EXPLANATORY MEMORANDUM TO
THE COUNTER-TERRORISM ACT 2008 (CODE OF PRACTICE FOR THE VIDEO RECORDING WITH SOUND OF POST-CHARGE QUESTIONING) ORDER 2012
2012 No. 1793

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 The purpose of this Order is to make provision for a Code of Practice in relation to the video recording with sound of the post-charge questioning of persons authorised under section 22 and section 23 of the Counter-Terrorism Act 2008.

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

3.1 None.

4. Legislative Context

4.1 Paragraph 3(2) of Schedule 8 to the Terrorism Act 2000 enables the Secretary of State to make an order requiring the video recording of interviews of persons detained under section 41 of, or Schedule 7 to, that Act. Where an order is made under this power, the Secretary of State is required to issue a Code of Practice about the video recording of interviews to which the order applies.

4.2 Sections 22 and 23 of the Counter-Terrorism Act 2008 provide that a judge or sheriff) may authorise the questioning of a person by a constable after that person has been charged with a terrorism offence or an offence with a terrorist connection in England and Wales and Scotland respectively. Under section 22(7) of that Act, Codes of Practice under section 66 of the Police and Criminal Evidence Act ("PACE") must make provision about the questioning of a person by a constable in accordance with section 22. Accordingly, the provisions of Part 2 of the Counter-Terrorism Act 2008 will be commenced after the introduction of revisions to the Codes of Practice issued under section 66 of PACE.

4.3 Section 25 of the Counter-Terrorism Act 2008 requires that any interview of a person by a constable under sections 22 to 24 (post-charge questioning) must be video recorded with sound. Section 26 of the Counter-Terrorism Act 2008, which sets out the process by which the Code of Practice issued under section 25 can be brought into effect, was commenced through the Counter-Terrorism Act 2008 (Commencement No. 5) Order 2012 on 30 April 2012.

4.4 In accordance with the powers contained in paragraph 3(2) of Schedule 8 to the Terrorism Act 2000, and Part 2 of the Counter-Terrorism Act 2008, this Code of Practice will apply to video recording with sound of all interviews of persons detained under section 41 or detained at a police station for examination under Schedule 7 to

the Terrorism Act 2000 *and* to post-charge questioning of terrorist suspects authorised under section 22 or 23 of the Counter-Terrorism Act 2008. The code of practice will apply only to England, Wales and Scotland. The Department of Justice is responsible for amendments to Northern Ireland (NI) PACE Codes. The NI Assembly Justice Committee considers any amendments to these PACE Codes. The Justice Committee is considering the latest amendments, including those related to Code of Practice for video recording with sound in terrorism cases, on 17 May. As soon as the Justice Committee is content with the changes, the Northern Ireland Office (NIO) will take forward commencement of the NI post-charge questioning provisions (section 24 of the Counter-Terrorism Act 2008).

4.5 *The Terrorism Act 2000 (Video Recording with Sound of Interviews and Associated Code of Practice) Order2012 and supporting explanatory memorandum bring this Code into force in respect of its application to interviews conducted under section 41 of or Schedule 7 to the Terrorism Act 2000.*

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom, however the Code which it brings into operation applies only to England, Scotland and Wales as permitted under S. 25(5) of the Counter-Terrorism Act 2008.

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 Counter-Terrorism Act 2008 (Code of Practice for the Video Recording with Sound of Post-Charge Questioning) Order 2012 are compatible with the Convention rights"*.

7. Policy background

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

7.1 Currently, all questioning of a person in England and Wales must cease in accordance with PACE[1] when a person has been charged or a decision taken to refer the case to a prosecutor for a decision on charging unless the interview is necessary:

- to prevent or minimise the harm or loss to some other person, or the public;
- to clear up an ambiguity in a previous answer or statement; or,
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed that they might be prosecuted.

7.2 Any questioning following the decision to refer for a charging decision or a decision to charge is subject to a limited caution under PACE Code C. This precludes the drawing of inferences from silences or refusal to say anything from any matters later relied on in court.

[1] c. 60 (PACE) Code C 16.5

7.3 Provisions to allow the post-charge questioning of terrorist suspects are included in sections 22 to 27 of the Counter-Terrorism Act 2008. These provisions are not yet commenced. The Government published the findings of the review of counter-terrorism and security powers[2] on 26 January 2011, which recommended the commencement of the post-charge questioning provisions contained in Part 2 of the Counter-Terrorism Act 2008 as an additional investigative tool. Evidence collected in terrorism investigations is of significant volume and complexity and the nature of terrorism related investigations is such that information or evidence may take a considerably longer period of time before it can be put to the suspect, e.g. where the prosecution team has had to decrypt material or obtain results from a forensic analysis of evidence. It is considered that these additional powers for the police to question suspects on evidence not available pre-charge may help in individual prosecutions and may encourage terrorist suspects to assist investigators either by turning 'Queen's Evidence' – i.e. becoming a witness for the Crown – or by providing intelligence. Post-charge questioning will allow the police to apply the pre-charge caution whereby inferences may be drawn from anything which is later relied on in court.

7.4 There was widespread support through the passage of the Counter-Terrorism Bill for the introduction of post-charge questioning about the offence charged in terrorism cases. The Government and Parliament recognised the need to ensure that appropriate safeguards are put in place. The Government accepted a number of recommendations made by the Joint Committee on Human Rights (JCHR)[3] to this effect. In particular, the primary legislation provides the additional safeguard that any interview by a constable of a person which takes place in accordance with an authorisation under Part 2 of the Counter-Terrorism Act 2008 (post-charge questioning) must be video recorded, and the video recording must be with sound.

7.5 This Order introduces a new Code of Practice for the video recording with sound of interviews conducted under section 41 of and schedule 7 to the Terrorism Act 2000 and post-charge questioning of terrorist suspects authorised under section 22 or section 23 of the Counter-Terrorism Act 2008.

8. Consultation outcome

8.1 Paragraph 4(2) of Schedule 8 to the Terrorism Act 2000 requires the Secretary of State, where an order is made requiring the video recording of interviews conducted under section 41 of or Schedule 7 to that Act, to consult on a draft Code of Practice. Section 26(2) of the Counter-Terrorism Act 2008 requires the Secretary of State to consult upon a draft Code of Practice for the video recording with sound of post-charge questioning of terrorist suspects authorised under Part 2 of the Counter-Terrorism Act 2008.

8.2 A twelve week public consultation was carried out which invited comments on proposed revisions to Codes of Practice C, H and G issued under PACE and the new Code of Practice for the video recording with sound of interviews and post-charge questioning of terrorist suspects under the Terrorism Act 2000 and the Counter-

[2] http://www.homeoffice.gov.uk/publications/counter-terrrorism/review-of-ct-security-powers/

[3] See: Joint Committee on Human Rights: Counter-Terrorism Policy and Human Rights (Thirtieth Report): Counter-Terrorism Bill, Thirtieth Report of Session 2007 – 08 (HL Paper 172 HC 1077)

Terrorism Act 2008 respectively. This consultation closed on 24 January 2012. In respect of the PACE Codes, in accordance with section 67(4) of PACE, the statutory consultees (the Association of Chief Police Officers for England, Wales and Northern Ireland, the General Council of the Bar, the Law Society of England and Wales and the Institute of the Legal Executives) and others were specifically invited to comment. Other groups included a range of groups and organisations who have a specific interest in human rights issues (e.g. Liberty and Justice), in supporting young and vulnerable persons in custody (e.g. the National Appropriate Adult Network (NAAN), MENCAP, Prison Reform Trust and Children's Society) and in promoting the interests of transgender individuals. Comments were also invited from members of the public and the drafts were available on the Home Office website.

8.3 Responses from 46 representative organisations and groups were received to the consultation. A number of responses raised concern about the operational and resource difficulties of making video recording with sound of interviews of persons detained under Schedule 7 to the Terrorism Act 2000 compulsory, with no exception. These concerns have been addressed by virtue of an exemption, which can only be exercised in very limited circumstances, contained within the Code.

8.4 A summary of responses received to the consultation is available on the Home Office website.

9. Guidance

9.1 The Code of Practice sets out the basic principles for the video recording with sound of:

- any interview by a constable of a person detained under section 41 of the Terrorism Act 2000 which takes place in a police station in England, Wales or Scotland;
- any questioning by a constable of a person detained for examination under Schedule 7 to the Terrorism Act 2000 which takes place in a police station in England, Wales or Scotland;
- any interview by a constable of a person which takes place in accordance with an authorisation under section 22 of the Counter-Terrorism Act 2008 (post-charge questioning) anywhere in England and Wales; and
- any interview by a constable of a person which takes place in accordance with an authorisation under section 23 of the Counter-Terrorism Act 2008 (post-charge questioning) anywhere in Scotland.

9.2 The Code is modelled on the existing provisions of PACE Codes E and F which apply to the compulsory audio and optional video recording of persons detained on suspicion of committing an offence.

9.3 The Code includes note for guidance to police officers and others about its application and interpretation.

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 Secretary of State, by virtue of powers contained at paragraph 4(5) of Schedule 8 to the Terrorism Act 2000 and section 26(6) of the Counter-Terrorism Act 2008 respectively, may make revisions to the Code of Practice.

12.2 The Code of Practice will be considered as part of the post-legislative scrutiny of the Counter-Terrorism Act 2008, which the Home Office will undertake in 2012/13.

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.gsi.gov.uk; or by post: 2 Marsham Street, Peel 5th Floor, London, SW1P 4DF.