EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (CODES OF PRACTICE)

(REVISION OF CODES A, B, C, D AND H AND NEW CODE I) ORDER 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The Order brings into force revised codes of practice issued under section 66 of the Police and Criminal Evidence Act 1984 (PACE), known as Codes A, B, C, D and H. Broadly, these revisions include:

- Updates to Code A, which covers the statutory powers of stop and search and requirements to record public encounters by police officers and staff, to:
    - Govern the use of search powers created within the State Threats Prevention and Investigation Measures (STPIMs) under Part 2 of the National Security Act 2023 (NS Act);
    - Protect the identities of police officers involved in investigations linked to national security including but not limited to investigations carried out under the powers in the NS Act;
    - Prepare for rescinding the Best Use of Stop and Search Scheme (BUSSS) by including the communication of a suspicionless powers authorisation and data collection requirements in the Code;
    - Update the ethnic categories found in Annex B;
    - Update the start and end date of the Serious Violence Reduction Orders (SVRO) pilot, and
    - Cover the new stop and search powers within the Public Order Act 2023 (POA).
- Updates to Code B, which covers the police powers to search premises and to seize and retain property found on premises and persons, to reflect the search and seizure powers contained in Schedule 2 to the NS Act.
- An addition to Code C, which covers the requirements for the detention, treatment and questioning of suspects, to make clear that the Code does not apply to a detained person arrested under section 27 of the NS Act, which will instead be covered by new Code I.
- Updates to Code D, which sets out the methods used by the police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records, to:
    - Make clear the Code doesn't apply to the taking of photographs, fingerprints, skin impressions, body samples or impressions of people arrested under section 27 of the NS Act, and

- Protect the identities of police officers involved in investigations linked to national security.

- Updates to Code H, which covers the requirements for the detention, treatment and questioning of suspects related to terrorism in police custody by police officers, to reflect that any time a person has spent in detention under separate powers will be accounted for when calculating the maximum period of detention following an arrest under section 41 of the Terrorism Act 2000.

2.2 These codes also contain, where necessary, a number of minor and technical amendments to reflect the creation of the NS Act or in consequence to the amendments set out above.

2.3 The order also brings into force a new code of practice issued under section 66 of PACE, known as Code I. This covers the detention, treatment and questioning of persons arrested under the NS Act.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of the instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention of Human Rights

5.1 The Minister for Crime, Policing and Fire, Rt Hon. Chris Philp MP has made the following statement regarding Human Rights:

"In my view, the provisions of the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B, C, D and H and new Code I) Order 2023 are compatible with the Convention rights".

6. Legislative context

6.1 The Home Secretary has issued a number of codes of practice in connection with the exercise by police officers of statutory enforcement powers in accordance with the requirement at section 66(1) of PACE. These codes of practice also set out associated rights and safeguards for suspects in England and Wales.

6.2 This order brings into force revised Codes A, B, C, D & H, and new Code I.

6.3 Section 67(4) of PACE requires that before the Home Secretary issues a new code or a revision of a code, a statutory consultation be carried out. Such consultation has been carried out in accordance with section 67(4).

6.4 On 11 May 2022 the Home Secretary introduced the National Security Bill into the House of Commons. This legislation provides law enforcement and our security and intelligence agencies with greater tools to tackle modern state threats. Specifically, the legislation includes powers of search, seizure and retention, arrest and detention, financial and property investigation powers, and STPIMs. These powers reflect the

modern threat and the sophistication of the hostile actors involved as they enable the police to effectively investigate individuals' behaviour and potential links to a foreign power, preserve evidence and analyse highly sophisticated behaviours to be able to charge an individual.

6.5 Updates to the relevant codes of practice are required to make specific provision in relation to investigations carried out under the NS Act and, where appropriate, disapply the equivalent provisions in relation to other police investigations to avoid uncertainty as to the processes and practices to be followed.

6.6 After Royal Assent of the NS Act on 11 July 2023, the Government launched a six week consultation on the revised and new PACE Codes from 20 July 2023 to 31 August 2023.

6.7 New stop and search powers were also introduced upon Royal Assent of the POA in May 2023. Sections 10, 11, 12, 13 and 14 of that Act cover both the suspicion led and suspicionless powers that can be used in a public order context. These powers are not in force yet as the PACE Codes need to be updated to reflect these new powers and this instrument will include the needed paragraphs so that these powers can commence.

6.8 Serious Violence Reduction Orders (SVROs) were introduced as part of the Police, Crime, Sentencing and Courts Act 2022. SVROs are a civil order which give the police powers to stop and search individuals convicted of an offence where a knife or offensive weapon was used or was present. With this Act a pilot was introduced for this new power for a period of two years and six months. The pilot was due to begin in January this year but owing to a delay the pilot began on the 19 April 2023 and ends on the 19 October 2025. This instrument will ensure that the duration of the pilot is stated correctly in the Code.

7. Policy background

What is being done and why?

Code A

7.1 Although Code A does not apply to the majority of provisions within the NS Act given that this legislation does not include powers of stop and search, changes to Code A are required to govern how searches of individuals subject to STPIMs under Part 2 of the NS Act should be carried out. These changes mirror the existing provisions in Code A for the equivalent terrorism measures (Terrorism Prevention and Investigation Measures).

7.2 The changes to Code A also exempt an officer having to give their name prior to a search in the case of enquiries linked to national security. This extends the approach currently taken towards terrorism investigations in section 3.8 of the code. This is a crucial change to protect police officers from being obliged to reveal their identity to highly trained state actors who may seek to use such knowledge to conduct harmful activity against the individual.

7.3 Other amendments to Code A are necessary to allow for the appropriate safeguards to be in place before the commencement of the powers granted to officers following the passage of the POA. The revisions to the Code set out the operational considerations that should be made when conducting searches under the powers in this Act and the

general principles to be considered when conducting these searches to ensure that they are fair and responsible.

7.4 In addition, measures within Code A will include a communication requirement for when suspicionless powers are authorised, where it is operationally beneficial to do so, and a data collection requirement for every search conducted. These changes are being introduced to increase transparency and for the first time codify within the Code the requirement for data collection on use of stop and search powers.

7.5 There are also some administrative changes to Code A being made in line with the updated ethnicities presented in the 2021 Census and to reflect the change of the start of the SVRO pilot, which began on the 19 April 2023 rather than 19 January 2023 and will now end on the 19 October 2025.

Code B

7.6 Section 23 and Schedule 2 to the NS Act replace Section 9 of the Official Secrets Act 1911 and provide powers of search and seizure for the police where there is reasonable suspicion that a relevant act has been, or is about to be, committed. Relevant acts are defined as certain offences under the NS Act as well as threats or acts which involve serious violence, endanger life or create a serious risk to the health or safety of the public (see section 33 of the NS Act) which are carried out for or on behalf of, or with the intention to benefit, a foreign power.

7.7 It was vital, in creating the suite of new offences in the NS Act, that the police and other agencies have the powers to effectively investigate the harms the legislation is seeking to address. These new search and seizure powers contain the same strong safeguards which apply to other modern search powers, including enhanced protections around the gathering of confidential material.

7.8 Given that Code B offers guidance explicitly to powers contained within terrorism legislation, and that there is substantial overlap between search and seizure powers contained within the Terrorism Act 2000 (TACT 2000) and the NS Act, Code B has been updated to cover the new search and seizure powers within the NS Act. The revisions largely replicate those already contained in the Code for similar powers.

7.9 The Code therefore expands the existing guidance on search and seizure powers exercised under Schedule 2 of the NS Act. For example, on search of premises, it requires an officer in charge to be appointed and guidance to ensure a search is conducted with the least possible disruption to activities carried out on the premises.

7.10 The updated Code B also reflects changes made by the NS Act to Schedule 5 to TACT 2000. Schedule 5 already allows a police officer of at least the rank of superintendent to give authorisation for an urgent premises search, which would otherwise require a search warrant issued by the court, where the case is one of great emergency and immediate action is necessary. The updated Code B reflects amendments which require judicial authorisation through a warrant if the police wish to retain confidential journalistic material seized during an urgent premises search for the purposes of a terrorist investigation. This change to Schedule 5 ensures additional protection for sensitive journalistic material and is in line with equivalent provisions in Schedule 2 to the NS Act and reflected in this Code.

Code C

7.11 Changes to Code C make clear that the code does not apply to a detained person if they are in custody as a result of being detained under Section 27 of the NS Act or under Schedule 3 to the Counter-Terrorism and Border Security Act 2019 (CTBSA).

7.12 The exercise of these powers of detention are covered by separate codes of practice and therefore are not covered by Code C (for the NS Act this will be Code I and for the CTBSA this is the Examining Officers and Review Officers under Schedule 3 to the CTBSA Code of Practice).

7.13 A further change has been made to Code C regarding interviewing suspects without legal representation. Where individuals are interviewed following arrest, under certain exceptional circumstances (as set out in PACE), a delay in access to legal advice can be authorised. These circumstances are reflected in Code C. Code C also referenced situations where awaiting the arrival of a legal representative would cause unreasonable delay to the process of investigation. This reference has been removed to ensure the Code is in line with recent case law and to ensure suspects have the right to legal advice in all but the most exceptional circumstances.

Code D

7.14 An amendment has been made to make clear that Code D does not apply to the taking of photographs, fingerprints, skin impressions, body samples or impressions from people arrested under Section 27 of the NS Act. The taking of such data is covered by paragraphs 10 to 14 of Schedule 6 to the NS Act and the new Code I.

7.15 The changes to Code D also exempt an officer having to give their name in the case of enquiries linked to national security. This extends the approach currently taken towards terrorism investigations in section 2.18 of this code so that it covers the investigation of offences in the NS Act. This is a crucial change to protect police officers from being obliged to reveal their identity to highly trained state actors who may seek to use such knowledge against them.

Code H

7.16 The following changes to Code H implement recommendations made by the Independent Reviewer of Terrorism Legislation, which the Government accepted.

7.17 Code H is being updated following amendments to section 41 of TACT 2000 made through the NS Act. These amendments mean that any time an individual has spent in detention under a separate power (as listed in new section 41(3A) of TACT 2000 and, including the power of arrest under section 24 of the PACE and section 27 of the NS Act) will be accounted for when calculating the maximum period of detention. This applies to detentions under section 41 TACT 2000, as well as where there is a warrant for further detention or extension of such a warrant under paragraphs 29 or 36 of Schedule 8 to TACT 2000.

7.18 Code H is also updated to reflect further amendments to section 41 of TACT 2000 which make clear that any time when an individual is arrested in hospital under section 41 and is not being questioned for the purposes of obtaining relevant evidence will not be included in calculating any period of time in detention.

7.19 A similar change that is set out in paragraph 7.13 has been made to Code H to ensure the Code is in line with recent case law and to ensure suspects have the right to legal advice in all but the most exceptional circumstances.

New Code I

7.20 Under Section 27 of the NS Act, a constable can arrest without a warrant anyone who they suspect is, or has been, involved in foreign power threat activity as defined in Section 33 of the NS Act. The new Code I will govern the detention, treatment and questioning of individuals arrested under that power. Schedule 6 to the NS Act contains provisions regarding treatment of individuals in detention and the rights of individuals. It includes the availability of longer detention periods to reflect the complex nature of state threats investigations and the taking and retention of biometric data which covers fingerprints, DNA samples and physical data.

7.21 New Code I is based closely on Code H and provides guidance for police on how suspects should be treated in custody, such as the rights that a suspect has and must be informed of upon arrest. Under TACT 2000, police have enhanced powers to facilitate early disruption and investigation of acts of terrorism and terrorist-related activity. Code I reflects the enhanced powers and tools that the police have been provided with for terrorism investigations and that are made available in relation to state threats investigations by the NS Act.

7.22 The Code contains various operational procedural matters such as how to arrange for an interpreter for the suspect, what information must be documented in the custody record, how to provide cautions and what to do with the detainee's property upon arrest.

7.23 Mirroring the updates to Code H set out above, Code I also makes it clear that any time an individual has spent detained under a separate power will be accounted for when calculating the maximum period of detention.

7.24 A similar change which is set out in paragraph 7.13 has been made to Code I to ensure the Code is in line with recent case law and to ensure suspects have the right to legal advice in all but the most exceptional circumstances.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 The Home Office ran two consultations regarding proposed revisions to PACE Codes A, B, C, D & H, and the creation of new Code I, from 20 July 2023 to 31 August 2023. One consultation focussed on changes required as a result of the NS Act, and the second focussed on amendments solely to PACE Code A in relation to the POA.

10.2 The statutory consultations sought responses from a set group of individuals and organisations as set out in section 67(4) of PACE. We received responses from several separate individuals and organisations, including Counter-Terrorism Policing, West Midlands Policing, Force leads across England and Wales, NPCC, College of Policing and the Police Federation. The majority of responses, including from Counter-Terrorism Policing and West Midlands Policing, acknowledged that the proposed changes to the PACE Codes were key to ensuring police officers have clear guidance

on the powers and ensuring that the powers are used in a way that is fair and proportionate.

10.3 The draft codes have been amended in light of two suggested revisions from Counter-Terrorism Policing to PACE Codes H and I to ensure that the role of custody officers and the period of application for a warrant for further detention are both clear and consistent across the codes. Minor amendments have also been made to the draft of PACE Code A to ensure consistency of language. In summary, the Government welcomes the amendments proposed by Counter-Terrorism Policing on Codes H and I, and will work with the College of Policing and NPCC to ensure guidance to the minor amendments in Code A are clear and user friendly. For full details of the changes made, see the Government's response to both consultations which will be published on www.gov.uk on the same day as the Order to which this Explanatory Memorandum refers is laid in Parliament.

11. Guidance

11.1 The amended codes include notes for guidance to police officers and others about the application and interpretation of the codes of practice.

11.2 No other guidance is required as a result of this statutory instrument.

12. Impact

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

12.2 The impact on the public sector is expected to include an improved understanding of the exercise by police of their statutory enforcement powers as well as clarity on the applicable code provisions for persons arrested and detained under the NS Act.

12.3 An Impact Assessment has not been prepared for this instrument given that this is covered already under the impact assessments for the relevant primary legislation. Impact assessments have been prepared in relation to the POA and the NS Act respectively. A copy of the impact assessment for the POA is available on www.legislation.gov.uk. Paragraphs 113 and 116 of this assessment note the benefit to business and limited impact on trade from these new powers. Paragraph 115 states that due to the nature of protest behaviour, it is difficult to identify the exact impacts of the measures to the public. A copy of the relevant impact assessment for the NS Act is available at Impact Assessment (publishing.service.gov.uk). Paragraph 92 of this assessment notes the limited impact this legislation will have on government, business or the general public. Hard copies of the various Codes and the impact assessments can be obtained by writing to the relevant team at the Home Office, 2 Marsham Street, London, SW1P 4DF: for Codes A to D or the POA impact assessment – the Power Powers Unit, Public Safety Group; for Code H – the Counter-Terrorism Pursue Unit, Homeland Security Group; for Code I or the NS Act 2023 impact assessment – the State Threats Unit, Homeland Security Group.

12.4 This statutory instrument will come into force on 20 December 2023.

13. Regulating small business

13.1 The legislation does not apply to small businesses.

14. Monitoring and review

14.1 Success criteria for the changes will be that:

- The guidance clearly sets out the requirements for officers when using each power;
- They are appropriate to cover investigations into state threats under the NS Act; and
- The guidance is clear and accessible to those who will need to use them or be impacted by them.

14.2 The Secretary of State, by virtue of powers contained at section 67 of PACE, may make revisions to these codes of practice.

14.3 Part 3 of the NS Act creates the role of the Independent Reviewer of State Threats Legislation (IRSTL). The IRSTL will assess the operation of UK state threats legislation including its fairness, effectiveness and proportionality. As part of this, the IRSTL will consider the exercise of police powers within the NS Act and the related guidance. The reviewer will report their findings and recommendations to Parliament in order to inform parliamentary and public debate on state threats law and civil liberties.

14.4 The Home Office will continue to monitor the use of the stop and search powers through the collection of stop and search statistics and the reports and recommendations from both the Independent Office of Police Conduct (IOPC) and His Majesties Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS).

15. Contact

15.1 National Security Consultations team at the Home Office nationalsecurityconsultations@homeoffice.gov.uk will answer any queries regarding the instrument.

15.2 Mark Leslie at the Home Office; Email: mark.leslie1@homeoffice.gov.uk can be contacted for any queries regarding the PACE Code A changes.

15.3 Mark Williams Deputy Director of the Police Powers Unit at the Home Office can confirm that this explanatory memorandum meets the required standard.

15.4 Chris Philp, Minister for Crime, Policing and Fire at the Home Office can confirm that this explanatory memorandum meets the required standard.