EXPLANATORY MEMORANDUM TO

THE COUNTER-TERRORISM AND BORDER SECURITY ACT 2019 (PORT EXAMINATION CODE OF PRACTICE) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The instrument brings into force a revised code of practice regarding functions carried out under Schedule 3 to the Counter-Terrorism and Border Security Act 2019 ("the 2019 Act"). The code of practice relates to powers exercisable at UK ports and the Northern Ireland border area to stop, question, search and detain persons to determine whether they are or have been engaged in hostile activity.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the whole of the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the whole of the United Kingdom.

5. European Convention on Human Rights

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

"In my view the provisions of the Counter-Terrorism and Border Security Act 2019 (Port Examination Code of Practice) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Under paragraph 56 of Schedule 3 to the 2019 Act, the Secretary of State shall issue, and may revise, codes of practice about the exercise by officers of functions conferred on them by virtue of that Act. A code of practice about the exercise by officers of functions exercised under Schedule 3 to the 2019 Act was last issued in August 2020 and was brought into force by the Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020. This instrument is bringing into force a revised version of that code, which is issued by the Secretary of State in accordance with paragraph 56 of Schedule 3 to the 2019 Act, following amendments made to the 2019 Act by the Nationality Security Act 2023.

7. Policy background

What is being done and why?

7.1 The powers under Schedule 3 to the 2019 Act allow an examining officer at UK ports and the Northern Ireland border area to stop, question, search and detain a person to determine whether they appear to be a person who is, or has been, involved in the commission, preparation or instigation of hostile activity.

7.2 There is an existing Code of Practice for Examining Officers and Review Officers under Schedule 3 to the Counter-Terrorism and Border Security Act 2019 ("the Schedule 3 Code") which was brought into force in August 2020 which relates to:

- the training to be undertaken by constables
- immigration officers and customs officers who are to act as examining officers or exercise other functions under Schedule 3,
- the exercise by such persons of functions conferred on them by virtue of Schedule 3,
- the video recording (with sound) of interviews by constables of persons detained under Part 1 of Schedule 3 at a police station; and
- reviews under Part 3 of Schedule 3.

7.3 The Schedule 3 Code acts as a guide to those police officers and members of law enforcement authorities who are able to exercise Schedule 3 powers by providing information on the processes and safeguards governing the use of those powers, including examples of best practice. For example, the Schedule 3 Code includes considerations an examining officer may make when deciding to select a person to examine and clarifies that selecting a person based on their protected characteristics alone is unlawful.

7.4 This instrument brings into force a revised version of the Schedule 3 Code. The revisions are necessitated by amendments made to the 2019 Act by the National Security Act 2023. The National Security Act 2023 amends the retention powers under Schedule 3 to the 2019 Act by changing the definition of "protected material" to no longer include confidential business material. Before the 2019 Act was amended, under Schedule 3 the definition of confidential business material fell within the definition of "protected material" and included material that had been acquired in the course of a trade and was held in confidence.

7.5 Under the 2019 Act, authorisation was required from the Investigatory Powers Commissioner (the Commissioner) to retain and use copies of protected material. The National Security Act 2023 removes the requirement for the Commissioner to authorise the retention of copies of confidential business material. That requirement has been replaced by a new authorisation procedure which requires a police officer of at least the rank of superintendent to authorise access to such material.

7.6 Applying the superintendent authorisation model to Schedule 3 will bring significant efficiencies to the use of the retention power while still providing a highly effective safeguard. This change will allow Counter-Terrorism police to expedite investigations relating to hostile actors involved in activities such as espionage, who may be concerned with the acquisition and collection of information that is generally unavailable to the public, such as business contracts.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 The Home Office ran a public consultation over the creation of the new Video Recording Code from 20 July 2023 to 31 August 2023.

10.2 In total there were five responses to the consultation. The revised Code received one supportive statement, and no suggestions for revisions. No changes to the draft revised Code of Practice were made as a result of feedback received in response to the consultation.

10.3 For full details of the changes made, see the Government's response to the consultation at www.gov.uk which will be published on the date of laying.

11. Guidance

11.1 The revised version of the Schedule 3 Code brought into force by the instrument contains guidance itself, including about the effect of the code of practice as set out above. The code of practice is publicly available at Codes of practice for officers using examination powers at ports - GOV.UK (www.gov.uk)).

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument as no, or no significant impact on the private, voluntary or public sector is foreseen. No financial impacts exist for Counter-Terrorism Policing.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 Paragraph 63 of the National Security Act 2023 requires the Secretary of State to appoint a person (the Independent Reviewer) to review the operation of Schedule 3 to the Counter-Terrorism and Border Security Act 2019, except for the retention functions of the Investigatory Powers Commissioner. The Independent Reviewer must provide the Secretary of State with an annual report on the exercise of the Schedule 3 powers.

15. Contact

15.1 The Borders and Aviation Security Unit at the Home Office can answer any queries regarding the instrument and can be contacted at the Home Office, 5th Floor, Peel Building, 2 Marsham Street, London, SW1P 4DF.

15.2 The Deputy Director for the Borders and Aviation Security Unit at the Home Office can confirm that this explanatory memorandum meets the required standard.

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