EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (CODES OF PRACTICE) (REVISION OF CODES A, B AND D) ORDER 2011

2011 No. 412

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 changes to Codes of Practice A, B and D under the Police and Criminal Evidence Act 1984 (PACE) to bring the Codes in line with changes in legislation and policy. The revised Codes of Practice will come into operation on the day on which this Order comes into force.

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

3.1 None.

4. Legislative Context

4.1 The revised Code A laid with the instrument sets out changes in the use of the stop and search powers in sections 44-47 of the Terrorism Act 2000 in the light of the judgment of the European Court of Human Rights in the case of *Gillan & Quinton v UK*.

4.2 The revised Codes A and D also implement the changes made by the Crime and Security Act 2010 to i) reduce the level of recording of stop and search encounters and ii) implement the powers to take fingerprints and samples for recordable offences under sections 61, 62 and 63 PACE and provisions under the Serious Organised Crime and Police Act 2005 section 117 for mobile fingerprinting. Commencement orders will be made for sections 1-7 of the Crime and Security Act 2010 and section 117 of the Serious Organised Crime and Police Act 2005 to come into force on 31st December 2010.

4.3 Changes to Code B reflect the judgment in Khan v Commissioner of Police of the Metropolis [2008] EWCA Civ 723 on the police's power to enter and search premises under section 18 of PACE and powers introduced by the Prevention of Terrorism Act 2005 to search premises of persons subject to control orders.

4.4 Other changes to Code D take account of the judgments in R v Chaney [2009] EWCA Crim 21 and R. v Smith [2008] EWCA Crim 1342 regarding procedures for obtaining evidence of recognition from viewing images, for example CCTV.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Minister of State for Policing and Criminal Justice (Rt Hon Nick Herbert 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 and D) Order 2011 are compatible with the Convention rights.

7. Policy background

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

7.1 Police powers are governed by the Police and Criminal Evidence Act (PACE) 1984 and the accompanying Codes of Practice, which set out the core framework of police powers and safeguards for individuals. Changes are being made to Code A (stop and search), Code B (enter and search premises and seize property) and D (identification). The changes are necessary to bring the Codes in line with changes to legislation and policy, take account of court judgments and update police working practices.

7.2 The changes to Code of Practice A are necessary to remove the national requirement to record 'stops' (i.e. stop and account encounters). Police forces are now free to decide, in consultation with their local communities, whether to continue monitoring these encounters on a local level, where community concerns exist around disproportionality (i.e. a greater proportion of people from a Black and Minority Ethnic background are stopped and searched than from the population as a whole). The changes are also needed to implement the reduced statutory level of recording of stop and search encounters provided for in the amendments to section 3 of PACE made by section 1 of the Crime & Security Act 2010. Reducing the amount of information which must be recorded for stop and search encounters produces significant savings in police bureaucracy, which can be further enhanced by the utilisation of mobile technology, particularly where community concerns exist around levels of disproportionality (i.e. particular ethnic backgrounds)

7.3 The revisions to Code A also set out the changes in the use of the stop and search powers in sections 44-47 of the Terrorism Act 2000 in the light of the judgment of the European Court of Human Rights in the case of *Gillan & Quinton v UK*. The revisions set out the key points of the Home Secretary's statement to Parliament of 8 July 2010 in such a way as to provide clear guidance to officers considering authorising or using these powers.

7.4 Code A also contains further guidance on the use of the powers in section 60 of the Criminal Justice and Public Order Act 1994. The powers allow a senior police

officer to authorise the stop and search of persons and vehicles within a defined locality (for a period up to 24 hours), without reasonable grounds, where there is good reason to believe that to do so would help to prevent incidents involving serious violence or that persons are carrying dangerous instruments or offensive weapons or to find instruments and weapons that have been used in such an incident. The current Code A does not place any *explicit* restrictions or give any guidance about the selection of who may be stopped under section 60. The only qualifications (in the *Notes for Guidance*) concern the extent of the authorisation. Additional provisions now support the statement in Code A 1.1 about *unlawful* discrimination and draw attention to the 'protected characteristics' set out in section 4 of the Equality Act 2010.

7.5 There has been significant public and media interest during the consultation process in the changes in Code A in respect of section 60 stop and search powers in particular. The Department has considered the concerns and addressed these in the revision of paragraph 2.14A of Code A. Paragraph 2.14A of the Code now states:

> *"The selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons. (see Notes 10 and 11). The powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation. When selecting persons and vehicles to be stopped in response to a specific threat or incident, officers must take care not to unlawfully discriminate against anyone on the grounds of any of the protected characteristics set out in the Equality Act 2010 (see paragraph 1.1)."*

7.6 A new Annex F has been added to Code A to provide guidance for police officers and police staff when there is doubt as to the gender of a person who is to be searched and there is an explicit statutory requirement for the searching officer/staff to be the same sex.

7.7 The changes to Code B are necessary to give guidance on the use of powers in the Prevention of Terrorism Act 2005 to search the premises of individuals subject to control orders and to reflect the judgment in Khan v Commissioner of Police of the Metropolis [2008] EWCA Civ 723 on the police's power to enter and search premises under section 18 of PACE. There is also further guidance to officers seeking to search premises with the consent of the occupier.

7.8 The majority of changes to Code D reflect amendments to the powers to take fingerprints and samples for recordable offences under sections 61, 62 and 63 PACE made by sections 2-7 of the Crime and Security Act 2010 and the power added by section 117 of the Serious Organised Crime and Police Act 2005 to take fingerprints "on the street" in connection with any offence using mobile fingerprint technology.

7.9 The National Policing Improvement Agency (NPIA) have trialled mobile fingerprinting technology (Projects Lantern/Midas) on the basis of individuals consenting to their fingerprints being checked as an alternative to being arrested to confirm their identity. The power can be used where the name of a person suspected

of committing any offence is unknown and cannot be readily ascertained, or where there are reasonable grounds for doubting the name given. Undertakings were given that the powers would not be commenced until a full Equality Impact Assessment had been completed; the NPIA have now completed this and have published the Report on their website. Code D gives additional guidance which provides safeguards regarding the circumstances in which police may use the technology including what might constitute reasonable doubt around identity and the circumstances in which identity cannot reasonably be ascertained.

7.10 New provisions also distinguish procedures for obtaining evidence of recognition from viewing images, for example CCTV, from eye-witness identification procedures. These take account of the judgments in R v Chaney [2009] EWCA Crim 21 & R. v Smith [2008] EWCA Crim 1342.

- ***Consolidation***

7.11 The instrument amends PACE Codes of Practice A, B and D. The Codes are subject to amendment from time to time and a consolidated version of the Codes, incorporating the changes made as a result of the Order, will be available on the PACE Codes website from the commencement date http://www.homeoffice.gov.uk/police/powers/pace-codes/

8. Consultation outcome

8.1 A 4-week consultation was carried out with statutory consultees (the Association of Police Authorities, 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 Legal Executives) in accordance with section 67(4) of the Police and Criminal Evidence Act 1984. This was a consultation with specified statutory consultees and not a public consultation so not subject to the 12 weeks duration criteria. In addition to the statutory bodies listed in that subsection, we have also consulted with other relevant organisations, including groups (Liberty and Justice) who have a specific interest in human rights issues.

8.2 The main concerns from the consultation were about the changes to PACE Code A. Significant concerns were raised about the extent to which proposed changes in paragraph 2.14A relating to section 60 of the Criminal Justice and Public Order Act 1994 would allow officers to take into consideration a person's ethnicity when stopping and searching under this power. The Department has considered the responses and has decided to amend the paragraph as set out in 7.5 above.

8.3 There was concern about the removal of the national recording requirements for stop and account and the consistency of around local monitoring – see paragraph 7.2.

8.4 Comments were made in relation to the statutory reduction to the recording requirements for stop and searches, but these have already been considered and approved by Parliament in its consideration of the Crime & Security Act 2010.

8.5 The Bar Council raised a number of concerns about Code D regarding a potential lack of safeguards in the recognition procedures. These have been addressed. Other comments concern the general need to bring the Codes up to date with current good practice.

8.6 Comments were made that other forms of discrimination should also be considered. Provisions that reflect the Equality Act 2010 have been added which address these concerns.

9. Guidance

9.1 The Association of Chief Police Officers will provide guidance to police forces on the application of the new recording requirements for stop and search.

10. Impact

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

10.2 The impact on the public sector is minimal.

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 Success criteria for the changes will be significant savings in police bureaucracy and time spent recording stop and search/stop and account encounters.

12.2 Statistics on stop and search are subject to national collection under section 95 of the Criminal Justice Act 1991. Stop and search statistics are also published annually by the Home Office under the Exercise of Police Powers under PACE. The Association of Chief Police Officers, in conjunction with the National Policing Improvement Agency and the Home Office, will monitor the implementation and impact of the amendments on an ongoing basis.

13. Contact

13.1 Andrew Alexander, Home Office Policing Powers and Procedures Unit, Andrew.Alexander@homeoffice.gsi.gov.uk (020 7035 0877) can answer any queries regarding the instrument.