**EXPLANATORY MEMORANDUM TO**

**THE REGULATION OF INVESTIGATORY POWERS (COVERT SURVEILLANCE AND PROPERTY INTERFERENCE: 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 This Order brings into force a revised code of practice relating to the carrying out of covert surveillance under Part II of the Regulation of Investigatory Powers Act 2000 and to interference with property or wireless telegraphy under section 5 of the Intelligence Services Act 1994 and Part III of the Police Act 1997. The revised code will replace the previous version.

2.2 The code provides guidance on:

a) the carrying out of directed and intrusive surveillance by relevant public authorities under RIPA; and

b) the entry on, or interference with, property or with wireless telegraphy by relevant public authorities under the Police Act 1997 and the Intelligence Services Act 1994.

## 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.

## 4. Legislative Context

4.1 Section 71 of RIPA requires the Secretary of State to issue statutory codes of practice relating to the exercise and performance of the powers and duties conferred or imposed by or under Part II of RIPA, Part III of the Police Act 1997 and section 5 of the Intelligence Services Act 1994. This Order brings into force the code of practice prepared under section 71 relating to carrying out of covert surveillance and to interference with property or wireless telegraphy under those Acts. 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 Surveillance and Property Interference Code of Practice) Order 2010 are compatible with the Convention rights."

## 7. Policy background

7.1 Authorisations or warrants granted under Part II of RIPA, Part III of the Police Act 1997 and section 5 of the Intelligence Services Act 1994 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 the primary legislation which only permit the exercise of these 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

to use directed and intrusive surveillance and to enter onto or interfere with property or with wireless telegraphy. 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 of covert techniques. 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 (Extension of Authorisation Provisions: Legal Consultations) Order 2010 requires that directed surveillance that is carried out in places ordinarily used for legal consultation, at a time when they are being used for such consultations, is to be treated as intrusive surveillance for the purposes of Part II of RIPA. This means that only those public authorities able to carry out intrusive surveillance will be able to conduct surveillance in these circumstances. It also means that they will require prior approval to do so either by a Surveillance Commissioner (for law enforcement agencies) or the Secretary of State (for intelligence agencies). This measure follows the House of Lords judgment in the case of *Re McE* [2009] UKHL 15.

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 constitutes private information. Most found the inclusion of examples helpful in illustrating the sorts of considerations that need to be addressed in the authorisation of covert techniques. The examples do not replace the key principles of necessity and proportionality or the advice and guidance available from the relevant oversight Commissioners.

## 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 Service 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.