EXPLANATORY MEMORANDUM TO

THE PROTECTION OF FREEDOMS ACT 2012 (CODE OF PRACTICE FOR POWERS OF ENTRY AND DESCRIPTION OF RELEVANT PERSONS) ORDER 2015

2015 No. [XXXX]

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

2. Purpose of the instrument

2.1 This instrument brings into force a Code of Practice which sets out considerations that apply before, during and after the exercise of powers to enter premises. It also provides a description of "relevant persons" who must have regard to the Code of Practice.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Code of Practice is made pursuant to sections 47 to 51 of the Protection of Freedoms Act 2012. Section 47 obliges the Secretary of State to prepare a code of practice containing guidance about the exercise of powers of entry. It allows for the code to make provision about considerations which apply prior to exercising powers of entry, when exercising them, and after exercising them. The Code must not make provision about devolved powers of entry. Section 48 obliges the Secretary of State to lay the code of practice before parliament along with a draft Order providing for the code to come into force, and to issue the code if that draft Order is approved by parliament. Section 50 obliges the Secretary of State to publish the code once it has been issued. Section 51(1) requires a "relevant person" to have regard to the code when exercising any functions to which the code relates. Section 51(5) sets out an enabling power for the Secretary of State to make an Order specifying or describing who the term "relevant person" will cover.

4.2 This Order is being made to implement the obligation in section 48 to lay the code of practice and a draft Order providing for the code to come into force; and ultimately to achieve the underlying objective of delivering heightened consistency in the exercise of powers of entry, by providing for a minimum level of applicable safeguards. The Order is also being made to set out who exactly the term "relevant person" will cover. The result is that persons exercising powers of entry, other than devolved powers of entry, will be obliged to have regard to the new code, unless the exercise of those powers is subject to a separate statutory code of practice.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

The Minister for Criminal Information has made the following statement regarding Human Rights:

In my view the provisions of The Protection of Freedoms Act 2012 (Code of Practice for Powers of Entry and Description of Relevant Persons) Order 2015 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 A power of entry is a statutory power for a person to enter land or other premises for a specific purpose. A review of existing powers identified 1,237 separate powers of entry across many pieces of primary and secondary legislation which may impact on a broad range of business and private circumstances. The particular construction of each power varies considerably, particularly in terms of the safeguards that are applied to their exercise. Safeguards include restrictions on the types of premises that may be entered, the time of day, or the types of person that may exercise a power; they may require that advance notice is provided before entry is undertaken, or require that specific circumstances, such as reasonable suspicion of the commission of an offence, are present; or may require judicial authorisation, such as a magistrate's warrant, in order to prevent arbitrary exercise of the power.

7.2 It may therefore be difficult for an individual or business subject to a power of entry to know what to expect when a power is exercised. The policy objective of the provisions in the 2012 Act, and the intent of this instrument and the Code of Practice it brings into force, is to provide a greater level of consistency in the exercise of powers of entry across the wide range of public and private agencies which are entitled to use such powers. It provides greater transparency for those subject to the use of such powers and reduces the impact of intrusion into homes or businesses.

7.3 By virtue of this instrument the Code of Practice will introduce a set of considerations that relevant persons must have regard to before, during and after the exercise of a power of entry. "Relevant persons" are those who will be placed under a statutory obligation to have regard to the code when exercising their functions, and this is a term which is defined in the Order. Key considerations include ensuring a proper process of approval for the exercise of powers of entry, provision of advance notice of intent to exercise a power of entry, ensuring entry to private dwellings is exercised with the consent of the occupier or with judicial authorisation, and the appropriate keeping of records of the exercise of powers.

7.4 This Code of Practice will have broad application across existing powers of entry relating to diverse circumstances including trading standards or environmental inspections, emergency response to gas malfunction and routine vehicle checks at port. The definition of relevant persons includes every person exercising a power of entry other than those powers subject to another statutory Code of Practice or devolved powers of entry. The Code does not apply, for example, to the investigation of offences which is already subject to the Police and Criminal Evidence Act 1984 (PACE) Code B, which covers the exercise by the police service in England and Wales of statutory powers of entry, search and seizure. This broad definition ensures that the exercise of powers of entry, of any nature, is always subject to a relevant statutory Code.

- Consolidation

7.5 This instrument does not create a need for consolidation.

8. Consultation outcome

8.1 Sections 47(4) and 51(8) of the 2012 Act place a requirement on the Secretary of State to consult with various people in the course of preparing the Code of Practice and in relation to the description of relevant persons.

8.2 The Code of Practice and description of relevant persons have been produced in consultation with all government Departments that are responsible for powers of entry. Departments have consulted with relevant operational and enforcement bodies who are entitled to exercise powers of entry throughout the process.

8.3 A draft Code of Practice was made available by the Home Office between 22 January and 5 March 2013 for public consultation. The Home Office received 28 responses from interested parties including businesses that exercise powers of entry and the Association of Licensed Multiple Retailers whose members are subject to the exercise of powers. Respondents generally welcomed the principles presented by the draft Code which were described as echoing the good practice already in place in many sectors. The main concerns raised were about the definition of relevant person, which the Department has sought to clarify, and the potential burden to those exercising powers of entry of complying with the Code, which the Department has recognised and sought to reduce where possible.

8.4 Prior to public consultation the Department consulted with the Lord Advocate on the Code of Practice.

9. Guidance

9.1 No additional guidance is to be issued as the Code of Practice provides appropriate level of detail.

10. Impact

10.1 The impact on business, charities or voluntary bodies is considered to be a net benefit, as the Code will bring greater clarity and consistency in the use of powers of entry, for example by helping to ensure that consent is sought and notice is given in appropriate cases. A small number of private businesses also exercise powers of entry, and consultation has indicated that the Code is broadly consistent with current good practice and should give rise only to minimal costs.

10.2 The impact of the Code on the public sector will be considered across individual departments and agencies, as part of a wider programme of reform which includes proposals to significantly reduce or consolidate powers of entry across Government.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to ensure the Code provides the necessary flexibility for the limited number of small businesses that may exercise powers of entry. An Impact Assessment has identified that the cost to small and micro businesses is limited to familiarisation cost.

11.3 The basis for the final decision on what action to take to assist small business has been consultation with Departments with policy responsibility for those sectors in which small businesses are entitled to exercise powers of entry.

12. Monitoring & review

12.1 An internal review of the working of the Code of Practice will take place after five years and will consider the extent to which the Code has impacted on the use of powers of entry in practice.

13. Contact

Samuel Wray at the Home Office. Tel: 020 7035 3235 or email: Samuel.Wray@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.