

EXPLANATORY MEMORANDUM TO
THE REVISION OF THE HIGHWAY CODE RULE 149 ABOUT USING MOBILE
PHONES WHILE DRIVING

2022 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Transport (“the Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This explanatory memorandum concerns changes to The Highway Code (“The Code”) by making alterations to Rule 149 about using mobile phones and similar devices while driving. Some of the revisions reflect a change in the law made under SI 2022/81 and others simply make existing elements in respect of the use of mobile phones and similar devices clearer for drivers.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments OR the Select Committee on Statutory Instruments OR the Sifting Committees

3.1 None. The Code is not a statutory instrument or other instrument falling within the terms of reference of the Joint Committee on Statutory Instruments.

4. Extent and Territorial Application

4.1 The territorial extent and application of The Code is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 As The Code is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Legislative provisions relating to the revision of The Code are set out in section 38 of the Road Traffic Act 1988 (“RTA”).

6.2 The Code does not itself create legal rights and obligations; a failure to observe its provisions does not in itself make a person liable to criminal proceedings. But such a failure can be relied on as evidence in civil or criminal proceedings (section 38(7) of the RTA).

6.3 Section 38(2) of the RTA provides that the Secretary of State may from time to time revise The Code by revoking, varying, amending or adding to the provisions of The Code in such manner as the Secretary of State thinks fit.

6.4 Where the Secretary of State proposes to revise The Code by making any alterations in the provisions of The Code (other than alterations merely consequential on the passing, amendment or repeal of any statutory provision) he must lay the proposed alterations before both Houses of Parliament and must not make the proposed revision until after the end of a period of forty days beginning with the day on which the

alterations were so laid (section 38(3) of the RTA). In reckoning any period of forty days, no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days (section 38(9)(c) of the RTA).

- 6.5 If within that period either House resolves that the proposed alterations be not made, the Secretary of State must not make the proposed revision (section 38(4) of the RTA).
- 6.6 Before revising The Code by making any alterations in its provisions which are required to be laid before Parliament, the Secretary of State must consult with such representative organisations as he thinks fit (section 38(5) of the RTA). Section 38(3) of the RTA provides for any alterations that are consequential on the passing, amendment or repeal of legislation to be made without the need for consultation or laying before Parliament.

7. Policy background

What is being done and why?

- 7.1 The Government is making six changes to Rule 149 of The Code which concerns the use of mobile phones while driving. Four of the changes are being made to reflect the changes to regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 and two of the changes are being made simply to clarify the position on using a hand-held mobile phone while driving.
- 7.2 Since 2003, it has been an offence to use a hand-held mobile phone or similar device while driving. Rule 149 of The Code explains this offence to road users.
- 7.3 The offence of using a hand-held mobile phone or similar device while driving is being amended by The Road Vehicles (Construction and Use) (Amendment) Regulations 2022 (SI 2022/81) (“the 2022 Regulations”). The principal change being made by the 2022 Regulations is to extend the offence of using a hand-held mobile phone or similar device while driving so that it covers so-called “standalone” functions in addition to the interactive communication functions covered now. The first change to Rule 149 is that The Code now makes it clear that the offence is triggered by *any* use of a hand-held mobile phone or similar device while driving.
- 7.4 Further changes made by the 2022 Regulations are that the offence of using a hand-held mobile phone while driving is triggered by using any device capable of interactive communication; and that the offence is triggered even if the interactive communication capability is switched off. Accordingly, the second and third changes to Rule 149 of The Code are to explain that the offence covers devices that are capable of interactive communication and that the offence applies even if that capability is switched off.
- 7.5 The 2022 Regulations also establish a new exemption from the offence of using a hand-held mobile phone or similar device when driving. The new exemption applies when the driver is stationary and holding a phone to make a contactless payment for goods or a service that they will receive at that time or afterwards, for example, at a drive-through food outlet. The fourth change to Rule 149 of The Code is to describe this new exemption.
- 7.6 It has become evident to the Department that many drivers use a hand-held mobile phone when they are stationary, for example, at traffic lights, presumably in the

mistaken belief that “driving” implies motion. Similarly, there are drivers who mistakenly believe that it is acceptable to pick up a phone and dial a number even if they subsequently place the phone in a cradle for the subsequent conversation. Both of these uses fall, and have always fallen, within the offence of using a hand-held mobile phone while driving. So, whilst nothing has changed in the legal position regarding these common, but risky, types of use, the Government wants to take this opportunity to explain through The Code that they are unlawful activities.

- 7.7 Consequently, The Code now explains that drivers must not pick up a phone or similar device to dial a number and they must not use a hand-held mobile phone or similar device whilst stationary in traffic. These are the fifth and sixth changes to Rule 149; they are not being made as a consequence of any change in legislation, rather they are changes seeking to clarify the existing position and that is why the changes to Rule 149 are being laid before Parliament.
- 7.8 Neither The Code, nor the THINK! campaigns have previously made a distinction between hand-held mobile phone use that involves interactive communication and that which involves standalone functions. Government advice has consistently been to avoid using a hand-held mobile phone while driving. Consequently, our plans to disseminate the message about this change to the law will reinforce this message while emphasising that *any* hand-held use of a mobile phone or similar device is prohibited; the Highway Code will tell drivers that they must not use a hand-held mobile phone, adding the words “*for any purpose*”, and the Department’s planned THINK! campaign will highlight some scenarios which do not involve interactive communication, such as taking a photo, to demonstrate that any hand-held use will now be captured by the offence.
- 7.9 In addition, the Department plans to include stronger and clearer advice on gov.uk about the use of mobile phones while driving to address some misunderstandings that were evident from consultation responses for example, people wondered whether this change would affect their use of phones as sat navs secured in cradles, which it won’t.

8. European Union Withdrawal and Future Relationship

- 8.1 The revision of The Code does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation is being carried out.

10. Consultation outcome

- 10.1 A consultation was undertaken between October 2020 and January 2021 on both the policy of amending regulation 110 of the Road Traffic (Construction and Use) Regulations 1986 and the proposed alterations to Rule 149 of The Code.

Electronic copies of the consultation can be found online at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927069/using-a-mobile-phone-while-driving-consultation-on-changing-the-law.pdf

Electronic copies of the government response document can be found online at:

<https://www.gov.uk/government/consultations/expanding-the-offence-of-using-a->

[hand-held-mobile-phone-while-driving-to-include-non-connected-mobile-application-actions/outcome/using-a-mobile-phone-while-driving-consultation-outcome](#)

- 10.2 The Government received 423 responses to the consultation. Around 75% of respondents thought that the proposed wording for both the change to the parameters of the offence and the new exemption was acceptable.
- 10.3 In light of constructive comments received in response to the Highway Code elements of the consultation, the Government amended the consultation version of the wording to clarify a common misunderstanding; The Code now makes it clear that for the new contactless payment exemption to apply the driver must hold the phone up to a card reader. The wording has also been amended post-consultation to make it clear that the exemption applies where goods or services are received “at the same time or after the contactless payment”; this is a change from the word “immediately” that was proposed in the consultation and accepts consultees’ concerns that it might take 10 or 15 minutes to deliver, for example, a takeaway meal at a drive-through restaurant. In addition, a couple of minor tweaks have been inserted post-consultation to improve the clarity of the advice in Rule 149, for example, making it clear that you must not pick up and use a hand-held device or similar device while stationary in traffic.

11. Guidance

- 11.1 No guidance is required for the mobile phone Rule change.

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 the proposed amendments to the Code.
- 12.4 However, a De Minimis Assessment (DMA) has been completed for the statutory instrument that makes the changes to regulation 110 of the Road Traffic (Construction and Use) Regulations 1986. This confirms the changes proposed would have an Equivalent Net Annual Direct Cost to Business within the +/- £5m threshold appropriate for this type of assessment. This is because The Code already exists, and this review is an extension of those guidance directions. The revisions seek to strengthen responsibility and ensure the most vulnerable road user groups have priority, leading to improvements in road safety without any disproportionate impact.

13. Regulating small business

- 13.1 The proposed alterations to The Code apply to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise the impact on small businesses as the amendments do not impose unnecessary burdens.

14. Monitoring & review

- 14.1 The Government keeps The Code under review to ensure it is up to date and aligned with road traffic legislation.

15. Contact

- 15.1 xxxxxxxxxxxxxx, at the Department for Transport, Great Minster House, 33 Horseferry Road, London SW1P 4DR, Telephone: xxxxxxxxxxxxxx or email: mobilephoneconsultation@dft.gov.uk.
- 15.2 xxxxxxxxxxxxxx, Deputy Director for Road Safety Division at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Baroness Vere of Norbiton at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.