EXPLANATORY MEMORANDUM TO

THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 (CODE OF PRACTICE FOR ARRANGING AND CONDUCTING INTERVIEWS OF WITNESSES NOTIFIED BY ACCUSED) ORDER 2010

2010 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Office for Criminal Justice Reform 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 Criminal Procedure and Investigations Act 1996 ('the 1996 Act') sets out the disclosure duties of the prosecution and the defence in relation to criminal proceedings. Section 34 of the Criminal Justice Act 2003 ('the 2003 Act') inserts a new section 6C into the 1996 Act. It creates a new requirement for the accused to disclose in advance the name, address and date of birth of the witnesses they intend to call at the trial. Section 6A(2) of the 1996 Act already requires the accused to provide these details in respect of any witness the accused believes is able to give evidence in support of an alibi. The police and other investigators may from time to time wish to interview one of those witnesses. The present order brings into force a code of practice which sets out how any such interviews are to be arranged and conducted.

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

3.1 None.

4. Legislative Context

4.1 It is intended to bring section 34 of the 2003 Act into force by commencement order simultaneously with the entry into force of the code of practice. In addition, it is intended to make regulations by negative resolution order, to come into force at the same time. The regulations are needed to specify the time limit within which the accused must comply with the disclosure requirement. A separate Explanatory Memorandum has been prepared for those regulations.

4.2 It was not originally intended that the new disclosure requirement should be accompanied by a code of practice. However, the Home Affairs Select Committee in its Second Report on the then Criminal Justice Bill 2002 expressed concerns that the police might apply undue pressure on witnesses disclosed by the accused. The Committee recommended that the Bill should be amended:

> "… so that, where the prosecution wish to interview a defence witness in advance of trial, they should be required to notify the defence and offer to interview the witness in the presence of the defence. We further suggest that any interview be tape-recorded."[1]

[1] http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/83/8307.htm

4.3 The Committee added that its preference was for the procedural requirements to be stated on the face of the Bill:

"We would prefer to see a provision of this nature be included in the Bill, rather than left to codes of practice. Arguably, defence witnesses require extra protection to ensure equality in this context. In contrast to most defendants, the police and prosecution have vast resources at their disposal with which to apply pressure to defence witnesses, if minded to do so."

4.4 During his Second Reading speech the then Home Secretary made the following commitment:

"My hon. Friend the Member for Sunderland, South (Mr. Mullin), the Chair of the Select Committee on Home Affairs, has been very generous in not intervening on me yet, but I would like to refer to his input in this matter. The Committee made the suggestion that we might develop a code that could incorporate measures to offer protection if there were any suggestion of a defence witness being leant on in the intervening period. I am happy to give the assurance that we will be prepared, in Committee, to provide for a code."[2]

4.5 Mr Mullin responded as follows:

"I am grateful to my right hon. Friend for that assurance. I think that it will resolve a problem. To make this measure effective, however, it will be necessary to ensure that defence witnesses whom the prosecution wish to contact should be interviewed only in the presence of a defence solicitor, and, preferably, that the interview should be recorded; otherwise, the measure will undoubtedly be abused."

4.6 The Home Secretary replied, "I am agreeing now that the code should cover those areas" (Official Report 2 November 2002, Cols. 918-919). The Bill was later amended accordingly in the House of Lords. On 3 July 2003, Baroness Scotland wrote to Lord Dahrendorf KBE, Chair of the Delegated Powers and Regulatory Reform Committee, enclosing the amendments together with an indicative draft of the code of practice.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales only.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State at the Ministry of Justice, Claire Ward MP, has made the following statement regarding Human Rights:

In my view the provisions of the Criminal Procedure and Investigations Act 1996 (Code of Practice for Police Interviews of Witnesses Notified by Accused) Order 2010 are compatible with the Convention rights.

[2] http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo021204/debtext/21204-06.htm

7. Policy background

7.1 Accused persons are required, in all Crown Court cases, to provide a statement before the trial setting out the nature of their defence. They may do so in magistrates' courts cases. These provisions are designed to focus the trial on the matters in dispute between the prosecution and the defence, and to avoid wasting court time on irrelevant matters. However, currently the accused are not required to provide the name, address and date of birth of the witnesses they intend to call at the trial, with the exception of witnesses supporting an alibi. As a result, it is still possible for the defence to call witnesses who are unknown to the prosecution at the time of the trial.

7.2 Should such a witness be called, it is necessary for the prosecution to apply for an adjournment to investigate the witness (failure to apply for or be granted an adjournment risking a successful "ambush defence" where a previously unknown defence witness is called unexpectedly to dispute key elements of the prosecution case). If the court is prepared to grant an adjournment, the prosecution will conduct a criminal records check and may make other enquiries. Should the check reveal previous convictions, the prosecution may make an application to the court to admit evidence of the defence witness's bad character. It is desirable that these procedures should be carried out before the trial begins. The purpose of the new disclosure requirement is to ensure that this takes place.

8. Consultation outcome

8.1 Between 10 September and 10 December 2004 the Government carried out a statutory public consultation exercise on two codes of practice under the Criminal Procedure and Investigations Act 1996, of which the present code was one.[3] There were 35 responses. The consultation exercise raised a significant number of issues relating to this proposed code of practice and it was decided to defer implementation of the defence witness disclosure requirement pending further consideration. The other code was implemented in April 2005.

8.2 The main issues highlighted by the consultation may be summarised as follows:

(1) Concerns about the rights of the witnesses, including their right to determine whether a defence solicitor should attend the interview.

(2) Suggestions of further practical areas of procedure the code might also cover.

8.3 With regard to (1), some respondents felt the code failed to make it sufficiently clear that the process of being interviewed is voluntary – the police have no power to compel the witness's attendance. The code now makes this clear. The revised code also makes it clear that the witness may bring his or her own solicitor to the interview. This approach is consistent with the interviewing of witnesses generally.

8.4 Different views were expressed by consultees on the attendance of the accused's solicitor. Some felt that the witness had the right, as recommended in the consultation version of the code, to determine whether the accused's solicitor was present, whereas

[3] See *Criminal Justice Act 2003 Implementation: Disclosure Codes of Practice, A Consultation Document*, Office for Criminal Justice Reform, September 2004. A pdf of the consultation document is annexed to this Memorandum.

others felt that the defence solicitor should be required to attend the interview. The Government's position remains as in the consultation version, that the witness's views are paramount. The witness can veto the interview.

8.5 With regard to (2), the Government takes the view that, as the process is entirely voluntary on the witness's part, little is served by setting out more prescriptive procedures for the police to follow. It is fortified in its view by the risk that any such procedures might be taken as a standard to apply to all police interviews with witnesses. It should be recalled that any interviews conducted under the code of practice will remain only a tiny percentage of all police interviews with witnesses. A considerable degree of flexibility applies and will continue to apply to the conduct of interviews generally, including those carried out after a person has been charged. It would not be appropriate for police interviewing of witnesses generally to be subject to the procedures set out in the code, if only by implication.

8.6 The consultation document contained one specific question for consultees on the present code, namely whether a legally unrepresented accused should be capable of being legally represented for the sole purpose of being represented at the interview with the witness. Respondents agreed with the Government's view that the answer to this question was "yes" and accordingly the code has not been changed.

8.7 Since the consultation exercise, the need for effective trial management has not diminished in importance. It is referred to explicitly in Part 3.2 of the Criminal Procedure Rules. In the case of *Kelly v. Warley Justices* (31 July 2007, CO/10678/2006) a magistrates' court purported to rely on powers conferred by the Rules to order the accused to provide much the same information as is required by section 34. The High Court found that the magistrates had no power to make the order in question. The solution to the problem created by this case is to implement the defence witness disclosure requirement, along with this code of practice. The Government now proposes to do so.

8.8 In view of the passage of time since the previous consultation exercise, a further consultation was conducted with the four statutory consultees (ACPO, Bar Council, Institute of Legal Executives and Law Society) between 22 November 2009 and 22 January 2010. This has not exposed any previously undetected issues of significance.

9. Guidance

9.1 It is envisaged that a Ministry of Justice Circular will be issued to accompany the commencement of the provisions.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as its sole purpose is to implement primary legislation and it has no impact on the private or third sectors.

10.2 The impact on the public sector is likely to consist in a modest increase in demand on the legal aid budget, and a similar decrease in court costs.

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 It is intended to monitor closely the operation of the provisions in practice.

13. Contact

Stephen Jones at the Better Trials Unit, Office for Criminal Justice Reform, Ministry of Justice Tel: 020 3334 6089 or e-mail: stephen.jones@justice.gsi.gov.uk can answer any queries regarding the instrument.