

EXPLANATORY MEMORANDUM TO
THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (CODES OF PRACTICE)
(REVISION OF CODE H) ORDER 2023

2023 No. 141

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Police and Criminal Evidence Act 1984 (PACE) and the accompanying PACE codes of practice establish the powers of the police to combat crimes while protecting the rights of the public. PACE sets out to strike the right balance between the powers of the police and the rights and freedoms of the public. The PACE codes of practice cover: stop and search, arrest, detention, investigation, identification, and interviewing detainees. PACE Code H focuses on the detention, treatment and questioning by the police under terrorism legislation.
- 2.2 The Secretary of State has revised PACE Code H to reflect updates to primary legislation made by the Police, Crime, Sentencing and Courts Act 2022 (the ‘2022 Act’) and the Counter-Terrorism and Border Security Act 2019 (the ‘2019 Act’). The Government has also made other minor updates to ensure terminology contained within PACE Code H is up-to-date with wider legislative changes.
- 2.3 This Order brings the revised code into force following its approval by each House of Parliament.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Order allows the revised code to come into force on the day after the day on which the Order is made. It is considered justified for the commencement to occur without further delay, and this is consistent with the approach previously taken when revising other codes of practice.
- 3.2 The primary purpose of the revisions to the code is to provide safeguards surrounding the exercise of the new section 43B urgent arrest power inserted into the Terrorism Act (TACT) 2000 by the 2022 Act. The revised code also incorporates changes made to primary legislation by the 2019 Act, all of which have also already commenced. It is considered to be in the public interest for the revised PACE Code H to be in force as soon as practicable to help govern the lawful and proportionate use of the updated powers by police forces in England and Wales.

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 this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. European Convention on Human Rights

5.1 The Secretary of State for the Home Department, Rt Hon Suella Braverman KC 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 Code H) Order are compatible with the Convention rights.”

6. Legislative Context

6.1 Under section 66 of PACE, the Secretary of State must issue codes of practice in connection with the exercise by police officers of statutory powers to arrest a person and the detention, treatment, questioning and identification of persons by police officers. PACE Code H governs the detention, treatment and questioning of persons detained under terrorism legislation. This Order brings into force a new revised PACE Code H, which was last revised in August 2019.

6.2 Under section 67(4) of PACE, before issuing a code, or any revision of a code, the Secretary of State must first carry out a statutory consultation. However, under section 67(4A) the duty to consult under subsection (4) does not apply to a revision of a code where the Secretary of State considers that the revision is necessary in consequence of legislation and the Secretary of State has no discretion as to the nature of the revision. Section 67(4A) is considered to apply to this revision of PACE Code H. The changes being made reflect existing statutory provisions which have already been approved by Parliament. The Government has not exercised any discretion as to the scope of the changes being made to PACE Code H as these parameters have been predetermined by the relevant primary legislation.

6.3 Under section 67(4B) of PACE, a revision of a code can be issued without prior consultation with the persons mentioned in subsection (4) provided that the Secretary of State (at the same time as issuing the revision) publishes a statement that, in his or her opinion, paragraphs (a) and (b) of subsection (4A) apply to the revision.

6.4 The Secretary of State for the Home Department, Rt Hon Suella Braverman KC MP, has made the following statement regarding the duty to consult under section 67(4) of PACE:

“In my opinion paragraphs (a) and (b) of section 67(4A) PACE 1984 apply to the revision of this code of practice.”

7. Policy background

What is being done and why?

7.1 Section 184 of the 2022 Act created new section 43B in TACT 2000. Section 43B provides the power for a constable to arrest without warrant a terrorist or terrorism-connected offender who has been released on licence if the constable has reasonable grounds for suspecting that the offender has breached a condition of their licence, and reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to detain the offender until a recall decision is made.

- 7.2 A terrorist offender who is detained under section 43B of TACT 2000 must (unless recalled to prison or otherwise detained under any other power) be released if a decision is made not to revoke their licence (and accordingly the offender is not recalled to prison). A terrorist offender must also be released if a recall decision has not been made by the end of the relevant period (which in relation to terrorist offenders who have been released on licence under the law of England and Wales is six hours beginning with the time of the arrest)¹.
- 7.3 The creation of this power was recommended by the Independent Reviewer of Terrorism Legislation (IRTL), following his independent review of the Multi-Agency Public Protection Arrangements (MAPPA) used to supervise terrorist and terrorist-risk offenders in response to the Fishmongers' Hall attack.
- 7.4 The new section 43B arrest power commenced on 28 June 2022 and is available for operational partners to use. The Government has amended PACE Code H to reflect this new arrest power, including ensuring that there is clarity for the police on the length of time for which the terrorist offender on licence can be detained and their rights upon first being detained, including to have one named person informed of their whereabouts and their right to consult and communicate privately with a solicitor.
- 7.5 The Government has also updated PACE Code H to reflect other changes already made to primary legislation by the 2019 Act. Specifically, the 2019 Act:
- amended provisions in Schedule 8 to TACT 2000 to specify on the face of the legislation that on first being detained a detainee must be informed of their rights to inform a named person of their detention and consult a solicitor;
 - replaced provisions in Schedule 8 which would enable a senior officer, in certain exceptional circumstances, to direct that the detainee has to consult their solicitor in the sight and hearing of another officer with one whereby a senior officer can, in these exceptional circumstances, require the detainee to consult a different solicitor of the detainee's choosing;
 - amended section 41 of, and Schedule 7 to, TACT 2000 to give effect to a recommendation made by a former Independent Reviewer of Terrorism Legislation that the detention clock should be suspended in the case of detainees who are admitted to hospital; and
 - created powers to stop, question, search and detain a person at UK ports and the Northern Ireland border area for the purpose of determining whether the person appears to be someone who is, or has been, engaged in hostile State activity.
- 7.6 When revising the Code, the Government has also made other minor, non-discretionary updates to ensure terminology contained within it is up-to-date and reflects wider legislative changes. The revised code makes a clarification to refer to retained EU law to reflect the effect of the European Union (Withdrawal) Act 2018, updates the wording regarding offences having a terrorist connection to reflect changes made by the Sentencing Act 2020, and updates a reference to the relevant department to the Foreign, Commonwealth and Development Office.
- 7.7 This updated PACE Code H benefits both police forces and the public with updated guidance governing counter-terrorism measures to support their lawful and

¹ Or up to twelve hours in relation to terrorist offenders who have been released on licence under the law of Scotland or Northern Ireland.

proportionate use. The revised code promotes the fundamental principles to be observed by the police and helps preserve the effectiveness of, and public confidence in, the use of police powers under PACE.

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 This instrument does not amend other secondary legislation.

10. Consultation outcome

10.1 The stakeholders the Government consulted on the revised PACE Code H are supportive of the approach being taken. These include Counter-Terrorism Policing – whom in turn consulted the National Police Chiefs’ Council and the College of Policing – the IRTL, other Government departments and the Devolved Administrations. The Government considers this to be an appropriate level of consultation given the revisions being made to PACE Code H are necessary in consequence of changes already made to legislation and there is no discretion as to the nature or substance of the revisions.

11. Guidance

11.1 No guidance is necessary in connection with this instrument.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument as impact considerations are covered in the Impact Assessments prepared for the Counter-Terrorism and Border Security Act 2019² and for the Police, Crime, Sentencing and Courts Act 2022³.

13. Regulating small business

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

14. Monitoring & review

14.1 The instrument does not include a statutory review.

14.2 Statistical data on the use of police powers in TACT 2000 in Great Britain is published by the Home Office on a quarterly basis.

² <https://www.gov.uk/government/publications/counter-terrorism-and-border-security-bill-2018-overarching-documents>.

³ <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-overarching-documents>.

15. Contact

- 15.1 A copy of the revised code of practice referred to in this instrument can be found publicly available online at www.gov.uk and hard copies can be obtained by writing to the Home Office, 2 Marsham Street, London, SW1P 4DF.
- 15.2 The CT Pursue Unit at the Home Office can answer any queries regarding the instrument and can be contacted at the Home Office, 5th Floor, Peel Building, 2 Marsham Street, London, SW1P 4DF. Telephone (9am-5pm): 020 7035 4848. E-mail: PursuePolicyTeam@homeoffice.gov.uk.
- 15.3 The Deputy Director for CT Pursue Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.4 The Secretary of State for the Home Department, Rt Hon Suella Braverman KC MP, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.