EXPLANATORY MEMORANDUM TO

THE TERRORISM ACT 2000 (CODE OF PRACTICE FOR EXAMINING OFFICERS AND REVIEW OFFICERS) ORDER 2015

2015 No. 906

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 operation a revised Code of Practice in relation to the exercise of powers under Schedule 7 to the Terrorism Act 2000 (the "2000 Act").

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

3.1 None.

4. Legislative Context

4.1 Schedule 7 to the 2000 Act (port and border controls) contains powers which allow "examining officers" to stop and question and, when necessary, detain and search, individuals travelling through ports, airports, international rail stations or the border area to determine whether any such person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism.

4.2 Schedule 7 also contains a power for examining officers to examine goods. This power may only be exercised for the purpose of determining whether the goods have been used in the commission, preparation or instigation of acts of terrorism.

4.3 Paragraphs 5 and 6 of Schedule 14 to the 2000 Act provide that the Secretary of State shall issue a Code of Practice about the exercise of functions conferred on examining officers by Schedule 7 and that examining officers shall perform those functions in compliance with any such Code. Paragraph 20K(8) of Schedule 8 to the 2000 Act provides that the Secretary of State must also issue a Code of Practice under paragraph 6 of Schedule 14 in relation to the functions of "review officers" who are responsible for keeping under review the detention of anyone under Schedule 7 powers.

4.4 Schedule 8 to the Counter-Terrorism and Security Act 2015 (the "2015 Act") amended Schedule 7 to the 2000 Act. This instrument brings into

operation a revised Code of Practice concerning the exercise by examining officers of the goods examination power, as amended by the 2015 Act.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Immigration and Security Minister, James Brokenshire, has made the following statement regarding Human Rights:

> "In my view the provisions of the Terrorism Act 2000 (Code of Practice for Examining Officers and Review Officers) Order 2015 are compatible with the Convention rights".

7. Policy background

- ***What is being done and why***

7.1 A revised Code of Practice for examining officers is required following the amendments made by the 2015 Act to the power contained in paragraph 9 of Schedule 7 to the 2000 Act. In summary, the amendments clarify the legal basis for the examination of goods outside the immediate boundary of a port, and amendments to other legislation make provision concerning use of the power for the examination of goods which comprise items of post.

7.2 The 2015 Act amended paragraph 9 of Schedule 7 by expressly providing locations outside the boundary of a port in which examinations of goods under paragraph 9 may take place. These are:

- premises operated by a "sea cargo agent", which has the meaning given by section 41(1) of the Aviation and Maritime Security Act 1990;
- premises operated by an "air cargo agent", which has the meaning given by section 21F(1) of the Aviation Security Act 1982;
- "transit sheds", which has the meaning given by section 25A of the Customs and Excise Management Act 1979; and
- any place which the Secretary of State has designated as a place in which goods can be examined under paragraph 9 of Schedule 7.

7.3 The effect of these changes is to ensure that the Schedule 7 goods examination power can be used to examine goods, which are not immediately about to leave Great Britain or Northern Ireland but are held by air and sea cargo agents pending the goods' departure. It also allows the power to be used outside port boundaries, whether in transit sheds, air or sea cargo agents' premises or any other location which the Secretary of State designates. The designation power is only exercisable if the Secretary of State reasonably believes that it is necessary to designate that place in order for examining officers to be able to exercise their functions under paragraph 9. There is an

obligation to publish a list of designations, which ensures transparency as to which designated locations the Schedule 7 goods examination power may be exercised. The 2015 Act amended paragraph 9 to provide that there are powers for examining officers to enter premises operated by an approved sea cargo agent, air cargo agent, transit sheds, and designated examination locations.

7.4 The 2015 Act also made amendments to the Regulation of the Investigatory Powers Act 2000 to ensure that the protection from interception afforded to postal communications in that Act does not restrict the use of the paragraph 9 power in respect of postal packets. The amendment made it clear that there is lawful authority for examinations of postal packets carried out under Schedule 7. The 2015 Act also amended the Postal Services Act 2000 to ensure that in cases where examining officers examine postal items under paragraph 9 of Schedule 7, this does not infringe the "inviolability of mails" principle in section 104(3) of the Postal Services Act 2000 - the principle that mail-bags, packets in the post and their contents, which are not the property of the Crown, enjoy the same immunity from examination, seizure or detention, as if they were the property of the Crown.

7.5 In light of the amendments to, and in relation to, the power in paragraph 9 of Schedule 7, a revised Code of Practice is needed for examining officers concerning the exercise of the amended power. The revised code includes guidance on:

- The purpose of the goods examination power, in that an examining officer may only examine goods to determine whether they have been used in the commission, preparation or instigation of acts of "terrorism" as defined in section 1 of the Terrorism Act 2000;
- When the power to examine goods may be exercised;
- Where goods examinations may take place;
- Powers of entry for examining officers, which specify that wherever possible, reasonable efforts should be made to obtain the permission of the owner or occupier before entering;
- Selection criteria for goods examinations, including examples of factors which could be taken into account;
- The process of goods examinations, including the use of a notice, which indicates the goods have been examined and gives a unique reference number in the event of a query or complaint;
- Protections for excluded material or special procedure material, as defined in sections 11 and 14 of the Police and Criminal Evidence Act 1984;
- The requirement for statistical records of goods examinations;
- How individuals who have sent or received goods can complain about the conduct of an examining officer;
- The steps to be taken when a detained individual claims they are a refugee (or has applied, or intends to apply, for asylum status); and

- Designation and accreditation of customs and immigration officers as review officers.

- ***Consolidation***

7.6 The Department does not assess that there is any need for consolidation measures.

8. Consultation outcome

8.1 Paragraph 7 of Schedule 14 to the 2000 Act requires that before the Secretary of State issues a Code of Practice (including a revised Code), a draft is published, any representations made in respect of the draft are considered and, if appropriate, the draft is modified in light of those representations. The Home Office carried out a 6 week public consultation on the revised Code as required by the 2000 Act. The consultation was live from 18 December 2014 until 30 January 2015 and invited views on potential changes to the counter-terrorism border security powers contained in Schedule 7.

8.2 To raise awareness of the consultation we wrote to police forces, legal organisations, industry groups and a wide range of community and faith groups. We received 7 responses, which we carefully considered.

8.3 The majority of consultation respondents agreed that the revised Code clearly reflected the changes made to Schedule 7 powers by the 2015 Act, and we will publish our response shortly. In light of certain representations though, the Home Office have made a number of minor changes to the draft Code to improve clarity. These are detailed below.

- To make the locations in which the examination of goods can take place under Schedule 7 clearer we have now included a reference to the word 'train' in paragraph 73 alongside ship or vehicle.
- Clarified that examinations of goods must not take longer than necessary in paragraph 75.
- Included the word "also" in paragraph 78 to clarify that following the examination of goods under the Schedule 7 power, there will be a notice placed on the goods on the outside to say an examination has been conducted, as well as a Goods Information Leaflet placed inside the goods (when this applies to a small good, such as a postal item).
- Fully reflected the language in the Counter-Terrorism and Security Act 2015 by inserting the word 'only' when stating the four types of locations where Schedule 7 goods examinations may take place.
- Specified in paragraph 81 of the Code (which sets out that an examining officer may access a premises or vehicle to examine goods) that examining officers, where possible must take all reasonable steps to obtain consent before entering.

- Included wording in paragraph 82 stating that there is an avenue of complaint for individuals who have sent or received goods, which have been subject to a Schedule 7 examination.
- Included "excluded material and special procedure material" in paragraph 40 to clarify that examining officers must cease to review, and must not copy, material which they have reasonable grounds for believing contains confidential journalistic source material.

9. Guidance

9.1 As the Schedule 7 amendments in the 2015 Act commenced on Royal Assent (on 12 February 2015), an interim Home Office Circular was published, also on Royal Assent, to be in place until the revised Code is approved.

9.2 The Home Office continue to work closely with the National Counter-Terrorism Policing Headquarters to monitor the implementation of changes and provide guidance on the use of Schedule 7.

10. Impact

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

10.2 There is no impact on the public sector.

10.3 An Impact Assessment was not deemed necessary due to the low costs and impact associated with these changes.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 Individuals can complain about a Schedule 7 examination (including an examination of goods) by writing to or emailing the Chief Officer of the police force concerned. All Schedule 7 complaints are overseen by Independent Police Complaints Commission.

12.2 Additionally, the power itself is kept under review by the Independent Reviewer of Terrorism Legislation, David Anderson Q.C. He is responsible for reporting each year on the operation of the 2000 Act, including Schedule 7.

13. Contact

13.1 The Schedule 7 team at the Home Office, tel: 020 7035 0653 or 020 7035 8619 or email: Schedule7Review@homeoffice.x.gsi.gov.uk can answer any queries regarding the instrument.