

Keeping up with the PACE 1984

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Corporate Crime analysis: How will changes to Code E of the Police and Criminal Evidence Act 1984 (PACE 1984) affect defence lawyers and suspects? Kristiina Reed, a barrister at Six Pump Court, examines the recent revisions and explains that, while the changes enhance the ability of investigators to manage low-level criminal activity, the effect on defence lawyers and suspects is less positive.

Original news

Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Code E) Order 2015, LNB News 09/11/2015 112
SI 2015/Draft: A revised Code of Practice is brought into force, 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 record audio for interviews, and applies to four specified types of low level indictable offences.

What is PACE 1984 Code E?

The Police and Criminal Evidence Act 1984 (PACE 1984) Code E applies to the audio recording of interviews with suspects. It provides that interviews with suspects cautioned in respect of an indictable only or either way offence must be audio recorded. The provision was established to instil confidence in its reliability to serve as an impartial and definitive record of the interview. In addition, it enables prosecuting authorities to make an informed decision based on what was said by the suspect during interview.

What are the key changes?

In a proposed change to the above provision, a revised Code E will exempt four specific offences from the requirement of audio recording. These offences are:

- o possession of cannabis
- o possession of khat
- o shoplifting of property with a value not exceeding £100, and
- o criminal damage to property not exceeding £300

The exemption applies only to suspects aged 18 years or over, who do not require an appropriate adult, whose arrest for the offence is deemed not necessary and concerns an interview elsewhere than at a police station.

What is the purpose behind the revision?

The purpose of the proposed revision is to enable the police to utilise street disposals for the specified offences while ensuring they do not breach the audio recording requirement in Code E.

What is the impact of the changes on investigators?

The proposed change will undoubtedly enhance the ability of investigators to manage low-level criminal activity with out-of-court disposals in a speedy and cost-efficient manner.

What is the impact of the changes on defence lawyers and suspects?

The impact of the revision on suspects and defence lawyers is arguably less positive. What if a suspect answers questions in a non-audio recorded interview, but subsequently wishes to challenge the arrest and interview or has a defence to the allegation? In these circumstances, there is no definitive record of interview to assist any of the parties. What if further circumstances emerge that were not known to the police at the time? For example, say, stolen property appeared to be of a low level value at the time of the interview but it subsequently became apparent that it had a value of

£1,000, thereby making an out-of-court disposal unrealistic. Or say, an individual arrested for possession of cannabis or khat, who it later becomes apparent is a dealer, leading to a charge of possession with intent to supply.

The unrecorded interview would still be admissible in subsequent court proceedings. The danger inherent in this proposal is that it is not inconceivable that an unrecorded interview may be used in evidence against a defendant, which inevitably serves to undermine the principles for which the provision of audio recording interviews was introduced--namely to instil confidence, ensure transparency and to guard against potential abuse of power by the police.

How does all this fit in with other developments in this area?

The proposed revision to Code E is part of a wider government policy to enhance the legal framework of out-of-court disposals. These measures include:

- o cannabis and khat warnings
- o conditional cautions
- o community resolutions, and
- o suspended prosecutions

In an age of restricted public funding, the measures provide the police with invaluable tools to tackle low-level offending in a cost-efficient and proportionate manner, but they do not come without any attached risk, which is the possibility of injustice and unfair outcomes. The safeguard that the individual must be an adult and not require the assistance of an appropriate adult is arguably insufficient. The vast majority of offenders found in possession of cannabis and khat or engaged in low value shoplifting or criminal damage offences are broadly speaking those with addiction problems or mental health difficulties. Many of these are highly vulnerable individuals, but may seem like offenders who do not require the assistance of an appropriate adult. They may be vulnerable to police pressure and are unlikely to have the ability to recall precise details of an unrecorded interview to sufficiently challenge the admissibility of the interview in subsequent proceedings.

The legal framework for out-of-court disposals has been available to police and investigators for some time now. What has been missing is the mechanism to utilise these disposals effectively in practice. The proposed revision to Code E is part of a package of reforms intended to fill that gap and to make out-of court disposals for low-level offending a more commonplace feature of our legal landscape. What does not seem to have been adequately considered are the safeguards against potential injustice arising from summary disposal and it may be that additional measures are required to protect against unfair outcomes.

Interviewed by Alex Heshmaty.

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