EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (CODES OF PRACTICE) (REVISION OF CODE E) ORDER 2016

2016 No. 35

1. Introduction

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

2. Purpose of the instrument

2.1 The Order brings into force a revised Code of Practice issued under the Police and Criminal Evidence Act 1984 ("PACE"), known as Code E, which deals with the audio recording of interviews with individuals suspected of committing criminal offences. The changes introduce a limited exemption from the requirement to audio record interviews and applies to four specified types of low level indictable offences.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 This instrument applies only to England and Wales as it is made under section 67(5) of the Police and Criminal Evidence Act 1984, which extends to England and Wales only. The instrument does not have minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.5 The Department has reached this view because it considers that the primary purpose of the instrument relates to policing, which is within the devolved legislative competence of the Scottish Parliament and Northern Ireland Assembly; the primary purpose of the subject matter of the instrument is not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

4. Legislative Context

4.1 Section 60 of PACE requires the Home Secretary to issue a code of practice in connection with the audio recording of interviews of suspects. Code E governs the conduct and recording of interviews of suspects in England and Wales and sets out the rights and safeguards available to suspects. This Order brings into force a revised Code E.

4.2 Section 67(4) of PACE requires that where the Home Secretary wishes to issue a revised code, a statutory consultation must first be carried out. This has been carried out in accordance with section 67(4).

4.3 The revisions are specifically to support police operational practice to respond to low level offending quickly and non-bureaucratically in a proportionate manner.

5. Extent and Territorial Application

5.1 The instrument extends to England and Wales (see paragraph 3.3 above).

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 The Minister of Policing, Crime and Criminal Justice, and Victims 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 Code E) Order 2016 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 Before October 2013, the audio recording requirement was confined to interviews for indictable offences carried out at police stations. On 27 October 2013, a revised Code E extended the requirement to voluntary interviews about indictable offences that take place elsewhere than at a police station. This was done to complement and support substantial revisions to Codes C and G in 2012. The latter clarified the need to arrest and the former established that the right to legal advice applies when a suspect who is not under arrest is interviewed by police in any location. The Code G changes promoted the wider use of voluntary interviews, particularly for low level offences.

7.2 Since the 2013 revision, the risk that the extended requirement for audio recording could jeopardise further developments to improve the effectiveness of out of court disposals and community resolutions has been recognised. This is apparent from an analysis of high volume low level offending focussing on four offence types. These are possession for personal use of cannabis and khat, low value retail theft and low value criminal damage. Prior to October 2013, a written interview record would have sufficed for these offences. Very few of these cases are dealt with by prosecution. For this reason, as well as having regard to the volume of cases (the table below breakdowns these offence types and their outcomes for the period April 2014 to March 2015), a written record of the interview rather than an audio recording is considered to be proportionate and appropriate.

Offence type	Total disposed of without prosecution*
Drug possession Cannabis/Khat	63,447
Retail theft	45,646
Criminal Damage	19,677

* Comprises Community resolutions, Warnings & Penalty Notice for Disorder

7.3 The limited exemption for the four indictable offence types is being introduced to address the risk described in 7.2 above. The aim is to enable the police to respond effectively and proportionately to the unique challenges created by high volume low level first time offending and to better manage their resources. It therefore supports Government policy for dealing with these cases in a fast and non-bureaucratic way.

7.4 The revisions to Code E are designed to implement this limited exemption and accordingly to avoid the need for police to either greatly reduce their response to such offending, or alternatively, to divert resources from more serious offending. They also ensure that the audio recording safeguards established by the 2013 extension continue to apply appropriately to voluntary interviews for all other indictable offence types that take place elsewhere than at a police station.

Consolidation

7.5 Not applicable.

8. Consultation outcome

8.1 The Home Office held a statutory consultation over revisions to Code of Practice E (audio recording of interviews)) from 24th March 2015 to 5th May 2015 (see https://www.gov.uk/government/consultations/consultation-on-proposed-changes-to-pace-code-e-which-concerns-the-audio-recording-of-interviews-with-suspects). The statutory consultation was in accordance to the provisions set out in section 67 of PACE.

8.2 The consultation sought views on introducing a limited exemption from the need to audio record voluntary interviews about indictable offences that take place elsewhere than at a police station. The consultation draft code included links to relevant publications concerning the ability of police to respond effectively to high volume low level offending.

8.3 Responses were received from 18 separate individuals and organisations. These came from 10 police forces, the National Policing Lead for Charging and Out of Court Disposals, the Police Federation, legal representative bodies (Law Society, London Criminal Courts Solicitor's Association, Bar Council, Criminal Bar Association and the Chartered Institute of Legal Executives) and one member of the public.

8.4 In general terms, the police response asked for a broad general exemption to cover any indictable offence. It argued that the proposed revisions did not go far enough, and more was required to enable officers to dispose of low level offending elsewhere than at a police station. To achieve this, they wanted to remove the requirement for audio recording of voluntary interviews elsewhere than at a police stations for a much wider range of offences. However, in the absence of a firm evidence base, the Government could not support this.

8.5 Conversely, the response from the legal profession and others indicated that they were not convinced that any exemption was necessary. They claimed that it would

fundamentally change the audio recording rule and that it could be extended to other offences. However, this fails to acknowledge that prior to 2013, there was no requirement to audio record any interview that takes place elsewhere than at a police station as well as the clearly stated intention to limit the exemption to specified high volume, low level offending which would rarely, if ever, result in criminal proceedings.

8.6 As a result of the consultation, the original proposal to establish a limited exemption based on four indictable offence types has been retained. It provides for a balanced approach to the concerns raised by the responses to the consultation. The Code has also been amended to improve presentation and help understanding and some small changes have been made in the interests of clarity and legal accuracy. For details of the changes made, see the Government's response to the consultation at www.gov.uk.

9. Guidance

9.1 We do not think that further guidance for the police is required to support the revisions of the Code. However, the Home Office will continue to work with the National Policing Leads and College of Policing to review policing practice.

10. Impact

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

10.2 The impact on the public sector is limited to the police.

10.3 An Impact Assessment has not been prepared for this instrument because the amounts involved fall below the threshold for producing one.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The success criteria for the changes will be:

- Continued use by the police of voluntary interviews taken place elsewhere than a police station for the four offence types exempted in the Code;
- Consistent implementation of voluntary interview safeguards for suspects.

12.2 The National Policing Leads, in conjunction with the College of Policing, the Home Office and Her Majesty's Inspector of Constabulary will monitor the implementation and impact of the amendments on an ongoing basis.

13. Contact

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