EXPLANATORY MEMORANDUM TO

THE TERRORISM ACT 2000 (CODES OF PRACTICE FOR THE EXERCISE OF STOP AND SEARCH POWERS) ORDER 2012

2012 No. 1794

1. This explanatory memorandum has been prepared by the Home Office 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 make provision for two Codes of Practice, one for Great Britain and one for Northern Ireland, for the exercise of stop and search powers under sections 43 and 43A of the Terrorism Act 2000, and the authorisation and exercise of stop and search powers relating to section 47A of, and Schedule 6B to, the Terrorism Act 2000.

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

3.1 This Order will not come into force before the expiry of a period of two months from the date of Royal Assent of the Protection of Freedoms Act 2012 (as contained in the Protection of Freedoms Act 2012 (Commencement No. 1) Order 2012.

4. Legislative Context

4.1 The terrorism stop and search powers provided by the Terrorism Act 2000 were significantly changed by the Protection of Freedoms Act 2012. These changes were a result of the European Court of Human Rights' judgment in *Gillan and Quinton* becoming final on 28 June 2010 and the Government's review of counter-terrorism and security powers which reported on 26 January 2011.

4.2 The Home Secretary made an urgent Remedial Order (the Terrorism Act 2000 (Remedial) Order 2011) under section 10 of the Human Rights Act 1998 on 18 March 2011 to replace sections 44 to 47 of the Terrorism Act 2000 (known as 'section 44' powers) with a more targeted and proportionate power. This Order included a sun-setting provision whereby if an Act passed in the same Session as that in which the Order is made repeals sections 44 to 47 of the 2000 Act, the non-textual amendments to the 2000 Act (and to other enactments) made by the Order cease to have effect on the coming into force of such provision.

4.3 Section 59 of the Protection of Freedoms Act 2012 repeals the stop and search powers in sections 44 to 47 of the 2000 Act. Section 60 and Schedule 5 to that Act introduce new and tightly circumscribed powers. The new powers enable the police to stop and search people and vehicles with no suspicion only in exceptional circumstances, where a senior police officer reasonably suspects that an act of

terrorism will take place and where the powers are considered necessary to prevent such an act. In addition to this significantly higher threshold for the police to authorise the use of the powers, there are a number of strengthening safeguards provided by the Act.

4.4 Section 62 of the Protection of Freedoms Act 2012 inserts new sections 47AA to 47AE into the 2000 Act, making provision for a Code of Practice for terrorism stop and search powers. New section 47AA places a duty on the Secretary of State to prepare a Code of Practice about the powers in section 43 and 43A of the 2000 Act (stop and search with reasonable suspicion), and those created by new section 47A of the 2000 Act.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom. It brings into operation two Codes of Practice, one for Great Britain and one for Northern Ireland.

5.2 A separate Code of Practice has been issued in respect of the exercise of counter terrorism stop and search powers in Northern Ireland to reflect the different operating environment due to the threat from Northern Ireland Related Terrorism (NIRT) but also to take account of other Northern Ireland specific legislation which is relevant in this context such as the provisions at section 75 and 76 of the Northern Ireland Act 1998 (relating to discrimination and equality of opportunity).

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State for Crime and Security has made the following statement regarding Human Rights:

> *"In my view the provisions of the Terrorism Act 2000 (Codes of Practice for the Exercise of Stop and Search Powers) Order 2012 are compatible with the Convention rights".*

7. Policy background

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

7.1 On 28 June 2010, the European Court of Human Rights (ECtHR) made final its decision in the case *Gillan and Quinton* which found sections 44-46 of the Terrorism Act 2000 to be in breach of Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR) because they were not "in accordance with the law". The ECtHR found the powers in those provisions were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. In a statement to Parliament on 8 July 2010, the Home Secretary announced that the police were no longer to make authorisations under section 44 for stop and search powers to be used without reasonable suspicion. She did this in order to take immediate steps to address the ECtHR's judgment, whilst the issue was considered as part of the Government's review of various counter-terrorism and security powers.

7.2 The Government published the findings of the review of counter-terrorism and security powers on 26 January 2011, which concluded that a power to stop and search individuals and vehicles without reasonable suspicion in tightly circumscribed circumstances is operationally necessary.

7.3 The review concluded that sections 44 to 47 of the 2000 Act should be repealed. The review also took into account the fact that there may be circumstances in which stop and search powers requiring reasonable suspicion, or other measures such as high visibility policing, are insufficient to counter the threat of a terrorist attack. The police may, for example, become aware of an intended terrorist attack on a particular site or transport network, but have no (or incomplete) information about the identity or characteristics of those planning to conduct it. It would be difficult, if not impossible, in such circumstances to reach the threshold required to conduct a stop and search under section 43 of the 2000 Act (power to search an individual where reasonable suspicion exists that the person is a terrorist). And yet it would be vital to have a power of stop and search available to address the potential terrorist threat in such circumstances. The review, therefore, concluded that it was necessary to introduce a replacement stop and search power, which is exercisable without reasonable suspicion, but which is available only in circumscribed circumstances. It was announced that the repeal of the section 44 powers and the introduction of the replacement power would be contained in the Protection of Freedoms Bill.

7.4 The review also recommended that consideration should be given to whether the replacement provisions could be implemented more quickly than could be achieved by primary legislation (i.e. the Protection of Freedoms Bill), to fill the operational gap left by the non-availability of any terrorism stop and search powers exercisable without reasonable suspicion. The Home Secretary considered that there were compelling reasons to address this operational gap by making a Remedial Order under section 10 of the Human Rights Act 1998, using the urgent procedure. The Remedial Order was approved by Parliament in October 2011. The Terrorism Act 2000 (Remedial) Order 2011 came into force on 18 March 2011 as an interim measure until the Protection of Freedoms Bill received Royal Assent. Two Codes of Practice, one for Great Britain and one for Northern Ireland, governing the use of section 47A powers were issued alongside the Terrorism Act 2000 (Remedial) Order 2011.

7.5 This Order introduces new Codes of Practice governing the use of powers by police officers under sections 43 and 43A of the Terrorism Act 2000 and the authorisation and use of powers by police officers under section 47A of and Schedule 6B to the Terrorism Act 2000, giving effect to section 62 of the Protection of Freedoms Act 2012, which places a duty on the Secretary of State to prepare a Code of Practice in relation to the use of terrorism stop and search powers.

8. Consultation outcome

8.1 There is a statutory requirement to consult on the draft Codes of Practice governing the counter-terrorism stop and search powers contained in the Terrorism Act 2000, as amended by the Protection of Freedoms Act 2012.

8.2 Consultations on the draft Codes of Practice were launched in Great Britain and Northern Ireland on 6 February 2012 and closed on 1 April 2012. The consultations ran for an eight week period due to the operational need to commence the powers. The draft Codes of Practice which formed the basis of the consultation incorporated and built on the interim Codes of Practice for Section 47A powers that were published alongside the Terrorism Act 2000 (Remedial) Order 2011. The Joint Committee on Human Rights (JCHR) issued a call for evidence in April 2011 on the Remedial Order and associated Codes of Practice as part of its scrutiny of the order. The JCHR published two reports on the Remedial Order on 15 June 2011 and 13 September 2011. The second JCHR report reflected a number of recommendations made by David Anderson QC, the statutory independent reviewer of terrorism legislation, in his annual review on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 published in July 2011. The Department responded to the JCHR's reports on 19 July 2011 and 28 September 2011.

8.3 There were 11 responses received to the consultation in Great Britain. The majority of responses welcomed the introduction of the new Code of Practice to ensure that the new counter-terrorism stop and search powers of the Terrorism Act 2000 are used effectively and fairly. Responses, including those from the Police Foundation, the Independent Police Complaints Commission (IPCC) and the Association of Police Authorities made particular reference to the importance of effective communication and community engagement.

8.4 The Department has given careful consideration to the representations received in developing the Code and has made a number of changes to it as a result. This has included representations from the consultation, the JCHR's scrutiny of the Remedial Order and the associated Code of Practice, David Anderson QC's review of the Terrorism Act 2000, and from the Department's engagement with stakeholders such as photography and journalist groups.

8.5 A summary of responses received to the consultation in Great Britain is available on the Department's website.

8.6 There were 6 responses received to the consultation in Northern Ireland. Responses were received from a number of organisations, including some from the Policing family, the Public and Rights/Equality Groups. The majority of responses were in favour of and had no contrary views to the new Code of Practice as drafted and raised no significant issues. Most emphasised the need for oversight and proportionate use of the powers.

8.7 The Northern Ireland Office has also given careful consideration to the representations received in developing the code and has made a minor change to them in order to include a paragraph which makes clear that any intrusion to the liberty of a person under stop and search powers should be as limited as possible.

8.8 A summary of responses received to the consultation in Northern Ireland is available on the Northern Ireland Office website.

9. Guidance

9.1 The Codes of Practice set out the basic principles for the use of powers by police officers under sections 43 and 43A of the Terrorism Act 2000 and the authorisation and use of powers by police officers under section 47A of, and Schedule 6B to, the Terrorism Act 2000.

9.2 The Codes of Practice will govern the way in which the powers are authorised and used. They include guidance on:

i. the scope of the powers;
ii. requirements for making an authorisation for the powers;
iii. briefing and tasking of officers;
iv. avoiding discrimination;
v. specific issues relating to stop and search and photographers;
vi. conduct of stops and searches;
vii. recording and monitoring of use of the powers; and
viii. community engagement.

10. Impact

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

10.2 The impact on the public sector is less than £5million.

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

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Codes of Practice provides guidance for the monitoring and supervision of the use of stop and search powers.

12.2 Statistical data on the use of the powers in Great Britain should be provided quarterly to the Home Office.

13. Contact

13.1 The Counter-Terrorism Legislation team at the Home Office can answer any queries regarding this instrument. The team can be contacted via email: counterterrorismlegislation@homeoffice.x.gsi.gov.uk; or by post: 2 Marsham Street, Peel 5th Floor, London, SW1P 4DF.

13.2 Alternatively, the Northern Ireland Office can be contacted via email: the.secretary@nio.x.gov.uk or by post at Stormont House Annexe, Stormont Estate, Belfast, BT4 3SH.