EXPLANATORY MEMORANDUM TO

THE REGULATION OF INVESTIGATORY POWERS (COVERT HUMAN INTELLIGENCE SOURCES: CODE OF PRACTICE) ORDER 2010

2010 No.

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this Order is to bring into force a revised code of practice relating to the conduct and the use of covert human intelligence sources by public authorities under the Regulation of Investigatory Powers Act 2000 ('RIPA'). The revised code will replace the previous version.

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

3.1 Subsections (1), (3), (4) and (5) of section 71 of the Act correspond in all material respects with section 102(1) and subsections (1), (4) and (5) of section 103 of the Anti-terrorism, Crime and Security Act 2001 to which the Committee referred in its Thirtieth Report (session 2002-03). In the light of the points raised by the Committee in its Report, the Department acknowledges that there is an ambiguity in section 71 of the Act, and that further explanation may be required.

3.2 The procedure which the Department has adopted in the belief that it complies with the provisions of section 71 is as follows. A draft code was prepared and published on 17 April 2009. The code in that form was not laid before Parliament. A revised version of that code was prepared following consultation and was published on the Home Office website on 3 December 2009. The revised code is being laid at the same time as this draft Order with a view to each House of Parliament approving the draft Order which will bring that version of the code into force. Once each House has approved the draft Order and the Order is made, the code will be issued under section 71.

3.3 The same procedure was adopted in respect of five codes of practice issued under the Act in 2002 – 2007. (The relevant Orders were the Regulation of Investigatory Powers (Interception: Code of Practice) Order 2002 (S.I. 2002/1693); the Regulation of Investigatory Powers (Covert Surveillance: Code of Practice) Order 2002 (S.I. 2003/1933); the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2002 (S.I. 2002/1932); the Regulation of Investigatory Powers (Acquisition and Disclosure of Communications Data: Code of Practice) Order 2007 (S.I. 2007/2197); and the Regulation of Investigatory Powers

(Investigation of Protected Electronic Information: Code of Practice) Order 2007 (S.I. 2007/2200).

3.4 Consideration will be given to amending the relevant provisions to remove any ambiguity when a legislative opportunity arises.

3.5 This instrument has been laid in substitution of an instrument of the same name. The earlier instrument referred to the laying date of the draft Covert Human Intelligence Sources: Code of Practice as 5th January 2010. That code of practice was withdrawn and re-laid before Parliament on 18th January to correct a formatting error which resulted in the loss of several lines of text from the code. The code of practice was again withdrawn and re-laid before Parliament on 21st January 2010 in consequence of the change of name of an Order referred to in the code. Article 2 of the re-laid Order refers to the date on which the most recent code of practice was laid in draft before Parliament.

4. Legislative Context

4.1 Section 71 of RIPA requires the Secretary of State to issue codes of practice relating to the exercise and performance of the powers and duties conferred or imposed by or under Part II of RIPA. This Order brings into force the code of practice prepared under section 71 relating to the conduct and the use of covert human intelligence sources under Part II of that Act. The Order is subject to the affirmative resolution procedure and will come into force on 6th April 2010.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 David Hanson, Minister of State for the Home Department has made the following statement regarding Human Rights:

"In my view the provisions of the Regulation of Investigatory Powers (Covert Human Intelligence Sources Code of Practice) Order 2010 are compatible with the Convention rights."

7. Policy background

7.1 Authorisations granted under Part II of RIPA for the conduct and use of covert human intelligence sources are subject to all the existing safeguards considered necessary by Parliament to ensure that investigatory powers are exercised compatibly with the ECHR. In particular, the substantive protections of Article 8 (right to respect for private and family life) are guaranteed by the express terms of RIPA which only permit the exercise of the Part II powers if the tests of necessity, proportionality and legitimate aim are satisfied. The revised code of practice will help ensure that the tests of necessity and proportionality are better understood by public authorities and applied lawfully and consistently to applications concerning the use and conduct of covert human intelligence sources. The revised code will require public authorities to

consider the seriousness of the offence under investigation, in addition to the previous requirement that they weigh up the benefits to the investigation in authorising the use and conduct of covert human intelligence sources. General examples are included in order to assist public authorities.

7.2 In addition, the revised code provides guidance in relation to the enhanced authorisation procedures that apply in the following instances:

a) The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 requires that the granting of an authorisation for the use or conduct of a covert human intelligence source to obtain knowledge of matters subject to legal privilege be subject to prior approval, by the Secretary of State (for the intelligence agencies) and by a Surveillance Commissioner (for other public authorities). This measure is in keeping with the House of Lords judgment in the case of Re McE [2009] UKHL 15, although the judgment did not specifically address the use of covert human intelligence sources.

b) The revised code makes it clear that constituents' communications with MPs on constituency business should be treated in the same way as other confidential material and therefore subject to approval by a more senior authorising officer. This follows the report of Sir Christopher Rose into the bugging of conversations in HMP Woodhill between Babar Ahmad and Sadiq Khan MP.

8. Consultation outcome

8.1 A public consultation which took place from 17 April to 10 July 2009 invited views, amongst other things, on the revised code of practice. The majority of responses offering views on the revised code stated that it provided greater clarity on what was required, through better guidance on necessity, proportionality and what constituted private information. Most found the inclusion of examples helpful in illustrating in a general way the sorts of considerations that need to be addressed in the authorisation of covert techniques. The examples will not replace the key principles of necessity and proportionality or the advice and guidance available from the relevant oversight Commissioners.

8.2 Following representations by the Scottish Crime and Drug Enforcement Agency (SCDEA), the Home Office has decided to add that public authority to Annex A to the code of practice to reflect the higher authorisation level required when knowledge of confidential information is likely to be acquired or when a vulnerable person or a juvenile is to be used as a covert human intelligence source. Such authorisations must be granted under RIPA where the SCDEA investigation relates to national security.

9. Guidance

9.1 The code will be supplemented by guidance provided by the Office of Surveillance Commissioners and the Intelligence Services Commissioner, who have the statutory responsibilities to inspect and oversee the use by relevant public authorities of the covert techniques covered by the code. In addition, accredited training will be

provided for public authority authorising officers under a scheme approved by the Home Office.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil

10.2 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies only to public authorities.

12. Monitoring & review

12.1 The Government will keep under review the operation of this legislation, including:

a) through the independent inspection and oversight by the Office of Surveillance Commissioners and the Intelligence Services Commissioner; and

b) through the Investigatory Powers Tribunal which is made up of senior members of the judiciary, is independent of Government and has full powers to investigate and determine any proceedings or complaints falling within its jurisdiction.

13. Contact

13.1 Tony Cooper of the Covert Investigation Policy Team at the Home Office, 2 Marsham Street, London SW1P 4DF (telephone 020 7035 1218; e-mail tony.cooper3@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.