EXPLANATORY MEMORANDUM TO

THE EQUIPMENT INTERFERENCE (CODE OF PRACTICE) ORDER 2016

2016 No. 38

1. Introduction

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

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

2. Purpose of the instrument

2.1 This explanatory memorandum concerns an order which brings into force a new Equipment Interference Code of Practice. The Code sets out the safeguards that apply to the security and intelligence agencies' exercise of equipment interference powers.

3. Matter of special interest to Parliament

Other matters of interest to the Joint Committee on Statutory Instruments

3.1 The Code of Practice contains information on the exercise of powers under section 7 of the Intelligence Services Act 1994. Section 71 of RIPA, under which the Code of Practice is issued, contains no express power to issue a code in relation to these powers. However, this material is connected to the exercise of powers under section 5 of the 1994 Act and is included for ease of reference since the powers are exercised in similar ways and similar safeguards apply.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and includes Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

4.1 Section 5 of the Intelligence Services Act 1994 provides the statutory framework governing the use of equipment interference to which the Code applies. The Code provides guidance on the procedures that must be followed before equipment interference can take place under that provision, and on the processing, retention, destruction and disclosure of any information obtained by means of the interference. In particular, the Code provides further information on the protections afforded to legally privileged communications and other confidential material.

4.2 This order has been grouped with the Interception of Communications (Code of Practice) Order 2015 as both bring into force codes of practice relating to investigatory powers. A joint public consultation was held.

5. Extent and Territorial Application

5.1 This instrument extends to all of the United Kingdom.

5.2 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Minister of State for Security has made the following statement regarding Human Rights:

In my view the provisions of the Equipment Interference (Code of Practice) Order 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 The ability to obtain communications of a subject of interest by interfering with equipment is a vital tool in the fight against terrorism and serious crime. It is also among the most intrusive powers available to the security and intelligence agencies. For that reason it is subject to strict safeguards as set out in the Intelligence Services Act 1994. The Code provides detailed guidance on the procedures that must be followed before equipment interference can take place and the safeguards that apply to the dissemination, storage and destruction of material obtained from equipment interference.

7.2 The Code provides information on the protections afforded to legally privileged communications and other categories of confidential material.

8. Consultation outcome

8.1 A public consultation between 6 February and 20 March 2015 invited views on the Interception of Communications and Equipment Interference Codes of Practice. The Government received 135 submissions from organisations and individuals suggesting amendments to the Codes. Approximately 100 replies were near identical and were based on a common script by an interested party. A large proportion of responses proposed increased safeguards relating to protections for communications subject to legal privilege, many of which the Government has adopted in the revised drafts.

9. Guidance

9.1 The Equipment Interference Code of Practice provides for the issuing of further advice, where appropriate.

10. Impact

10.1 There is no foreseeable impact on businesses, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the private or voluntary sector is foreseen and the impact on the public sector is minimal.

11. Regulating small business

11.1 This Code of Practice has no effect on activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Minister of State for Security has made the following statement regarding a review clause:

"In my view a statutory five-year review clause is not appropriate. The Government has committed to bring forward legislation relating to the security, intelligence and law enforcement agencies' use of investigatory powers and to have that legislation enacted before the sunset provision in the Data Retention and Investigatory Powers Act 2014 takes effect on 31 December 2016. This will build on three comprehensive reviews covering investigatory powers, privacy and security from David Anderson QC, the independent reviewer of terrorism legislation; the Intelligence and Security Committee and the Royal United Services Institute. It would be inconsistent with this objective to provide for a five-year review clause in the instrument.

The Government published a draft Bill in autumn 2015 for pre-legislative scrutiny by a Joint Committee of Parliament, with the intention of introducing a Bill early in 2016."

13. Contact

13.1 The RIPA team at the Office for Security and Counter Terrorism, Telephone: 0207 035 4848, email address: RIPA@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.