EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (CODES OF PRACTICE) (REVISION OF CODES C, E, F, AND H) ORDER 2018

2018 No. 829

1. Introduction

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

2. Purpose of the instrument

2.1 The Order brings into force four revised Codes of Practice issued under the Police and Criminal Evidence Act 1984 ("PACE"), known as: Code C, which deals with detention and questioning under PACE; Code E, which deals with audio recording of interviews of suspects; Code F, which deals with visual recording of interviews of suspects; and Code H, which deals with detention and questioning under terrorism legislation. The changes will bring the Codes in line with changes in legislation, policy, operational policing practice and case law.

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 66 of PACE requires the Home Secretary to issue codes of practice in connection with the detention, treatment, questioning and identification of persons by police officers. Code C governs the detention, treatment and questioning of persons arrested and detained, but not under terrorism legislation and Code H governs the detention, treatment and questioning of persons detained arrested under terrorism legislation. Section 60 of PACE requires the Home Secretary to issue a code of practice in connection with the audio recording of interviews of persons suspected of criminal offences and by Order, to require the police to audio record such interviews in accordance with Code E. Section 60A of PACE empowers the Home Secretary to issue a code of practice in connection with the visual recording of interviews of persons suspected of criminal offences but does not require an Order to be made to require visual recording. Code F governs the visual recording of interviews on any occasion that police decide to visually record an interview. This Order brings into force revised Codes C, E, F and H.

4.2 Codes C and H were previously revised in February 2017, Code E was last revised in February 2016 and Code F was last revised in October 2013. 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).

5. Extent and Territorial Application

5.1 This instrument applies 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 State for Policing and the Fire Service 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 C, E, F, and H) Order 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Police powers in England and Wales are governed by the provisions of PACE and the accompanying Codes of Practice. PACE sets out the core framework of powers and the Codes govern the way in which the powers are exercised their powers whilst also ensuring that the rights and entitlements of individuals are safeguarded. The revisions are necessary to bring Codes C, E, F and H in line with current legislation and to support operational policing practice.

7.2 The main revisions to PACE Code C concern safeguards for vulnerable suspects, voluntary interviews, and amendments to PACE introduced by the Policing and Crime Act 2017. The changes comprise the following:

(a) A new definition of 'vulnerable' to describe a person for whom an appropriate adult must be called. This is supported by a new requirement for proactive

steps to be taken to identify and record factors that indicate whether a suspect may require help and support from an appropriate adult, an updated role description of the appropriate adult and specification as to who may or may not act in this capacity. These changes clarify when an appropriate adult is needed and strengthen the requirement to secure an appropriate adult for a vulnerable suspect. These proposals take account of the work of the Home Office chaired Working Group on Vulnerable People. The requirement to identify particular factors that indicate vulnerability is also extended to juveniles for whom, by virtue of their age, an appropriate adult must always be called. For adults and juveniles, the record must be available for officers and others who need to communicate with the individual concerned to take into account.

(b) For voluntary suspect interviews, the rights, entitlements and safeguards that apply and the procedure to be followed when arranging for the interview to take place are extended. These changes take account of concerns that suspects might not realise that a voluntary interview is just as serious and important as being interviewed after arrest. This applies particularly when the interview takes place in the suspect's own home rather than at a police station. The approach mirrors that which applies to detained suspects on arrival at a police station with the interviewer standing in for the custody officer. In particular, it requires the suspect to be informed of all the rights, entitlements and safeguards that will apply before they are asked to consent to the interview and to be given a notice to explain those matters.

(c) The amendments to PACE made by the Policing and Crime Act 2017 which:

(i) insert new provisions to enable the use of a live link by:

- a superintendent to authorise an extension of detention without charge under section 42 of PACE for up to 36 hours;
- a magistrates' court to hear an application under section 43 of PACE for a warrant of further detention without charge and to hear applications under section 44 to extend a warrant of further detention by up to 96 hours; and
- an interviewing officer who is not present at the police station where a suspect is detained in order to interview that suspect; and

(ii) amend previous provisions to ensure that 17-year-olds are treated as children for all purposes under PACE.

7.3 Revisions to Code H are confined to mirroring those in Code C which are described in paragraph 7.2(a) since the other changes are outside the scope of Code H.

7.4 Revisions to Code E which are mirrored (as appropriate) in Code F introduce substantial changes to the approach to audio and visual recording of suspect interviews. The new and revised provisions cover all interviews for all types of offence, for all suspects – whether or not arrested and irrespective of the case disposal outcome. In brief, the revised approach:

(a) Specifies the types of devices which, if authorised by the chief officer, are to be used to audio record suspect interviews for any offence type. The specification extends the range of devices that may be used but does not specifically refer to body warn video (BWV) devices. Such devices may not

be used to record suspect interviews unless they comply with the revised operating specifications and manufacturers' instructions; and

(b) Means that for any interview for any type of offence whenever a suitably compliant authorised recording device is available and can be used, it must be used and a written interview record may be made only if a specified officer (the 'relevant officer') determines that such a device is not available or cannot be used and that the interview should not be delayed until such time that it can be audio recorded. Depending on the offence in question, whether the suspect has been arrested and where the interview takes place, the 'relevant officer' may be the custody officer, a sergeant or the interviewer.

7.5 Code F mirrors the revisions in Code E by setting out the requirements and modifications that apply exclusively for the purposes of making a visual recording with sound in the context that the police are under no obligation to make such a visual recording. The aim of this approach is to:

- make it clear that a visual recording with sound comprises an audio recording made in accordance with Code E together with a simultaneous visual recording;
- avoid replication of the full Code E provisions that govern the conduct and recording of all audio recorded interviews; and
- clarify the circumstances under which police may make a visual recording to using an authorised recording device.

Consolidation

7.6 Not applicable.

8. Consultation outcome

8.1 The Home Office consulted on the revisions to Codes of Practice C (detention), E (Audio recording of suspect interviews), F (Visual recording of suspect interviews) and H (detention - terrorism) from 24th October 2017 to 6th December 2017 (see https://www.gov.uk/government/consultations/revising-pace-codes-c-h-e-and-f. In accordance with section 67(4) of the Police and Criminal Evidence Act 1984, statutory consultees and others were invited to comment

8.2 Responses were received from 32 separate individuals and organisations. They came from; individual police forces and police officers, National Policing Leads, the Police Superintendents' Association of England and Wales, Police Federation of England and Wales, Crown Prosecution Service, HM Inspectorates of Constabulary and Fire and Rescue Services and of Prisons, Environment Agency, National Inshore Marine Enforcement Group, the Independent Office for Police Conduct, London Criminal Courts Solicitor's Association, individual practising solicitors, Cardiff University School of Law and Politics, National Appropriate Adult Network, Prison Reform Trust, Justice, Just for Kids Law, Revolving Doors, Standing Committee for Youth Justice, and an individual independent custody visitor. Standardised responses from individual members of organisations which repeat the response of their representative organisation or that of others are not counted in these totals.

8.3 The main concerns argued that the safeguards for juveniles and vulnerable suspects were not sufficient and respondents proposed a number of further changes to address these issues. These argued that the threshold for determining whether a suspect was

vulnerable should not be raised from 'suspicion' to 'belief' and, with regard to using a live link for juveniles or vulnerable suspects, that there should be a presumption not to use it and that additional safeguards should be in place in the circumstances that it is used. For voluntary interviews, there were concerns that the proposed safeguards might not be effective if the interview took place elsewhere than at police station and without effective supervision. A number of responses asked for clarification and some proposed further changes to support operational implementation.

8.4 The outcome of the consultation prompted a number of significant changes to the original proposals. In particular; the threshold for determining whether a suspect is vulnerable has been set at 'any reason to suspect' and has not been raised to 'belief'; the safeguards for juvenile and vulnerable suspects have been strengthened; and, with regard to live link interviews, the safeguards considerably extended.

8.5 These further revisions reflect what is essentially established good practice. They will improve the operational implementation of the changes and provide for a balanced approach to the points raised in the responses to the consultation. 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 The Home Office is working with National Policing Leads and the College of Policing to develop further operational guidance and support material in light of the revised Codes.

9.2 A Home Office Circular will be issued to publicise the revised Codes and the changes within them.

10. Impact

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

10.2 The impact is limited to the police in England and Wales.

10.3 An Impact Assessment has not been prepared for this instrument.

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:

- Improved identification vulnerable adult suspects.
- Improved implementation of safeguards for juvenile and vulnerable adult suspects, in particular, the attendance of an appropriate adult.
- Successful implementation by forces of live—link for the purposes of interviewing suspects and the authorisations to extend detention before charge.
- Increase in the number of audio recorded suspect interviews with a corresponding decrease in written interview records.

12.2 The National Police Chiefs Council Leads, in conjunction with the College of Policing, the Home Office and Her Majesty's Inspectorate of Constabulary and Fire

and Rescue Services will monitor the implementation and impact of the amendments on an ongoing basis.

13. Contact

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