



House of Commons

House of Lords

Joint Committee on Human
Rights

Draft Investigatory Powers Act 2016 (Remedial) Order 2023: Second Report

First Report of Session 2023–24

*Report, together with formal minutes relating
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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Committee staff

The current staff of the Committee are Amna Bokhari (Commons Second Clerk), Glenn Chapman (Committee Operations Officer), Alyssa Curry (Deputy Counsel), Thiago Simoes Froio (Committee Specialist), Alexander Gask (Deputy Counsel), Rhiannon Hollis (Commons Clerk), Alasdair Love (Lords Clerk), Niamh McEvoy (Committee Specialist), George Perry (Media Officer) and Hafsa Saeed (Committee Operations Manager)

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 4710; the Committee's email address is jchr@parliament.uk.

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Summary

The Draft Investigatory Powers Act 2016 (Remedial) Order 2023 ('the Draft Remedial Order') concerns the selection for examination and retention of confidential journalistic material which has been collected under a bulk interception warrant.

In May 2021, the relevant provisions of the Regulation of Investigatory Powers Act 2000 were found by the Grand Chamber of the European Court of Human Rights ('ECtHR') to be incompatible with Article 10 (freedom of speech) of the European Convention on Human Rights ('ECHR'). The Government is seeking to use the delegated powers given to it by section 10 of the Human Rights Act 1998 ('HRA') to amend the relevant statute and remedy the incompatibility. Under HRA, the Government must lay the Draft Remedial Order before Parliament for approval, and Standing Orders require this Committee to report to Parliament with its recommendation regarding whether the Draft Remedial Order should be approved.

The Draft Remedial Order will bring the UK's bulk interception regime into line with the requirements of Article 10 ECHR concerning the protection of journalistic material and sources of journalistic material. It will do so by requiring prior independent authorisation for examination of such material except in urgent cases, and independent authorisation for the retention of such material.

We recommend that the Draft Remedial Order be approved by both Houses of Parliament.

1 Introduction

The draft Remedial Order

1. The draft Investigatory Powers Act 2016 (Remedial) Order 2023 (‘the Draft 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 ‘Bulk interception’ is the process by which the UK’s security agencies collect a large volume of communications before selecting specific communications to be reviewed.² The ECtHR found against the UK Government in *Big Brother Watch and Others v UK* (‘the *Big Brother Watch* case’).³ 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 ECHR arising from the lack of independent authorisation for selecting journalistic material for examination or retaining such material.

2. Freedom of the press is one of the essential foundations of a democratic society and is protected by Article 10 (freedom of expression).⁴ The protection of journalistic sources is one of the cornerstones of a free press.⁵ Interferences with journalistic material may have a chilling effect on sources assisting the press to inform the public about matters of public interest.⁶ 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.⁷

3. 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 Chamber, RIPA had already largely been repealed and replaced by the Investigatory Powers Act 2016 (‘IPA’).

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 Home Office, [Investigatory Powers Bill: Factsheet - Bulk Interception](#) (October 2015), pg 1, accessed 18 December 2023

3 *Big Brother Watch and Others v United Kingdom* (application nos. 58170/13, 62322/14, and 24960/15)

4 See, e.g., *Godwin v UK* [GC] (application no. 17488/90) at [39]; *Financial Times LTD v UK* (application no. 821/103) at [59]; *Roemen and Schmit v Luxembourg* (application no. 51772/99) at [46]; *Tillack v Belgium* (application no. 20477/05) at [53]

5 See, e.g., *Godwin v UK* [GC] (application no. 17488/90) at [39]; *Financial Times LTD v UK* (application no. 821/103) 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]

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

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

However, 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.

4. The UK’s bulk communications interception regime therefore remains incompatible with Article 10 ECHR as regards the protection of journalistic material.⁸ The Home Office’s Draft Remedial Order seeks to correct these incompatibilities. The Home Office’s proposals are set out in Chapter 4, below.

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

The power to lay a draft remedial order

6. 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.⁹ 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,¹⁰ and they must be approved by each House.¹¹ In addition, Schedule 2 sets out timetables which provide that, when using the non-urgent procedure, a proposal for a draft remedial order must be laid before Parliament, together with certain additional information, for 60 sitting days, during which time representations can be made regarding the proposals. If the Government decides to proceed following those representations, it can then lay a draft remedial order, accompanied by a statement responding to any representations and explaining what changes, if any, have been made to the draft in consequence.

Role of the Joint Committee on Human Rights

7. The Standing Orders of the House of Commons relating to the Joint Committee on Human Rights (‘JCHR’) require the Committee to report to the House of Commons on whether we recommend that a draft remedial order should be approved.¹² We may also report on any matter arising from our consideration of the draft.¹³ In addition, we are required to report on the technical compliance of a 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 remedial order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (‘JCSI’).¹⁴ We

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

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

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

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

12 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 152B(3)

13 House of Commons, [Standing Orders, Public Business 2021](#), HC 804, S.O. No. 152B(3)

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

are also charged under the Standing Orders of the House of Lords to consider remedial orders, to perform such functions as would otherwise be carried out by the JCSI, and to report to the House of Lords on draft remedial orders.¹⁵

8. The Government laid its Proposed Draft Remedial Order ('the Proposed Draft Order') before both Houses on 20 March 2023. We issued a call for evidence on the Proposed Draft Order on 23 March 2023,¹⁶ to which we received no responses. We published our report scrutinising the Proposed Draft Order on 13 June 2023 ('our First Report').¹⁷ The Government subsequently laid its Draft Remedial Order before both Houses on 18 October 2023.

Matters for consideration

9. When considering a draft remedial order, the Committee generally considers:
- Whether the conditions for laying 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 JCSI 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 draft remedial order would remedy the incompatibility identified by the court.

15 House of Lords, [Standing Orders of the House of Lords Relating to Public Business 2021](#), HL Paper 232, S.O. 73(c); House of Lords, [Companion to the Standing Orders and Guide to the Proceedings of the House of Lords](#), 26th Edition, para 10.25

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

17 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210

2 Investigatory powers and the need for a remedial order

Bulk interception

10. 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 generally involves the indiscriminate interception of communications travelling along a particular route or cable, or carried by a particular telecommunications operator.¹⁸ 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.¹⁹ Authorised human analysts can then apply search terms or ‘selectors’ to select communications for actual examination.²⁰

Legislative background: Regulation of Investigatory Powers Act 2000

11. 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’).

12. 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: targeted intercept warrants (section 8(1)) and untargeted intercept warrants (section 8(4)).

13. Warrants for the bulk interception of communications were 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.²¹ The required content of an application for a bulk warrant was set out in RIPA and the statutory guidance relating to it was entitled *Interception of Communications: Code of Practice* (the ‘IC Code’).²² 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 certify that they considered the examination of the material to be necessary for one of the reasons given in section 5.²³

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

19 *Ibid*, para 6.6

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

21 [Regulation of Investigatory Powers Act 2000](#), section 20. ‘British Islands’ are defined in Schedule 1 of the [Interpretations Act 1978](#) as “the United Kingdom, the Channel Islands and the Isle of Man”.

22 [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

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

14. 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 required “consideration” to be given to interceptions which may have intercepted confidential journalistic information.²⁴ 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,²⁵ and required the IC Commissioner to be notified of the retention of such material “as soon as reasonably practicable”.²⁶ Anyone exercising or performing any power covered by the IC Code was required to have regard to its provisions.²⁷

Litigation history

15. 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

16. The Grand Chamber concluded that the bulk interception regime under section 8(4) breached Article 8 ECHR. Although the ECtHR acknowledged that the UK regime had built-in safeguards, including some “robust ones”, it found that 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.²⁸ 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;²⁹
- the failure to require the categories of selectors to be included in an application for a warrant.³⁰ As a consequence, there was no possibility for their necessity and proportionality to be assessed at the authorisation stage;³¹ and
- the failure to subject selectors linked to an individual to prior internal authorisation.³²

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

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

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

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

28 *Big Brother Watch v UK* at [425]

29 *Ibid* at [377]

30 *Ibid* at [383] and [391]

31 *Ibid* at [381]

32 *Ibid* at [383] and [391]

17. As a result, the EctHR found that the bulk interception warrant regime under section 8(4) did not meet the ‘quality of law’ requirement,³³ and was incapable of keeping interferences with Article 8 rights to what was “necessary in a democratic society”.^{34,35}

Incompatibility of the bulk interception regime with Article 10

18. 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 weakness 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

19. 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.³⁶

20. 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 probably 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.³⁷

33 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’ 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 v UK* 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 v UK* at [334]

34 *Big Brother Watch v UK* at [426]

35 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 UK* (application no. 7525/76) at [51]-[53]

36 *Big Brother Watch v UK* at [448]

37 *Ibid* at [456]

Retention of journalistic material

21. 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 continued 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”.³⁸

22. 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.³⁹

Replacement for RIPA: Investigatory Powers Act 2016

23. 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.⁴⁰

24. 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 sets out the conditions for issuing ‘bulk warrants’. These bulk warrants constitute lawful authority for interception and therefore those acting in accordance with the terms of such a warrant do not commit an offence under section 3 IPA. 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

25. 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.

26. 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.⁴¹ 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.⁴² The warrant can authorise

38 Ibid at [450]

39 Ibid at [457]

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

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

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

the interception of such overseas-related communications, obtaining secondary data from such communications,⁴³ and selection for examination of the intercepted content or secondary data.⁴⁴ 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.⁴⁵ The selection of intercepted content or secondary data for examination may only be carried out for the operational purposes specified in the warrant.⁴⁶

27. 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.⁴⁷ 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.⁴⁸ The Judicial Commissioner must apply the same principles as a court would on an application for judicial review.⁴⁹

Bulk interception warrants - additional requirements for journalistic information

28. 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 some 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”.⁵⁰

29. IPA makes no provision for prior independent authorisation for selectors which would, or would be highly likely to, make journalistic 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.⁵¹

43 “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 [Investigatory Powers Act 2016](#), sections 137 and 263

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

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

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

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

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

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

50 “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.

51 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), page 6

3 Procedural requirements

Accompanying statement

30. When a draft remedial order is laid before Parliament for the second 60-day scrutiny period, it must be accompanied by a statement containing a summary of any representations made during the first 60-day scrutiny period.⁵² If the proposed draft remedial order has been changed as a result of those representations, the accompanying statement must also include details of those changes.⁵³

31. In the case of the Draft Remedial Order, the Home Office has provided an accompanying statement which sets out that representations were received from the JCHR via our First Report, the Investigatory Powers Commissioner’s Office (‘IPCO’), and the Security and Intelligence Agencies.⁵⁴ It summarises those representations and notes how the Draft Remedial Order has been amended as a result. The accompanying statement also details typographical and consequential amendments to the Draft Remedial Order.⁵⁵

32. We are satisfied that the Government has complied with the procedural requirement to summarise the representations it has received and to detail any changes that have been made to the Draft Remedial Order as a result of those representations.

Compelling reasons and use of the remedial power

33. A remedial order can only be made when the Minister considers that there are “compelling reasons” for proceeding using this mechanism.⁵⁶

34. We noted in our First Report that the Government’s justification for proceeding by way of remedial order was set out in the paper laid before both Houses by the Home Office in March 2023:⁵⁷

Ministers have considered the best way to [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

52 [Human Rights Act 1998](#), Schedule 2, para 3

53 [Human Rights Act 1998](#), Schedule 2, para 3(2)(b)

54 Home Office, [The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023 \(HC 1264, HL Paper 210\): Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023 \(October 2023\)](#)

55 Home Office, [The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023 \(HC 1264, HL Paper 210\): Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023 \(October 2023\)](#), paras 6 and 7

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

57 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210, para 32

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.⁵⁸

35. In principle, we agreed in our First Report that the fact of any legislation being incompatible with Convention rights is a serious matter and should therefore be remedied swiftly.⁵⁹ We accepted 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.⁶⁰

36. A new Investigatory Powers (Amendment) Bill was subsequently announced in the King's Speech on 7 November 2023⁶¹ and introduced into Parliament on 8 November 2023.⁶² The Home Office has confirmed to us in correspondence that the contents of the Draft Remedial Order would be within scope of the Bill.⁶³ The Home Office explained that, at the time the Proposed Draft Order was laid in March 2023, the decision on whether the Bill would be included in the legislative programme for the fourth session of this Parliament had not yet been taken.⁶⁴ The Home Office maintains the view that proceeding by way of remedial order is the most expedient way to rectify the incompatibility, which has been pending since May 2021, in light of the differing "potential parliamentary timelines" for the Bill and the Remedial Order to complete their passages through Parliament.⁶⁵

37. We remain content that the Home Office has compelling reasons for proceeding by way of remedial order. We accept that, notwithstanding the introduction of the Investigatory Powers (Amendment) Bill, it remains appropriate in the circumstances for the Government to proceed by way of remedial order.

Use of the non-urgent procedure

38. A remedial order can either be made by way of the urgent or non-urgent procedure. The Government set out its reasons for using the non-urgent procedure in its proposal paper.⁶⁶ The Government stated that it has balanced the importance of the right affected by the incompatibility and the potential for more individuals to be impacted during the time taken by using the non-urgent procedure with the desirability of allowing an opportunity for the measures to be scrutinised by Parliament and other interested parties.

39. We remain 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.

58 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

59 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210, para 33

60 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210, para 33

61 HL Deb, 7 November 2023, [col 2](#) [Lords Chamber]

62 [Investigatory Powers \(Amendment\) Bill](#) [Lords] [Bill 3 (2023–24)]

63 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 18

64 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 17

65 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, paras 17 and 18

66 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

40. The JCHR is required by Standing Orders to consider whether the special attention of Parliament should be drawn to a draft remedial order on any of the grounds available to the JCSI.⁶⁷ The JCSI can draw a statutory instrument to the special attention of each House on the following relevant grounds:⁶⁸

- the statutory instrument 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 statutory instrument before Parliament;
- there appears to be doubt whether the statutory instrument 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 statutory instrument's form or purport calls for elucidation;
- the statutory instrument's drafting appears to be defective; or
- any other grounds which do not impinge on the statutory instrument's merits or the policy behind it.

Consideration of the JCSI grounds

41. **We are satisfied that we do not need to draw the Draft Remedial Order to the special attention of Parliament on any of the JCSI's grounds.**

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

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

4 Remediating the incompatibility

Representations on the Proposed Draft Order and Government responses

JCHR representations and Government responses

42. In our First Report, we recommended that the Draft Remedial Order should be amended to reflect the findings of the ECtHR in the *Big Brother Watch* case, namely that the independent and impartial decision-making body *must* order the relevant material to be destroyed unless the public interest test is met.⁶⁹ The Proposed Draft Order had empowered the Investigatory Powers Commissioner to authorise the retention of relevant material, subject to conditions, even where the public interest test had not been met.⁷⁰

43. The Government accepted our recommendation.⁷¹ The Draft Remedial Order has been amended so that it is explicit that the power to impose retention subject to conditions is only available where it is in the public interest that the journalistic material is retained (see new section 154(6) to (8)). If the public interest test has not been met, the material must be destroyed (see new section 154(6)).

44. We welcome the amendments made by the Government in response to our recommendation to amend the draft to require the Investigatory Powers Commissioner to order the destruction of the relevant material unless the public interest test is met.

Other representations and Government responses

45. The Home Office received representations from IPCO and the United Kingdom Intelligence Community (“UKIC”). These representations “questioned whether the proposed new section 154 should contain a process for the approval of the use of certain criteria for the selection for examination, or retention of material, in urgent circumstances.”⁷² The Home Office’s accompanying statement fails to disaggregate the representations of IPCO from UKIC.⁷³ It is therefore implied that the IPCO and UKIC expressed reasons for their views which were substantively similar and in favour of such a mechanism.

46. As a result of these representations, the Draft Remedial Order now includes a new section 154A (procedure where use of criteria approved by senior official) and an altered new section 154(2) accordingly.

69 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, *Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023*, HC 1264 / HL Paper 210, para 47; *Big Brother Watch* case at [450]

70 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, *Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023*, HC 1264 / HL Paper 210, para 46

71 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), paras 10 to 12

72 Home Office, *The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023* (HC 1264, HL Paper 210): *Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023* (October 2023), para 5

73 Home Office, *The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023* (HC 1264, HL Paper 210): *Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023* (October 2023), paras 4 and 5

The Government's Draft Remedial Order

47. The Investigatory Powers Act 2016 (Remedial) Order 2023 would replace section 154 IPA in its entirety. It would introduce a new section 154A IPA. It would also make consequential amendments to section 229 IPA.

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

- a) Requires the Investigatory Powers Commissioner (or a senior official in cases where the urgent procedure under new section 154A applies) 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 those criteria is to identify any confidential journalistic material or to identify or confirm a source of journalistic information (new section 154(1)(a)); or second, where the use of the criteria is highly likely to identify such material or identify or confirm such a source (new section 154(1)(b)).
- b) Sets out the test to be applied by the Investigatory Powers Commissioner (or the senior official in cases where the urgent procedure under new section 154A applies) when deciding whether to give that prior approval for the use of the criteria. Two conditions must both be met for approval to be given: 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 (new section 154(3)(a)); and second, there are no less intrusive means by which the information may reasonably be obtained (new section 154(3)(b)).

49. As a consequence of representations from UKIC and the IPCO, a new urgency procedure for prior authorisation by a senior official has been added to the Draft Remedial Order:

- a) New section 154(2)(b) read with new section 154A IPA would provide for a senior official to give prior authorisation instead of the Investigatory Powers Commissioner. The senior official could carry out this function when they consider there is an “urgent need to do so” (new section 154(2)(b)). “Urgent” is not defined. “Senior official” is defined as “a member of the Senior Civil Service or a member of the Senior Management Structure of Her Majesty’s Diplomatic Service.”⁷⁴
- b) In cases where a senior official has given such prior authorisation, the Secretary of State must inform the Investigatory Powers Commissioner of that fact “as soon as reasonably practicable” (new section 154A(2)).
- c) Having been informed of the senior official’s authorisation, the Investigatory Powers Commissioner must review that authorisation “as soon as reasonably practicable” to determine whether the public interest test has been met (new section 154A(3)). The conditions of the public interest test applied at this stage are

74 [Investigatory Powers Act 2016](#), section 157

the same as the conditions which would have been applied by the senior official or Investigatory Powers Commissioner when making the original authorisation decision under new section 154(3) (see new section 154A(4)).

- d) If the Investigatory Powers Commissioner concludes that the public interest test has not been met, the senior official's approval ceases to have effect upon notification of that fact to the Secretary of State (new section 154A(5) and 154A(3)(b)). This cancellation does not render unlawful anything done before the cancellation takes effect or anything in the process of being done at the time of the cancellation which could not be stopped or was not reasonably practicable to stop (new section 154A(6)).

50. 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 which would identify or confirm a source of journalistic material (new section 154(4) and (5)).
- b) Requires the Investigatory Powers Commissioner, when informed of the retention of such material, to direct that the relevant material is destroyed unless the public interest test is met, namely that the public interest in retaining the material outweighs the public interest in the confidentiality of confidential journalistic material or sources of journalistic information (new section 154(6) and (8)).
- c) Allows the Investigatory Powers Commissioner, in cases where the public interest test is met, to impose such conditions on the use or retention of the relevant material as they consider necessary to protect the opposing public interest (new section 154(7)).
- d) Requires the Investigatory Powers Commissioner to have regard to any representations made by any affected party regarding a direction to destroy the relevant material or apply conditions to its use or retention (new section 154(9) (b)). The Commissioner is also empowered to require an affected party to make such representations (new section 154(9)(a)). New section 154(10) adopts the definition of an "affected party" given in section 153(14), namely the Secretary of State or the person to whom the warrant is or was addressed.

51. Article 3 would make consequential amendments to section 229 IPA (Main oversight functions). Current section 229(6) states that, in exercising functions under the IPA, a Judicial Commissioner must not act in a way which the Commissioner considers to be contrary to the public interest or prejudicial to national security; the prevention or detection of serious crime; or the economic well-being of the United Kingdom. Current section 229(7) states that a Judicial Commissioner must, in particular, ensure that the Commissioner does not: jeopardise the success of an intelligence or security operation or a law enforcement operation; compromise the safety or security of those involved; or unduly impede the operational effectiveness of an intelligence service, police force, government department or armed forces. Current section 229(8) goes on to list Judicial Commissioner functions to which subsections (6) and (7) do not apply. Article 3 would add to this list of functions to which (6) and (7) do not apply:

- a) In the case of prior authorisation, the approval of the Investigatory Powers Commissioner under new section 154(2)(a) of criteria for selecting relevant material for examination (new section 229(8)(fa)(i)).
- b) In the case of authorisation for retention, the application by the Investigatory Powers Commissioner of the public interest test set out in new section 154(8) for the purposes of deciding whether to order the destruction of the relevant material or permit its retention under certain conditions (new section 229(8)(fa)(ii)).
- c) In cases where a senior official has given authorisation for the use of criteria in urgent circumstances under new section 154(2)(b), the Investigatory Powers Commissioner's subsequent review under new section 154A(3)(a) of the public interest test (new section 229(8)(fa)(iii)).

52. The effect of these changes is to ensure that the overriding directive set out in section 229 IPA for Judicial Commissioners not to hinder the work of the security and intelligence agencies is disapplied to the judicial functions exercised by the Investigatory Powers Commissioner under new sections 154 and 154A (i.e., the Investigatory Powers Commissioner must exercise those powers without regard to any negative effect on the ability of the security and intelligence agencies to perform their statutory functions).⁷⁵

Analysis

Independent and impartial decision-making body

53. The Draft Remedial Order would bestow the functions of giving non-urgent prior authorisation for selectors and authorisation for retention upon the Investigatory Powers Commissioner.⁷⁶ The Investigatory Powers Commissioner's Office is an arm's-length body of the Home Office with its own budget and staff.⁷⁷ The Investigatory Powers Commissioner and Judicial Commissioners must hold or have held high judicial office,⁷⁸ 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.⁷⁹ **We are satisfied that the Commissioner is sufficiently independent and impartial to exercise the authorisation functions.**

75 See [Explanatory Notes to the Investigatory Powers Act 2016](#), paras 638 to 640; and [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 7

76 See, *mutatis mutandis*, the Interception of Communications Commissioner, as discussed in the judgments of both the First Section and the Grand Chamber in the *Big Brother Watch* case. The Investigatory Powers Commission 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)

77 Investigatory Powers Commissioner's Office and Office for Communications Data Authorisations, [Annual Report of the Investigatory Powers Commissioner 2021](#) (March 2023)

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

79 [Investigatory Powers Act 2016](#), section 228(4) and (5). The Investigatory Powers Commissioner is a Judicial Commissioner (see section 227(7)) and the Investigatory Powers Commissioner may delegate the exercise of their functions to any other Judicial Commissioner, except in limited circumstances (see section 227(8)). References to the Investigatory Powers Commissioner are therefore usually read to include any other Judicial commissioner (see section 227(13)(b)).

Prior authorisation for selection

54. The effect of the Draft Remedial Order, as set out in paragraph 48, above, fulfils the requirements set out by the Grand Chamber.⁸⁰ As explained above, prior authorisation would be required from an independent and impartial decision maker before relevant selectors could be applied, and such authorisation would only be given where the public interest test is met.

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

New urgency procedure

56. New section 154(2)(b) would empower a senior official,⁸¹ acting on behalf of the Secretary of State, to give prior authorisation instead of the Investigatory Powers Commissioner in cases in which that senior official subjectively “considers there is an urgent need to do so”. This provision was not present in the Home Office’s Proposed Draft Order. The Home Office’s justification for the inclusion of this urgent mechanism is that it is “essential [...] as IPCO does not provide a mechanism for approvals outside of standard working hours”.⁸² The Home Office therefore argues that “[i]n the interests of national security and in threat to life situations, there must be a process for authorising activity outside of these periods.”⁸³

57. The impact of the new urgent mechanism would be that a senior official could authorise the use of selectors with the purpose of selecting intercepted content to identify any confidential journalistic material or to identify or confirm a source of journalistic information, or to authorise the use of selections which are highly likely to identify confidential journalistic material or identify or confirm the source of such material.

58. The Grand Chamber’s judgment on the face of it does not support the notion that a senior official giving prior authorisation in such circumstances would be compatible with Article 10 ECHR, even in urgent cases, as such an official would not be independent or impartial. The language of the judgment is unequivocal:

[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 ...**⁸⁴ [emphasis added]

59. The Home Office argues that the new urgency procedure would nevertheless be compatible with the UK’s human rights obligations.

60. The Home Office’s first argument is based on practical features of the UK’s existing regime. On a practical level, the Home Office is concerned that the lack of an urgency

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

81 [Investigatory Powers Act 2016](#), section 157. “Senior official” means a member of the Senior Civil Service or a member of the Senior Management Structure of Her Majesty’s Diplomatic Service

82 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 4

83 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 4

84 *Big Brother Watch v UK* at [448]

procedure could create real risks in national security crises and threat-to-life situations.⁸⁵ Given the fact that the IPCO only works during standard working hours and the possibility of short operational windows to prevent loss of life or serious harm, there needs to be a process for urgent authorisations to meet these challenges. In these circumstances, the Home Office argues that it is highly unlikely that the Grand Chamber intended to prohibit an urgency procedure like the one proposed if it was accompanied by sufficient safeguards.⁸⁶

61. It is the recognition of this practical feature of the UK's current regime which means that special procedures for 'urgent cases' are provided for in certain other powers of the IPA.⁸⁷

62. Linked to its first argument, the Home Office's second argument is that the above cited paragraph of the judgment must be read in the context of the wider *Big Brother Watch* judgment.⁸⁸ The guiding principle is that any interference with the right to protection of journalistic sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.⁸⁹ The Draft Remedial Order builds-in several levels of safeguards to the urgency procedure to this end, including:

- a) The bar for what is 'urgent' is likely to be high. Although 'urgent' is not defined in the Act, the Interception of Communications Code of Practice ('IC Code') provides certain statutory guidance on the matter.⁹⁰ Anyone exercising a function under the IPA must have regard to the guidance. In relation to urgent authorisation of targeted warrants under section 19(1)(d) and section 24 IPA, the IC Code states that urgency is determined by whether it would be reasonably practicable to seek a Judicial Commissioner's approval in the time available to meet an operational or investigative need. Urgent warrants should fall into one or both of the following categories:
 - Imminent threat to life or serious harm - for example, if an individual has been kidnapped and it is assessed that their life is in imminent danger;
 - An intelligence-gathering or investigative opportunity with limited time to act - for example, a consignment of Class A drugs is about to enter the UK and law enforcement agencies want to have coverage of the perpetrators of serious crime in order to affect arrests.⁹¹
- b) In cases where a senior official has given authorisation, there would be rapid post-factum review by a Judicial Commissioner. The Secretary of State would be obliged to notify the Investigatory Powers Commissioner "as soon as reasonably practicable" of the senior official's authorisation and the Commissioner would

85 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 4

86 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 10

87 See, e.g., [Investigatory Powers Act 2016](#), section 24 (Approval of warrants issued in urgent cases), section 61A (Power of designated senior officers to grant authorisations: urgent cases), section 122 (Approval of modifications under section 118 made in urgent cases), section 124 (Approval of modifications under section 123 in urgent cases)

88 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 5

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

90 [Investigatory Powers Act 2016](#), Schedule 7. For the current version of the IC Code see: Home Office, [Interception of Communications Code of Practice 2022](#) (December 2022)

91 Home Office, [Interception of Communications Code of Practice 2022](#) (December 2022), para 5.59

then have to review the decision “as soon as reasonably practicable”.⁹² If the Commissioner does not approve the decision, the senior official’s authorisation ceases to have effect.⁹³

- c) If UKIC wished to retain any journalistic material examined under a senior official’s authorisation - including one which ceased to have effect - they would require the prior authorisation of a Judicial Commissioner on the basis of the public interest test in order for it to be retained (see *Authorisation for Retention, below*).

63. In the context of urgent situations, the Home Office supports its position by arguing that the ECtHR has found similar safeguards to be compatible with the ECHR.⁹⁴ Such safeguards have included exceptions being limited to urgent cases and the requirement for judicial validation within a short period of the decision.⁹⁵

64. We are content that the addition of the urgent procedure for prior authorisation of selectors is compatible with Article 10 ECHR in light of its attendant safeguards. We accept that it may be necessary in some circumstances for decisions to be made urgently outside working hours. We consider other ways could have been found to accomplish this, but given that the Government has decided to proceed in this manner and included the safeguards set out, above, we accept that the procedure is likely to be considered compatible with Article 10. However, the Government should take steps to ensure that the circumstances in which it is necessary to use the procedure are kept to a minimum.

65. In light of the particular importance of the maintenance of journalistic freedoms under Article 10 ECHR, we recommend that the IC Code is updated to give clear guidance on the meaning of ‘urgent’ in the specific context of authorisations by senior officials under new section 154(2)(b) concerning journalistic material, as well as illustrative examples. This updated guidance should be published within six months of the Remedial Order coming into force.

66. We are surprised by the Home Office’s statement that the IPCO does not have a mechanism for facilitating urgent approvals by Judicial Commissioners outside standard working hours. We therefore encourage the Home Office to engage with the IPCO to see whether an appropriate mechanism - such as an on-call rota - could be developed in order to minimise the situations in which a senior official would take initial decisions in place of an independent Judicial Commissioner. We request that the Home Office writes to the JCHR before the end of six months after the Remedial Order comes into force to set out what actions have been taken by it to ensure that the circumstances in which a senior official would need to take a decision out of hours instead of a Judicial Commissioner have been minimised.

92 New section 154A(2) and (3), respectively

93 New section 154A(5)

94 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, paras 5 to 8; *Weber and Saravia v Germany* (application no. 54934/00) at [115]; *Ekimdzhiev v Bulgaria* (application no. 62540/00); *Roman Zakharov v Russia* (application no. 47143/06)

95 *Ekimdzhiev v Bulgaria* (application no. 62540/00) at [16] and [82]

Authorisation for retention

67. The effect of the amended Draft Remedial Order, as set out in paragraph 50, above, fulfils the requirements set out by the Grand Chamber.⁹⁶

68. We are satisfied that the Draft Remedial Order would bring the bulk interception regime under the IPA into line with the requirements of Article 10 ECHR regarding authorisation for retention, as set out by the Grand Chamber in the Big Brother Watch case.

Conclusion

69. **We are satisfied that the Draft Remedial Order would adequately address the incompatibilities with Article 10 ECHR (freedom of speech) identified by the Grand Chamber in the Big Brother Watch case concerning the examination and retention of journalistic material.**

70. *We recommend that the Draft Remedial Order is approved by Parliament.*

96 Home Office, [The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023 \(HC 1264, HL Paper 210\): Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023 \(October 2023\)](#), para 5

5 Other matters arising

Major changes to proposed draft remedial orders

71. The Draft Remedial Order introduced a significant new policy aspect with clear human rights implications - an urgency procedure - which was not present in the previous Proposed Draft Order. Given how the Draft Remedial Order would directly and significantly affect UKIC's work, we are disappointed that the Government had not fully explored their views during the policy development phase. We accept that the IPCO is independent of Government and therefore it is appropriate for their views to have been sought during the representations process once a proposed draft remedial order had been laid. However, had the Home Office properly consulted the Security Agencies before laying the proposal they may have identified this policy gap and dealt with it before laying, rather than being notified of it by the Security Agencies at the same time as the IPCO via representations. The result is that Parliament has had a reduced opportunity to scrutinise the human rights implications of this major change to the policy of the Draft Remedial Order.

72. The Committee expects proposals for draft remedial orders to be presented to Parliament only when they are ready, following the requisite internal Government policy work and consultation. The system of representations and responses set out in Schedule 2 of the Human Rights Act 1998 no doubt foresees some changes between a proposed draft remedial order and a subsequent draft remedial order - indeed, it would be perverse if the Government never improved remedial orders in light of such representations. However, the representations process is meant to ensure that there is external scrutiny of Government proposals; the laying period is not meant to provide time for the executive to remedy its own failure to carry out effective policy consultation with its own agencies, which could reasonably have been done before a proposed draft is presented to Parliament.

73. Departments should only lay proposals for draft remedial orders before Parliament when they have fully determined their policy requirements. This includes carrying out effective engagement with UKIC, which can reasonably be expected of Government where a remedial order would have a direct and profound impact on the functions of security agencies. The two-stage process for Parliamentary scrutiny of remedial orders should not be used by the Government as an opportunity to 'correct' policy oversights which it could reasonably have identified by consulting UKIC or other Government agencies, thereby reducing the time available to Parliament and other parties to fully scrutinise the Government's policy.

Material selected for examination and retained since the Grand Chamber judgment

74. In our First Report we made the following recommendation:

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.⁹⁷

75. As a result of this recommendation, the Home Office engaged with IPCO to determine whether a review of any journalistic material which has been retained or remains retained is required to ensure it meets the public interest test.⁹⁸ The Home Office assures the Committee that there is already “a process in place to apply a public interest test for all retained confidential journalistic material”.⁹⁹ It explains:

[T]he current process under s.154 IPA 2016 and paragraph 9.89 of the Interception of Communications Code of Practice requires that where an intelligence agency retains confidential journalistic material (CJM) for a purpose other than destruction, they must inform the Investigatory Powers Commissioner as soon as reasonably practicable. When this happens, the notification is placed before a Judicial Commissioner for consideration. This is an informal process for which there is no statutory basis, pending the changes being proposed in [the draft Remedial Order].¹⁰⁰

76. We welcome the fact that the Home Office has followed the recommendation of our previous report in a timely fashion.

Provision of sufficient detail for future remedial orders

77. In our First Report, we noted that the Home Office had not supplied as much detail as we would have wanted 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 proceedings by way of remedial order.¹⁰¹ We noted that the reasons given tended towards being generic, and lacked explicit linkage to the specific circumstances in which the Proposed Draft Order was being put forward.¹⁰²

78. We reiterate our reminder that Government 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.

97 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210, para 52

98 Home Office, [The Home Office response to the thirteenth report from the Joint Committee on Human Rights, Session 2022–2023 \(HC 1264, HL Paper 210\): Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023 \(October 2023\)](#), para 16 ; [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 13

99 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 14

100 [Letter from the Security Minister to the Chair of the JCHR](#), 14 December 2023, para 15

101 Joint Committee on Human Rights, Thirteenth Report of Session 2022–23, [Proposal for a Draft Investigatory Powers Act 2016 \(Remedial\) Order 2023](#), HC 1264 / HL Paper 210, para 53

102 Ibid

The need for timely responses to JCHR requests for further information

79. The Home Office was slow to respond to the Committee on two separate occasions during our scrutiny of the Remedial Order:

- a) The Committee published our First Report on the Proposed Draft Order on 13 June 2023. It is customary for the Government to respond to select committee reports within two months. However, we did not receive a response from the Home Office until 18 October 2023. In that response, the Security Minister indicated that he regretted the delay.¹⁰³
- b) The Committee wrote to the Security Minister on 18 November 2023 to request further information to assist us in scrutinising the Draft Remedial Order. A response was requested by 30 November 2023. A response was finally received on 14 December 2023.¹⁰⁴ No explanation was given for the delay, nor any apology. This unexplained delay was particularly disappointing in light of the previous delay, and in light of the new policy which had been added to the Draft Remedial Order and had therefore not been previously scrutinised by the Committee.

80. The Committee requests information in relation to Remedial Orders so it can fulfil its duty under Standing Orders to assist the House in scrutinising these instruments. The timetable for the passage of remedial orders through Parliament is set out in Schedule 2 of the Human Rights Act 1998. Delays to responses can be obstructive to effective scrutiny and frustrate the Committee's ability to fulfil the requirements set out in Standing Orders. Delays without explanation or apology can show a lack of respect for the Committee and its role in the process of Parliamentary scrutiny.

81. We remind Departments of the need for timely responses to the Joint Committee on Human Rights in order to ensure that remedial orders receive effective Parliamentary scrutiny.

¹⁰³ [Letter from the Security Minister to the Chair of the JCHR, 18 October 2023](#)

¹⁰⁴ [Letter from the Security Minister to the Chair of the JCHR, 14 December 2023](#)

Conclusions and recommendations

Introduction

1. We welcome the Government's action in laying the Draft Remedial Order to rectify the incompatibility of the UK's bulk communications interception regime as regards the protection of confidential journalistic material and sources of journalistic material, as protected by Article 10 (freedom of expression) ECHR. (Paragraph 5)

Procedural requirements

2. We are satisfied that the Government has complied with the procedural requirement to summarise the representations it has received and to detail any changes that have been made to the Draft Remedial Order as a result of those representations. (Paragraph 32)
3. We remain content that the Home Office has compelling reasons for proceeding by way of remedial order. We accept that, notwithstanding the introduction of the Investigatory Powers (Amendment) Bill, it remains appropriate in the circumstances for the Government to proceed by way of remedial order. (Paragraph 37)
4. We remain 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 39)
5. We are satisfied that we do not need to draw the Draft Remedial Order to the special attention of Parliament on any of the JCSI's grounds. (Paragraph 41)

Remedying the incompatibility

6. We welcome the amendments made by the Government in response to our recommendation to amend the draft to require the Investigatory Powers Commissioner to order the destruction of the relevant material unless the public interest test is met. (Paragraph 44)
7. We are satisfied that the Commissioner is sufficiently independent and impartial to exercise the authorisation functions. (Paragraph 53)
8. We are satisfied that the Draft Remedial Order would bring the bulk interception regime under the IPA in line with the requirements of Article 10 ECHR regarding prior authorisation, as set out by the Grand Chamber in the Big Brother Watch case. (Paragraph 55)
9. We are content that the addition of the urgent procedure for prior authorisation of selectors is compatible with Article 10 ECHR in light of its attendant safeguards. We accept that it may be necessary in some circumstances for decisions to be made urgently outside working hours. We consider other ways could have been found to accomplish this, but given that the Government has decided to proceed in this manner and included the safeguards set out, above, we accept that the procedure

is likely to be considered compatible with Article 10. However, the Government should take steps to ensure that the circumstances in which it is necessary to use the procedure are kept to a minimum. (Paragraph 64)

10. In light of the particular importance of the maintenance of journalistic freedoms under Article 10 ECHR, we recommend that the IC Code is updated to give clear guidance on the meaning of ‘urgent’ in the specific context of authorisations by senior officials under new section 154(2)(b) concerning journalistic material, as well as illustrative examples. This updated guidance should be published within six months of the Remedial Order coming into force. (Paragraph 65)
11. We are surprised by the Home Office’s statement that the IPCO does not have a mechanism for facilitating urgent approvals by Judicial Commissioners outside standard working hours. We therefore encourage the Home Office to engage with the IPCO to see whether an appropriate mechanism - such as an on-call rota - could be developed in order to minimise the situations in which a senior official would take initial decisions in place of an independent Judicial Commissioner. We request that the Home Office writes to the JCHR before the end of six months after the Remedial Order comes into force to set out what actions have been taken by it to ensure that the circumstances in which a senior official would need to take a decision out of hours instead of a Judicial Commissioner have been minimised. (Paragraph 66)
12. We are satisfied that the Draft Remedial Order would bring the bulk interception regime under the IPA into line with the requirements of Article 10 ECHR regarding authorisation for retention, as set out by the Grand Chamber in the Big Brother Watch case. (Paragraph 68)
13. We are satisfied that the Draft Remedial Order would adequately address the incompatibilities with Article 10 ECHR (freedom of speech) identified by the Grand Chamber in the Big Brother Watch case concerning the examination and retention of journalistic material. (Paragraph 69)
14. We recommend that the Draft Remedial Order is approved by Parliament. (Paragraph 70)

Other matters arising

15. Departments should only lay proposals for draft remedial orders before Parliament when they have fully determined their policy requirements. This includes carrying out effective engagement with UKIC, which can reasonably be expected of Government where a remedial order would have a direct and profound impact on the functions of security agencies. The two-stage process for Parliamentary scrutiny of remedial orders should not be used by the Government as an opportunity to ‘correct’ policy oversights which it could reasonably have identified by consulting UKIC or other Government agencies, thereby reducing the time available to Parliament and other parties to fully scrutinise the Government’s policy. (Paragraph 73)
16. We welcome the fact that the Home Office has followed the recommendation of our previous report in a timely fashion. (Paragraph 76)

17. We reiterate our reminder that Government 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 78)
18. We remind Departments of the need for timely responses to the Joint Committee on Human Rights in order to ensure that remedial orders receive effective Parliamentary scrutiny. (Paragraph 81)

Formal minutes

Wednesday 10 January 2024

Members present

Joanna Cherry KC MP, in the Chair

Lord Alton of Liverpool

Lord Dholakia

Dr Caroline Johnson MP

Baroness Kennedy of the Shaws

Baroness Lawrence of Clarendon

Baroness Meyer

Jill Mortimer MP

Bell Ribeiro-Addy MP

Draft Report (*Draft Investigatory Powers Act 2016 (Remedial) Order 2023 – Second Report*), 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 81 read and agreed to.

Summary agreed to.

Resolved, That the Report be the First 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.

Adjournment

Adjourned until 17 January at 2.45pm

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	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	Legislative Scrutiny: Illegal Migration Bill	HC 1241 HL 208
13th	Proposal for a Draft Investigatory Powers Act 2016 (Remedial) Order 2023	HC 1264 HL 210
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
8th Special Report	Legislative Scrutiny: Illegal Migration Bill: Government Response to the Committee's Twelfth Report	HC 1790

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

Number	Title	Reference
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
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

Number	Title	Reference
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
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

Number	Title	Reference
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911