



House of Commons

House of Lords

Joint Committee on Human
Rights

Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023

Thirteenth Report of Session 2022–23

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to the report*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Publication

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Summary

The Government's draft of its proposed Remedial Order concerns the selection of confidential journalistic material collected under a bulk interception warrant for examination and retention. The relevant provisions of the Regulation of Investigatory Powers Act 2000 were found by the Grand Chamber of the ECtHR to be incompatible with Article 10 (freedom of speech) of the ECHR. The Government is seeking to use the delegated powers given to it by section 10 of the Human Rights Act 1998 to amend the relevant statute and remedy the incompatibility. Under the Human Rights Act 1998, the Government must lay before Parliament proposals for a draft Remedial Order before laying the draft, and this Committee is required under its Standing Orders to report on any such proposals.

The proposed draft Remedial Order would largely bring the UK's bulk interception regime into line with the requirements of Article 10 ECHR concerning journalistic material and sources of journalistic material by requiring prior independent authorisation for examination of such material and independent authorisation for the retention of such material. However, the proposed draft Remedial Order as currently drafted would allow the Investigatory Powers Commissioner to permit the retention of journalistic material (with conditions) even where there is no overriding public interest in doing so. We would therefore not be able to recommend that Parliament approve the Remedial Order in its current form.

We recommend that the Remedial Order be amended before it is laid in draft to remove the ability for the Commissioner to authorise the retention of journalistic material where there is not an overriding public interest in its retention.

1 Introduction

The proposed draft Remedial Order

1. The proposed draft Investigatory Powers Act 2016 (Remedial) Order 2023 (the Remedial Order) seeks to remedy an incompatibility found by the European Court of Human Rights (ECtHR) with the European Convention on Human Rights (ECHR) regarding how the UK's bulk interception regime approaches confidential journalistic material and sources of journalistic material.¹ The European Court of Human Rights (ECtHR) found against the UK Government in *Big Brother Watch and Others v UK* (the *Big Brother Watch* case).² In the judgment handed down by the Grand Chamber in May 2021, the ECtHR found various violations of Article 8 (right to respect for private and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) arising from the lack of independent authorisation for selecting journalistic material for examination or retaining such material.

2. The Government laid the proposed draft Remedial Order before both Houses of Parliament on 20 March 2023. An error was made when the Home Office initially tried to lay its proposal for a draft Remedial Order on this matter on 20 December 2022. This led to the proposal being withdrawn on 9 January 2023 before being re-laid, correctly, on 20 March 2023.

3. Freedom of the press is one of the essential foundations of a democratic society and is protected by Article 10.³ The protection of journalistic sources is one of the cornerstones of a free press.⁴ Interferences with journalistic material may have a chilling effect on sources assisting the press to inform the public about matters of public interest.⁵ The ECtHR has consistently found that interferences with the protection of journalistic sources can only be compatible with Article 10 if justified by an overriding requirement in the public interest and subject to legal procedural safeguards commensurate with the importance of the principles at stake.⁶

4. In the *Big Brother Watch* case, the ECtHR concluded that the UK's bulk communication interception regime under the Regulation of Investigatory Powers Act 2000 (RIPA) did not provide adequate legal safeguards to the interception of journalistic material. In particular, no prior independent authorisation was required for their collection. Similarly, no independent authorisation was required for the retention of such communications for reasons other than destruction. The Grand Chamber therefore found the UK to be in breach of Article 10. The ECtHR's relevant findings are set out more fully in Chapter 2, below. By the time the *Big Brother Watch* case was heard by the Grand

1 "Journalistic material" is defined by section 264(2) Investigatory Powers Act 2016 as "material created or acquired for the purposes of journalism". "Confidential journalistic material" is further defined in section 264(6) as journalistic material held in confidence or which the sender intends to be held in confidence by the intended recipient.

2 *Big Brother Watch and Others v United Kingdom* (Application Nos. 58170/13, 62322/14, and 24960/15)

3 See, e.g., *Godwin v UK* [GC] (application no. 17488/90) at [39]; *Financial Times LTD v UK* (application no. 821/03) at [59]; *Roemen and Schmit v Luxembourg* (application no. 51772/99) at [46]; *Tillack v Belgium* (application no. 20477/05) at [53];

4 See, e.g., *Godwin v UK* [GC] (application no. 17488/90) at [39]; *Financial Times LTD v UK* (application no. 821/03) at [59]; *Roemen and Schmit v Luxembourg* (application no. 51772/99) at [46]; *Tillack v Belgium* (application no. 20477/05) at [53]; *Big Brother Watch v UK* at [442]

5 See, e.g., *Big Brother Watch v UK* at [442]

6 *Big Brother Watch v UK* at [444]

Chamber, RIPA had already largely been repealed and replaced by the Investigatory Powers Act 2016 (IPA). However, the IPA does not contain the protections for journalistic material identified by the Grand Chamber to ensure compatibility with Article 10. The legislative and litigation background to the Remedial Order is set out more fully in Chapter 2 below.

5. The UK’s bulk communications interception regime therefore remains incompatible with Article 10 ECHR as regards the protection of journalistic material.⁷ The Home Office’s proposed draft Remedial Order seeks to correct these incompatibilities. The Home Office’s proposals are set out in Chapter 4, below.

6. We welcome the Government’s action in proposing the draft Remedial Order to rectify the incompatibility of the UK’s bulk communications interception regime as regards confidential journalistic material and sources of journalistic material, as protected by Article 10 (freedom of expression) ECHR.

The power to propose a Remedial Order

7. Section 10 of the Human Rights Act 1998 (HRA) provides that, where it appears to a Minister that a provision of legislation is incompatible with the UK’s obligations under the ECHR in light of a finding of the ECtHR, a Minister may remove the incompatibility through a Remedial Order. Remedial Orders are powerful legislative instruments, as they can be used to amend primary legislation.⁸ However, this power is tempered by safeguards to ensure appropriate usage, including the fact that they can only be used where there are “compelling reasons” for doing so,⁹ and they must be proactively approved by each House.¹⁰ In addition, Schedule 2 sets out timetables which so that, when using the non-urgent procedure, a proposal for a draft has to be laid before Parliament for 60 days, together with the additional required information, during which time representations can be made. If the Government does decide to proceed, it will then lay a draft Order, accompanied by a statement responding to representations and explaining what changes, if any, have been made to the draft in consequence.

Role of the Joint Committee on Human Rights

8. The Standing Orders of the Joint Committee on Human Rights (JCHR) requires the Committee to report to each House whether we recommend that a draft order in the same terms as the proposal should be laid before Parliament.¹¹ We may also report on any matter arising from our consideration of the proposal.¹² In addition, we are required to report on the technical compliance of a proposed draft Remedial Order with the procedural requirements of Schedule 2 of the HRA and determine whether the special attention of each House should be drawn to the order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (JCSI).¹³

7 For the purposes of this report, ‘journalistic material’ is used to cover both ‘confidential journalistic material’ and ‘sources of journalistic material’.

8 [Human Rights Act 1998](#), Schedule 2 para 1(2)

9 [Human Rights Act 1998](#), section 10

10 [Human Rights Act 1998](#), Schedule 2 para 2

11 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 152B; House of Lords, [Standing Orders of the House of Lords](#), Public Business 2021, HL Paper 232, S.I. No. 73(1)(c)

12 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 152B

13 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 152B(2)(c)

9. We issued a call for evidence on the Government’s proposed draft Remedial Order on 23 March 2023.¹⁴ We received no responses. We are grateful to the Home Office for the helpful approach of its staff while we scrutinised the proposed draft of the Remedial Order.

Matters for consideration

10. When considering a proposal for a draft Remedial Order, the Committee generally considers:

- Whether the conditions for making a Remedial Order under section 10 and Schedule 2 HRA have been met;
- Whether the Government has compelling reasons to remedy the incompatibility by way of Remedial Order;
- Whether the procedure adopted by the Government for making the Remedial Order (i.e. urgent or non-urgent) is appropriate in the circumstances;
- Whether the criteria of technical propriety applied by the Joint Committee on Statutory Instruments are satisfied;
- Whether the Government has produced the required information to our Committee and effectively responded to other requests for information from the Committee;
- Whether the proposed draft Order would remedy the incompatibility with Convention rights identified by the court.

14 Joint Committee on Human Rights, [Call for evidence: Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#)

2 Investigatory powers and the need for a Remedial Order

Bulk interception

11. Untargeted interception, also known as bulk interception, intercepts communications on the basis of the bearer of the communication, rather than targeting the sender or recipients of a communication in particular. Such bulk interception classically involves the interception of communications travelling along a particular route or cable, or carried by a particular telecommunications operator.¹⁵ We understand that various filters are applied to the intercepted communications and data to determine which are the most likely to have potential intelligence value.¹⁶ Authorised human analysts can then apply search terms or ‘selectors’ to select communications for actual examination.¹⁷

Legislative background: Regulation of Investigatory Powers Act 2000

12. The legislation governing warrants for bulk interceptions of communications for the purposes of the Big Brother Watch case was the Regulation of Investigatory Powers Act 2000 (RIPA).

13. Section 1 RIPA made interception of any communication in the course of transmission unlawful unless it was done in accordance with a warrant. Section 5 gave the Secretary of State the power to issue a warrant authorising interception where necessary in the interests of national security, to prevent or detect serious crime, or to safeguard the economic well-being of the UK. The Secretary of State could only authorise a warrant if doing so was proportionate to what the warrant sought to achieve. Section 8 set out two types of warrants and their relevant requirements: targeted intercept warrants (section 8(1)) and untargeted intercept warrants (section 8(4)).

14. Warrants for the bulk interception of communications would be issued under section 8(4) RIPA. Such warrants were for the interception of “external communications” for one of the reasons given in section 5. An ‘external communication’ was defined as a communication sent or received outside the British Islands.¹⁸ The required content of an application for a bulk warrant was set out in RIPA and the statutory guidance entitled *Interception of Communications: Code of Practice (IC Code)*.¹⁹ When issuing a warrant under section 8(4), the Secretary of State had to set out a description of the intercepted material they considered it necessary to examine and that they considered the examination of the material to be necessary for one of the reasons given in section 5.²⁰

15. RIPA itself did not include any specific safeguards for journalistic material. However, the IC Code did set out some limited additional safeguards. In the case of selection of communications for examination, for example, the IC Code variously required

15 Home Office, [Interception of Communications: Code of Practice](#) (December 2022), para 6.8

16 *Ibid*, para 6.6

17 *Ibid*, para 6.6; *Big Brother Watch* case at [382]

18 [Regulation of Investigatory Powers Act 2000](#), section 20

19 [Regulation of Investigatory Powers Act 2000](#), section 8. The *Interception of Communications Code of Practice* in force at the relevant time on the facts of the case was issued in 2016: Home Office, [Interception of Communications: Code of Practice](#) (January 2016), paras 6.8 - 6.18

20 [Regulation of Investigatory Powers Act 2000](#), section 8(4)(b)

“consideration” to be given to interceptions which may have intercepted confidential journalistic information.²¹ In the case of retention of confidential material, for example, the IC Code stated that such material should only be retained where it was necessary and proportionate to do so,²² and required the IC Commissioner to be notified of the retention of such material “as soon as reasonably practicable”.²³ Anyone exercising or performing any power covered by the IC Code was required to have regard to its provisions.²⁴

Litigation history

16. Various aspects of the UK’s bulk interception regime were challenged before the Grand Chamber of the ECtHR in the *Big Brother Watch* case. In particular, the compatibility of the bulk interception warrant regime under section 8(4) of RIPA was challenged on the grounds of Articles 8 (right to private and family life) and 10 (freedom of expression) of the ECHR. The Grand Chamber of the ECtHR handed down its judgment in May 2021.

Incompatibility of the bulk interception regime with Article 8

17. The Grand Chamber concluded that the bulk interception regime under section 8(4) breached Article 8 ECHR. Although the ECtHR acknowledged the UK regime had built-in safeguards, including some “robust ones”, the regime as a whole did not contain sufficient “end-to-end” safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse.²⁵ This was in particular due to:

- the absence of independent authorisation of bulk interception. The Secretary of State alone had the power to issue a warrant, without reference to any body independent of the executive;²⁶
- the failure to require the categories of selectors to be included in an application for a warrant.²⁷ As a consequence, there was no possibility for their necessity and proportionality to be assessed at the authorisation stage.²⁸
- the failure to subject selectors linked to an individual to prior internal authorisation.²⁹

21 Home Office, [Interception of Communications: Code of Practice](#) (January 2016), paras 4.1, 4.2 and 4.26

22 Home Office, [Interception of Communications: Code of Practice](#) (January 2016), para 4.29

23 Home Office, [Interception of Communications: Code of Practice](#) (January 2016), para 4.31

24 [Regulation of Investigatory Powers Act 2000](#), section 72

25 *Big Brother Watch v UK* case at [425]

26 *Big Brother Watch v UK* case at [377]

27 *Big Brother Watch v UK* case at [383] and [391]

28 *Big Brother Watch v UK* case at [381]

29 *Big Brother Watch v UK* case at [383] and [391]

18. As a result, the ECtHR found that the bulk interception warrant regime under section 8(4) did not meet the ‘quality of law’ requirement,³⁰ and was incapable of keeping interferences with Article 8 rights to what was “necessary in a democratic society.”^{31, 32}

Incompatibility of the bulk interception regime with Article 10

19. The Grand Chamber built on the above conclusions when considering whether the regime’s approach to journalistic material breached Article 10. The two particular weaknesses set out, below, added to the weaknesses identified by the ECtHR in its finding that there had been a breach of Article 8, resulted in the Grand Chamber concluding that the section 8(4) bulk interception regime also breached Article 10 as regards journalistic material.

Use of selectors

20. The Grand Chamber concluded that prior authorisation from an independent body was required for selectors in certain circumstances regarding journalistic material. It stated that:

[B]efore the intelligence services use selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms must have been authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether they were “justified by an overriding requirement in the public interest” and, in particular, whether a less intrusive measure might have sufficed to serve the overriding public interest.³³

21. The Grand Chamber found that the regime under section 8(4) failed to fulfil this requirement as, where the intention was to access confidential journalistic material, or that was highly probable in view of the use of selectors connected to a journalist, all that RIPA required was that the reasons for doing so and the perceived necessity and proportionality of doing so were documented clearly.³⁴

30 The text of Article 8 ECHR permits interference with Article 8 rights only where such interferences are ‘in accordance with the law’. The interference must therefore have some basis in domestic law. The ‘quality of law’ requirement is an extension of this, requiring that domestic law must be compatible with the rule of law, meaning it must be accessible and foreseeable in its application. See *Big Brother Watch* case at [332]. In the surveillance context, the test is closely linked to the question of necessity and requires domestic law to ensure that secret surveillance measures are applied only when necessary in a democratic society, in particular by providing adequate and effective safeguards against abuse. See *Big Brother Watch* case at [334].

31 *Big Brother Watch v UK* case at [426]

32 The text of Article 8 ECHR permits interference with Article 8 rights only where such interference is ‘necessary in a democratic society’ for one of the listed legitimate aims. A measure will only be necessary in a democratic society where it is proportionate to the legitimate aim pursued in light of a pressing social need. See *Dudgeon v United Kingdom* (application no. 7525/76) at [51]-[53].

33 *Big Brother Watch v UK* case at [448]

34 *Big Brother Watch v UK* case at [456]

Retention of journalistic material

22. The Grand Chamber concluded that authorisation from an independent body was also required for the retention of confidential journalistic material. It stated that:

If and when it becomes apparent that the communication or related communications data contain confidential journalistic material, their continue storage and examination by an analyst should only be possible if authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether continued storage and examination is “justified by an overriding requirement in the public interest.”³⁵

23. The Court concluded that the bulk interception regime under section 8(4) failed to fulfil this requirement because all that the IC Code required was that ‘particular consideration’ be given to any interception which might have involved interception of confidential journalistic material, including consideration of any possible mitigation steps.³⁶

Replacement for RIPA: Investigatory Powers Act 2016

24. By the time the *Big Brother Watch* case was heard by the Grand Chamber, the relevant provisions of RIPA had already largely been repealed and replaced by the Investigatory Powers Act 2016 (IPA). IPA is now the principal source of law concerning powers to intercept communications in bulk.³⁷

25. Section 3 IPA makes it an offence to intentionally intercept a communication in the UK in the course of its transmission without lawful authority. Part 6 IPA sets out the lawful authority for issuing ‘bulk warrants’. IPA makes provision for three kinds of bulk warrants: bulk interception warrants, bulk acquisition warrants, and bulk equipment interference warrants.

Bulk interception warrants—in general

26. Chapter 1 of Part 6 IPA sets out the requirements for bulk interception warrants of the type which are relevant to the facts of the *Big Brother Watch* case.

27. Under IPA, the Secretary of State may issue a bulk interception warrant where they consider it necessary in the interests of national security, preventing or detecting serious crime, or in the interests of the economic well-being of the UK so far as those interests are also relevant to interests of national security.³⁸ A bulk interception warrant’s main purpose must be to intercept “overseas-related” communications, namely communications sent by, or received by, individuals outside the British Islands.³⁹ The warrant can authorise the interception of such overseas-related communications, obtaining secondary data of such

35 *Big Brother Watch v UK* case at [450]

36 *Big Brother Watch v UK* case at [457]

37 N.B., IPA has separate provisions relating to the targeted interception of communications. See [Investigatory Powers Act 2016, Part 2](#)

38 [Investigatory Powers Act 2016](#), section 138

39 [Investigatory Powers Act 2016](#), section 136(1) - (3) and section 138(1)

communications,⁴⁰ and selection for examination of the intercepted content or secondary data.⁴¹ Amongst the information which must be included in an application for a warrant, the request must specify the operational purposes for which any intercepted content or secondary data obtained under the warrant may be selected for examination.⁴² The selection of intercepted content or secondary data for examination may only be carried out for the operational purposes specified in the warrant.⁴³

28. As part of the ‘double-lock’ authorisation procedure, a bulk interception warrant must be approved by a Judicial Commissioner before it can be issued by the Secretary of State.⁴⁴ Section 140 IPA sets out the requirements for a Judicial Commissioner reviewing the Secretary of State’s conclusions. These include reviewing the necessity and proportionality of the warrant as well as the necessity of the operational purposes specified in the warrant.⁴⁵ The Judicial Commissioner must apply the same principles as a court would on an application for judicial review.⁴⁶

Bulk interception warrants—additional requirements for journalistic information

29. Chapter 1 of Part 6 IPA also contains a sub-heading for additional safeguards and restrictions on the use of bulk interception warrants in specific scenarios. Section 154 IPA (additional safeguard for confidential journalistic material) sets out additional requirements in relation to bulk interception warrants in relation to journalistic material. Section 154 IPA requires only that, where an intercepted communication containing confidential journalistic material is retained after examination for purposes other than destruction, the Investigatory Powers Commissioner must be informed “as soon as is reasonably practicable”.⁴⁷

30. IPA makes no provision for prior independent authorisation for selectors which would or would be highly likely to make journalist material available for examination. IPA also does not require independent authorisation for the retention of confidential journalistic material. In light of this, although the Grand Chamber’s judgment in the *Big Brother Watch* case concerned the incompatibility of RIPA, IPA is also incompatible with the ECtHR’s judgment.

40 “Secondary data” is data associated with or attached to the communication. It includes: *systems data* - data which enables, facilitates, identifies or describes anything connected with enabling or facilitating the functioning of a postal service, a telecommunications system, a telecommunications service, a relevant system or any service provided by means of a relevant system; and *identifying data* - data which may be used to identify or assist in identifying any person, apparatus, system, service, event or location. See sections 137 and 263.

41 [Investigatory Powers Act 2016](#), section 136(4)

42 [Investigatory Powers Act 2016](#), section 142(3)

43 [Investigatory Powers Act 2016](#), section 152

44 [Investigatory Powers Act 2016](#), section 138(1)(g)

45 [Investigatory Powers Act 2016](#), section 140(1)

46 [Investigatory Powers Act 2016](#), section 140(2)

47 “Journalistic material” is defined by section 264(2) IPA as “material created or acquired for the purposes of journalism”. “Confidential journalistic material” is further defined in section 264(6) as journalistic material held in confidence or which the sender intends to be held in confidence by the intended recipient.

3 Procedural requirements

Compelling reasons and use of the remedial power

31. A remedial order can only be made when the Minister considers that there are “compelling reasons” for proceeding using this mechanism.⁴⁸
32. The Government’s justification for proceeding by way of remedial order are set out in the proposal paper laid before both Houses by the Home Office:

Ministers have considered the best way to do this [amend the incompatibility] 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.⁴⁹

33. In principle, any legislation being incompatible with Convention rights is a serious matter and should therefore be remedied swiftly. We accept the general point that there are pressures on the Government’s legislative timetable and therefore the risk that correcting the incompatibility via an appropriate Bill could result in delay.

34. **We are content that the Home Office has compelling reasons for proceeding by way of remedial order.**

Use of the non-urgent procedure

35. A remedial order can either be made by way of the urgent or non-urgent procedure. The Government has set out its reasons for using the non-urgent procedure in its proposal paper.⁵⁰ The Government states that they have balanced the importance of the right affected by the incompatibility with the potential impact on individuals of allowing the opportunity for scrutiny by Parliament and other interested parties.

36. **We are satisfied that the use of the non-urgent procedure is appropriate. We accept that the non-urgent procedure ensures there is an opportunity for representations to be made on the Government’s proposals.**

48 [Human Rights Act 1998, section 10\(2\)](#)

49 Home Office, [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), p 7

50 Home Office, [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), p 9

Joint Committee on Statutory Instruments

Grounds upon which the JCSI can draw an instrument to the attention of each House

37. The JCSI can draw a statutory instrument to the special attention of each House on the following relevant grounds:⁵¹

- the SI imposes a charge on the public revenues or contains provisions requiring payments to be made to a public authority;
- there appears to have been unjustifiable delay in the publication or laying of the SI before Parliament;
- there appears to be doubt whether the SI is *intra vires* or it appears to make some unusual or unexpected use of powers conferred by the statute under which it is made;
- that for any special reason the SI's form or purport calls for elucidation;
- the SI's drafting appears to be defective; or
- any other grounds which do not impinge on the SI's merits or the policy behind it.

Consideration of the JCSI grounds

38. **We are required to report on whether the proposal for the draft Remedial Order meets the criteria of the Joint Committee on Statutory Instruments. We are satisfied that it does so.**

51 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 151

4 Remedying the incompatibility

The Government's draft proposed Remedial Order

Legislative amendments

39. The Investigatory Powers Act 2016 (Remedial) Order 2023 would replace section 154 IPA in its entirety. This is the only amendment to legislation which would be made in order to bring the IPA into compliance with Article 10 ECHR.

40. As regards the potential selection of confidential journalistic material or sources of journalistic material for examination under bulk interception warrants, the new section 154 IPA:

- a) Requires the Investigatory Powers Commissioner to give prior approval to the use of criteria for selecting communications or secondary data for examination in two circumstances: first, where the purpose or one of the purposes of using the criteria is to identify any confidential journalistic material or to identify or confirm a source of journalistic information; and second, where the use of the criteria is highly likely to identify confidential journalistic material or confirm a source of journalistic information. (See new section 154(1) and (2)).
- b) Sets out the test to be applied by the Investigatory Powers Commissioner when deciding whether to give that prior approval for the use of the criteria. Two conditions must both be met for the Commissioner to give approval: first, the public interest in obtaining the information that would be examined as a result of using the criteria outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information; and second, there are no less intrusive means by which the information may be obtained. (See new section 154(3)).

41. As regards the retention of journalistic material, the new section 154 IPA:

- a) Requires the Investigatory Powers Commissioner to be notified “as soon as reasonably practicable” of the retention for purposes other than destruction of material containing confidential journalistic material or material that would identify or confirm a source of journalistic material. (See new section 154(4) and (5)).
- b) When informed of the retention of such material, the default position is that the Commissioner must either direct the material to be destroyed, or impose conditions on the use or retention of the material. (See new section 154(6)). The exception is where the Commissioner concludes that the public interest in retaining the material outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information. (See new section 154(8)). If this public interest test is met, the material can be retained or retained subject to whatever conditions the Commissioner may impose as they consider necessary to protect the public interest. (See new section 154(7)).

- c) Requires the Investigatory Powers Commissioner to have regard to any representations made by the Secretary of State or the relevant security agency about whether the Commissioner should direct the relevant material to be destroyed or impose conditions on its use or retention. The Commissioner is also empowered to require the Secretary of State or relevant security agency to make such representations. (See new section 154(9) read with section 153(14)).

Analysis

Independent and impartial decision-making body

42. The Remedial Order would bestow the functions of giving prior authorisation for selectors and authorisation for retention upon the Investigatory Powers Commissioner.⁵² The Investigatory Powers Commissioner's Office is an arm's-length body of the Home Office with its own budget and staff.⁵³ The Commissioner must hold or have held high judicial office,⁵⁴ and cannot be removed from office during their tenure except by a resolution of each House of Parliament or by the Prime Minister in limited circumstances such as bankruptcy.⁵⁵ **We are satisfied that the Commissioner is sufficiently independent and impartial to exercise the authorisation function.**

Prior authorisation for selection

43. The effect of the Remedial Order, as set out at paragraph 40, above, fulfils the requirements set out by the Grand Chamber.⁵⁶

44. **We are satisfied that the proposed draft Remedial Order would bring the bulk interception regime under the IPA in line with the requirements of Article 10 of the ECHR regarding prior authorisation, as set out by the Grand Chamber in the Big Brother Watch case.**

Authorisation for retention

45. The Grand Chamber was clear in its judgment that any “interference with the protection of journalistic sources cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”⁵⁷ The judgment went on to state that:

[I]f and when it becomes apparent that the communication or related communications data contain confidential journalistic matter, their continued storage and examination by an analyst should only be possible if authorised by a judge or other independent and impartial decision-making

52 See, *mutatis mutandis* the Interception of Communications Commissioner, as discussed in judgment of both the First Section and the Grand Chamber in the *Big Brother Watch* case. The Investigatory Powers Commissioner replaced the Interception of Communications Commissioner. See, also, *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2022] EWHC 1630 (Admin)

53 Investigatory Powers Commission's Office and Office for Communications Data Authorisations, [Annual Report of the Investigatory Powers Commission](#) (March 2023)

54 [Investigatory Powers Act 2016](#), section 227 (2)

55 [Investigatory Powers Act 2016](#), section 228(4) and (5)

56 See, in particular, *Big Brother Watch* case at [448]

57 At [444]

body invested with the power to determine whether continued storage and examination is “justified by an overriding requirement in the public interest”.⁵⁸

46. The draft of the proposed Remedial Order does not currently meet this requirement. As currently drafted, in circumstances where the public interest test in (8) is *not* met, the Investigatory Powers Commissioner is empowered by (6) either to direct that the relevant material is destroyed or *impose one or more conditions as to the use or retention of the relevant material*. No guidance is given on what these conditions might be. This contravenes the Grand Chamber judgment, which concluded that an independent decision-making body should only be able to authorise retention—whether or not with conditions—where it is justified by an overriding requirement in the public interest.

47. We are not satisfied that the proposal for the draft Remedial Order would bring the retention regime under the IPA in line with the requirements of Article 10, as set out by the Grand Chamber in the Big Brother Watch case. We recommend that the proposed draft be amended to reflect that the Investigatory Powers Commissioner must order the relevant material to be destroyed unless the public interest test is met. The Commissioner must not be empowered to authorise the retention of the relevant material—even with conditions—where the public interest test has not been met.

Conclusion

48. Subject to our recommendation regarding authorisation for retention, we are satisfied that the draft of the proposed Remedial Order would adequately address the incompatibilities with Article 10 (freedom of speech) identified by the Grand Chamber in the Big Brother Watch case concerning the examination and retention of journalistic material. We recommend that the Government proceeds to lay a draft order before both Houses once the Remedial Order has been modified in accordance with our recommendation concerning retention.

5 Other matters arising

Material selected for examination and retained since the Grand Chamber ruling

49. The Grand Chamber handed down its judgment in the *Big Brother Watch* case in May 2021. Any Remedial Order will not be made until later in 2023 at the earliest. As a result, the safeguards required under Article 10 for the examination and retention of journalistic material will have been absent for over two years.

50. It is not possible, in our view, to retrospectively remedy the use of selectors during the intervening years which may have caused journalistic material to be examined without prior authorisation. However, it is possible that some journalistic material has been retained following such examination without being subject to a public interest threshold.

51. We are unclear whether the Home Office or the Investigatory Powers Commissioner intends to review journalistic material retained by the security agencies before the Remedial Order is made, but we are of the view that such a review would be appropriate in order to minimise the adverse human rights consequences which may have arisen since the Grand Chamber's judgment in May 2021.

52. We recommend that the Home Office and the security agencies engage with the Investigatory Powers Commissioner so they can review any journalistic material which has been retained and remains retained before this Remedial Order is made to ensure that it meets the public interest test.

Future Remedial Orders

53. The Home Office did not supply as much detail as we would have liked concerning the decision-making process it used to reach its conclusions on the use of the non-urgent procedure and the existence of compelling reasons for proceeding by way of remedial order. The reasons given tended towards being generic and lacked explicit linkage to the specific circumstances in which this proposal is being made. For example, the Home Office asserted that 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”.⁵⁹ Similarly, the Home Office states that 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” without being specific about what the Home Office has determined the potential impact on individuals to be.⁶⁰

59 Home Office, [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 \(March 2023\)](#), p 7

60 Home Office, [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 \(March 2023\)](#), p 9

54. Departments must give us as much detail as they can when explaining their decisions regarding the use of delegated powers to make Remedial Orders under the Human Rights Act. They must provide specific information about how they came to the relevant conclusions about the compelling reasons for using the Remedial Order powers, and whether or not the urgent procedure should be used.

Conclusions and recommendations

Introduction

1. We welcome the Government's action in proposing the draft Remedial Order to rectify the incompatibility of the UK's bulk communications interception regime as regards confidential journalistic material and sources of journalistic material, as protected by Article 10 (freedom of expression ECHR). (Paragraph 6)

Procedural requirements

2. We are content that the Home Office has compelling reasons for proceeding by way of remedial order. (Paragraph 34)
3. We are satisfied that the use of the non-urgent procedure is appropriate. We accept that the non-urgent procedure ensures there is an opportunity for representations to be made on the Government's proposals. (Paragraph 36)
4. We are required to report on whether the proposal for the draft Remedial Order meets the criteria of the Joint Committee on Statutory Instruments. We are satisfied that it does so. (Paragraph 38)

Remedying the incompatibility

5. We are satisfied that the Commissioner is sufficiently independent and impartial to exercise the authorisation function. (Paragraph 42)
6. We are satisfied that the proposed draft Remedial Order would bring the bulk interception regime under the IPA in line with the requirements of Article 10 of the ECHR regarding prior authorisation, as set out by the Grand Chamber in the Big Brother Watch case. (Paragraph 44)
7. We are not satisfied that the proposal for the draft Remedial Order would bring the retention regime under the IPA in line with the requirements of Article 10, as set out by the Grand Chamber in the Big Brother Watch case. (Paragraph 47)
8. *We recommend that the proposed draft be amended to reflect that the Investigatory Powers Commissioner must order the relevant material to be destroyed unless the public interest test is met. The Commissioner must not be empowered to authorise the retention of the relevant material—even with conditions—where the public interest test has not been met.* (Paragraph 47)
9. Subject to our recommendation regarding authorisation for retention, we are satisfied that the draft of the proposed Remedial Order would adequately address the incompatibilities with Article 10 (freedom of speech) identified by the Grand Chamber in the Big Brother Watch case concerning the examination and retention of journalistic material. (Paragraph 48)

10. *We recommend that the Government proceeds to lay a draft order before both Houses once the Remedial Order has been modified in accordance with our recommendation concerning retention. (Paragraph 48)*

Other matters arising

11. *We recommend that the Home Office and the security agencies engage with the Investigatory Powers Commissioner so they can review any journalistic material which has been retained and remains retained before this Remedial Order is made to ensure that it meets the public interest test. (Paragraph 52)*
12. *Departments must give us as much detail as they can when explaining their decisions regarding the use of delegated powers to make Remedial Orders under the Human Rights Act. They must provide specific information about how they came to the relevant conclusions about the compelling reasons for using the Remedial Order powers, and whether or not the urgent procedure should be used. (Paragraph 54)*

Formal minutes

Wednesday 7 June 2023

Hybrid Meeting

Members present

Joanna Cherry KC MP, in the Chair

Lord Alton of Liverpool

Lord Dholakia

Lord Henley

Dr Caroline Johnson MP

Baroness Kennedy of the Shaws

Baroness Lawrence of Clarendon

Baroness Meyer

Draft Report (*Proposal for a draft Investigatory Powers Act 2016 (Remedial) Order 2023*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 54 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjournment

Adjourned until 14 June at 2.45pm

Declarations of interests

Lord Alton of Liverpool (Crossbench)

- Patron or Trustee of a number of charities or NGOs involved in the promotion of human rights domestically and internationally, officer or vice-chair of a number of APPGs

Lord Dholakia (Liberal Democrat)

- No relevant interests to declare

Lord Henley (Conservative)

- No relevant interests to declare

Baroness Kennedy of the Shaws KC (Labour)

- Director, International Bar Association's Institute of Human Rights; Patron, Rights and Security International; practitioner at the English Bar.

Baroness Lawrence of Clarendon (Labour)

- No relevant interests to declare

Baroness Meyer (Conservative)

- No relevant interests to declare

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2022–23

Number	Title	Reference
1st	Legislative Scrutiny: Public Order Bill	HC 351 HL 16
2nd	Proposal for a draft State Immunity Act 1978 (Remedial) Order	HC 280 HL 42
3rd	The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976	HC 270 HL 43
4th	Protecting human rights in care settings	HC 216 HL 51
5th	Legislative Scrutiny: National Security Bill	HC 297 HL 73
6th	Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill	HC 311 HC 79
7th	Draft State Immunity Act 1978 (Remedial) Order 2022	HC 895 HL 103
8th	Draft Bereavement Benefits (Remedial) Order 2022: Second Report	HC 834 HL 108
9th	Legislative Scrutiny: Bill of Rights Bill	HC 611 HL 132
10th	Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022–2023	HC 1088 HL 157
11th	Human Rights Ombudsperson	HC 222 HL 175
12th	Illegal Migration Bill report	HC 1241 HL 208
1st Special Report	Human Rights Act Reform: Government Response to the Committee's Thirteenth Report of Session 2021–22	HC 608
2nd Special Report	Legislative Scrutiny: Public Order Bill: Government Response to the Committee's First Report	HC 649
3rd Special Report	Protecting Human Rights in Care Settings: Government Response to the Committee's Fourth Report	HC 955
4th Special Report	Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill: Government response to the Committee's Sixth report	HC 1179

5th Special Report	The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976: Government Response to the Committee’s Third Report	HC 1180
6th Special Report	Legislative Scrutiny: Strikes (Minimum Service Levels) Bill: Government response to the Committee’s Tenth Report	HC 1315
7th Special Report	Human Rights Ombudsperson: Government Response to the Committee’s Eleventh Report	HC 1489

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government’s Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90
8th	Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners	HC 594 HL 91
9th	Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement	HC 885 HL 112
10th	Legislative Scrutiny: Judicial Review and Courts Bill	HC 884 HL 120
11th	Legislative Scrutiny: Nationality and Borders Bill (Part 5)— Modern slavery	HC 964 HL 135
12th	Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders	HC 1007 HL 143
13th	Human Rights Act Reform	HC 1033 HL 191
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee’s Fourteenth Report of Session 2019–21	HC 545

Number	Title	Reference
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911
8th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People: Government Response to the Committee's Sixth Report	HC 983
9th Special Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing: Government Response to the Committee's Third Report of Session 2019–21	HC 1198
10th Special Report	Legislative Scrutiny: Nationality and Borders Bill: Government Responses to the Committee's Seventh, Ninth, Eleventh and Twelfth Reports	HC 1208

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90

Number	Title	Reference
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911