations

What did any law do before the changes to be made by this instrument?

7.6 Section 229 of the IPA specifies areas where the IPC exercises oversight on a statutory basis. These changes modify the functions of the IPC to include responsibility for keeping under review (including by way of audit, inspection, and investigation) the exercise by public authorities in the two areas described above.

Why is it being changed?

7.7 The IPC has specifically requested that these specific areas of oversight be placed on a statutory footing. These changes will provide greater public accountability and enable the effective discharge of the IPC's responsibilities. As a statutory authority, the parameters of the IPC's remit are set by Parliament and the IPC has made clear that he considers formalising his oversight responsibilities as being in the best interests of transparency and robust oversight.

What will it now do?

7.8 This instrument will ensure that the IPC's activities are underpinned by statute, as well as promoting public accountability during the discharge of these functions. The current non-statutory arrangements have been noted by IPCO to be working well.

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 No consolidation is required.

10. Consultation outcome

10.1 A public consultation was not conducted, as the changes brought about by this instrument do not directly affect the general public and one was not required under the IPA. Stakeholders such as Metropolitan Police Service (Counter Terrorism Police), IPCO, NCA (National Crime Agency) and GCHQ have been consulted and are supportive.

11. Guidance

11.1 Guidance is not being provided with this instrument as it is not required.

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 it relates to maintenance of existing regulatory standards.

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 IPC will continue to have oversight of the use of the powers to which these regulations apply, and adherence to the practices and processes described in it.

14.2 Section 234 of the IPA requires the IPC to make an annual report to the Prime Minister about the carrying out of the activities of the JCs, which must be published, with a copy laid before Parliament.

15. Contact

15.1 The Investigatory Powers Unit at the Home Office can be contacted on 03001055970 or IPASI@homeoffice.gov.uk with any queries regarding this legislation.

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 MP, can confirm that this Explanatory Memorandum meets the required standard.