EXPLANATORY MEMORANDUM TO

THE REGULATION OF INVESTIGATORY POWERS (INTERCEPTION OF COMMUNICATIONS: CODE OF PRACTICE) ORDER 2016

2016 No. 37

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 Interception of Communications Code of Practice. The code is an updated version of the code which came into force in 2002. The code enhances the safeguards that apply to the security and law enforcement agencies' exercise of interception powers.

3. Matter of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Chapter 12 of the Code of Practice does not technically fall within the scope of section 71 of RIPA in respect of which codes of practice are issues. However, this chapter is connected to the exercise of interception powers in Part 1 Chapter 1 of RIPA and is included in view of public concerns about bulk intelligence gathering.

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 Chapter 1 of Part 1 of RIPA provides a statutory framework governing the interception of communications by a limited number of public authorities (as set out in section 6(2) of RIPA), consistent with the Human Rights Act 1998. The code updates the Interception of Communications Code of Practice which came into force in 2002 and sets out how the legislation is implemented in practice. In particular, the code provides additional information on the safeguards that exist for the interception and handling of external communications under section 8(4) of RIPA. It also provides further information on the protections afforded to legally privileged communications and other confidential material.

4.2 This order has been grouped with the Equipment Interference (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 Regulation of Investigatory Powers (Interception of Communications: 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 intercept the communications of a suspect of interest is a vital tool in the fight against terrorism and serious crime. It is also among the most intrusive powers available to law enforcement and the security and intelligence agencies. For that reason it is subject to strict safeguards in the Regulation of Investigatory Powers Act 2000 (RIPA) and the Interception of Communications Code of Practice. The code provides detailed guidance on the procedures that must be followed before interception of communications can take place and the safeguards that apply to the dissemination, storage and destruction of intercepted material.

7.2 The code largely replicates the previous interception code and does not remove any of the existing safeguards. The main changes concern the provision of additional safeguards. These fall into three categories:

- Confidential information. The code provides further information on the protections afforded to legally privileged communications and other categories of confidential material. It specifies that as a matter of policy the Prime Minister will be consulted should there ever be a proposal to target any UK Parliamentarian under a warrant issued by a Secretary of State. This applies to Members of the House of Commons, Members of the House of Lords, the Scottish Parliament, the Northern Ireland Assembly, the Welsh Assembly and UK members of the European Parliament. The Prime Minister will play no role should there ever be any proposal to conduct any such activity by Police Scotland, where these warrants are authorised by the Scottish Government.
- External interception under section 8(4) of RIPA. The code provides additional information on the safeguards that exist for the interception and handling of external communications.
- Requests for intercept material from international partners. Guidance has been added at chapter 12 pertaining to those agencies that undertake interception under a section 8(4) warrant when requesting unanalysed intercepted communications from a foreign government and the handling of any such material received. While this chapter does not technically fall within the powers listed in section 71 of RIPA in respect of which codes of practice are issued, it is connected to the exercise of interception powers in Part 1 Chapter 1 of RIPA and is included in view of public concerns about bulk intelligence gathering.

7.3 In order to reflect developments since 2002, the following minor changes have also been made:

- In light of provisions in the Data Retention and Investigatory Powers Act 2014 (DRIPA), the code provides guidance on service of warrants and notices on communication services providers outside the UK. It also reflects the clarification of the existing definition of "telecommunications service" in RIPA which makes clear that internet based services are included.
- Amendments to reflect the introduction of the Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interception) Regulations, which came into force in June 2011 and which provided for a new offence of unintentional interception; and
- Clarification, in view of recent court judgments, of the treatment of stored communications, specifically with regard to unauthorised access to voicemail.

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 number 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 Interception of Communications Code of Practice provides for the issuing of further advice, where appropriate.

10. Impact

10.1 The impact on business, charities or voluntary bodies is cost neutral.

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 The legislation applies to activities undertaken by small businesses.

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach maintained is that firms complying with requests to give effect to an interception warrant or to provide a permanent interception capability are reimbursed by the Government.

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.