

**LIBERTY**

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's submission to the Home  
Affairs Select Committee inquiry into  
immigration detention**

**April 2018**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

## **Contact**

Rachel Robinson

Policy and Advocacy Manager

Direct Line: 020 7378 3659

Email: [Rachelr@libertyhumanrights.org.uk](mailto:Rachelr@libertyhumanrights.org.uk)

Sam Grant

Policy and Advocacy Officer

Direct Line: 020 7378 3258

Email: [Samg@libertyhumanrights.org.uk](mailto:Samg@libertyhumanrights.org.uk)

1. Liberty welcomes the opportunity to provide evidence to the Home Affairs Select Committee review into immigration detention.

### **The scale and duration of detention**

2. Indefinite detention for administrative convenience is offensive to the UK's proudest traditions of liberty. The experience of immigration detention is rendered all the more cruel and unusual by its indefinite nature, the lack of judicial involvement in the decision to detain and the extent to which vulnerability is present, perpetuated and exacerbated in the detention estate. There is an ever growing list of reports and organisations who have called for an end to indefinite immigration detention. The system has been criticised by the UN High Commissioner for Refugees ("UNHCR") for its indefinite and systematic nature;<sup>1</sup> by HM Inspector of Prisons ("HMIP") for creating "*heightened levels of anxiety and distress*";<sup>2</sup> by the Independent Chief Inspector of Borders and Immigration for failing vulnerable people,<sup>3</sup> by a cross-party Parliamentary Inquiry for "*unacceptable and deeply shocking*" treatment of women;<sup>4</sup> and by Government appointed reviewer, Stephen Shaw, as a dehumanising process which undermines welfare and contributes to vulnerability.<sup>5</sup> In 2017, a Panorama documentary revealed the scale of mistreatment and abuse at Brook House detention centre.<sup>6</sup> In the wake of these revelations, six G4S staff members were sacked and this Committee began an inquiry. The Home Office also commissioned Stephen Shaw to follow up on his first report and see what progress has been made on his 64 recommendations since 2016.

3. The Shaw Review recommended that the Home Office focus on "*strengthening the legal safeguards against excessive length of detention*" and "*investigate the development of alternatives to detention*".<sup>7</sup> Yet, in the last quarter of 2017, 70 per cent of people who were taken into detention were held for longer than 28 days, compared to 64 per cent a year earlier. The list of the top 20 longest periods spent in detention shows that as of December 2017, someone had spent 1,698 days – almost five years – in a detention centre.<sup>8</sup> Zero per cent of the 27,819 people held in immigration detention in 2017 knew how long they would

---

<sup>1</sup> UNHCR, *Global Strategy Beyond Detention: Progress Report*, August 2016.

<sup>2</sup> HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, *The effectiveness and impact of immigration detention casework*, December 2012, p. 5.

<sup>3</sup> *Ibid.*, p. 6.

<sup>4</sup> All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom*, 3 March 2015, p. 65.

<sup>5</sup> Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons*, January 2016.

<sup>6</sup> Panorama, *Undercover: Britain's Immigration Secrets*, September 2017.

<sup>7</sup> *The Shaw Review*, recommendations 62 and 63.

<sup>8</sup> *Immigration Statistics 2017* <https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2017>

be locked up. In the words of Souleymane, an expert by experience of detention - "*in prison, you count your days down, but in detention you count your days up and up and up.*"<sup>9</sup>

4. Government reforms in response to the Shaw Review have failed to meaningfully reduce the size of the detention estate. Less than half the people held in detention are removed or return voluntarily on leaving detention, the rest are released back into the community, rendering their detention an expensive and futile attack on the right to liberty.<sup>10</sup> Detention remains indefinite and protracted and the case for exploring alternatives to detention grows stronger with every new quarterly breakdown of immigration statistics.

5. In July 2016 this Committee, noting the increase in the number of individuals facing protracted detention, argued:

'...the Government aims to address the problem of long detention in its 'adults at risk' policy. The policy states that "a failure to remove within the expected timescale might also tip the balance to the extent that release becomes appropriate." This does not strike us as a firm commitment to reduce the length of time people are detained. We will monitor the implementation of this policy closely. It must meet our and Mr Shaw's recommendations that the length of detention be reduced. If it fails to do so then further interventions such as a statutory limit on detention will have to be considered.'<sup>11</sup>

6. Since the Committee made these comments, the Home Office has made no progress in reducing the length of time people spend in detention. The group Women for Refugee Women recently interviewed 26 asylum-seeking women as part of a small study on the impact of the Adults at Risk Guidance introduced by the Home Office last year. Although the sample size is small, it suggests that even amongst this very vulnerable group, lengthy detention was a problem. 85 per cent of the detained women included in the survey reported experiences of sexual or gender-based violence, yet 88 per cent had been detained for more than a month and 73 per cent for more than three months.<sup>12</sup>

7. Calls for a time limit on immigration detention were again reiterated by HMIP in a report on an inspection of Yarl's Wood Immigration Removal Centre carried out in June

---

<sup>9</sup> All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom*, 3 March 2015, p. 18

<sup>10</sup> *Immigration Statistics October – December 2017*.

<sup>11</sup> Home Affairs Select Committee, *The work of the Immigration Directorates (Q1 2016): Sixth Report of Session 2016–17*, published July 2016, paragraph 19.

<sup>12</sup> Women for Refugee Women, *We are still here: the continued detention of women seeking asylum in Yarl's Wood*, October 2017.

2017. The inspection found protracted periods of detention, “15 detainees had been held for between six months and a year and one had recently been held in detention for more than three years.”<sup>13</sup> Soft commitments, guidance and internal reviews have failed to reduce the size of the detention estate and failed to reduce the unacceptably long periods too many people spend locked up for immigration purposes. **The time has come for a 28 day statutory time-limit to end the uncertainty and suffering caused by the UK’s indefinite detention regime.**

### **Effective alternatives to detention**

8. To meet the Shaw review’s recommendation of countering excessive lengths of detention effective alternatives need to be piloted and developed. A 2016 report by Detention Action reveals the range of alternatives to detention used effectively in other countries. In Sweden, intensive case management and engagement with individuals in the community has led to low rates of detention and high rates of voluntary return where claims are unsuccessful.<sup>14</sup> This preserves people’s dignity and enables them to actively understand their cases which increases trust and confidence in the system. An aggressive enforcement strategy centred on long-term incarceration fosters hostility and polarisation.

9. Guidelines from the UNHCR highlight the legal importance of alternatives, stating that they need to be accessible and designed around the principle of minimum intervention. The ‘availability, effectiveness and appropriateness’ of less coercive measures than detention should be considered in all cases.<sup>15</sup> The availability of alternatives is essential to the lawfulness of detention in international law. Yet for those held in immigration detention in the UK there is no meaningful safeguard or access to alternatives to detention.

### *The cost of detention*

10. The human price we pay for immigration detention is high. In 2017, numerous people died in immigration detention centres, with many taking their own lives.<sup>16</sup> The courts, on more than one occasion, have identified inhuman and degrading treatment in the UK’s immigration detention centres, in breach of Article 3 of the European Convention on Human Rights.<sup>17</sup>

---

<sup>13</sup> HM Chief Inspector of Prisons, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre*, p18 (S35).

<sup>14</sup> Detention Action, *Without Detention: Opportunities for Alternatives*, September 2016.

<sup>15</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.3.

<sup>16</sup> The Guardian, “*Marcin was crying, begging for help: crisis of EU migrants detained in the UK*”, 3<sup>rd</sup> December 2017.

<sup>17</sup> *Review into the Welfare in Detention of Vulnerable Persons*, p.12.

11. Further, the system fails to deliver the enforcement gains sought by Government. An approach which prioritises engagement over traditional enforcement mechanisms will not only reduce human rights violations and increase cooperation - it will save huge amounts of public money. In the region of £76 million per year is wasted on the long-term detention of individuals who are ultimately released. In 2010-2014 the Government paid £15 million in compensation to people unlawfully detained and mistreated.<sup>18</sup>

### **Judicial oversight and legal access**

12. Many held in immigration detention have no automatic right to have their detention reviewed by the courts. Instead, new arrivals must wait a week before they are permitted to apply for bail. If no application is made, detention is not reviewed by the Tribunal.<sup>19</sup> The requirement that the individual held in detention initiate a bail application is a barrier to meaningful review, particularly for the significant number with poor or no literacy, who speak no English, who have mental health problems or who lack capacity. At a more general level, concerns have been repeatedly expressed about failures to adequately explain the existence of, and the procedure for, accessing immigration bail.

13. The Immigration Act 2016 also repealed provisions under which people in detention accessed accommodation in order to be released.<sup>20</sup> The guidance supplied by the Home Office to explain new bail provisions is opaque and could mean an individual is presented with a choice between homelessness or remaining in detention.<sup>21</sup> As Detention Action argue *“completing the 35-page form, requiring various evidence, for each monthly bail application, is not a plausible process for people in detention.”*<sup>22</sup> The 2016 Act brought in automatic judicial oversight for some of those in detention after four months. However, automatic bail hearings appear to be functioning in a haphazard manner with those held in detention not given advance notice of bail hearings and forced to appear without legal representation and interpreters. Further, in excluding people who are subject to deportation it provides no protection for some of those most vulnerable to lengthy detention.<sup>23</sup>

---

<sup>18</sup> Matrix Evidence, *An economic analysis of alternatives to long-term detention*, September 2012.

<sup>19</sup> Immigration Act 1971, Schedule 2, paragraph 22(1)(a) and (1B).

<sup>20</sup> Immigration Act 2016, Section 61

<sup>21</sup> *Immigration Bail*, Home Office, Published for Home Office staff on 12 January 2018

<sup>22</sup> *The future of bail addresses in doubt*, Detention Action, 27 January 2018

<sup>23</sup> Bail for Immigration Detainees: Submission to the Home Affairs Select Committee's Inquiry on Immigration policy: principles for building consensus, November 2017

14. These problems are exacerbated by the lack of availability and sometimes poor quality of legal advice available to those in detention, including practical difficulties in accessing those legal services which are provided.<sup>24</sup> Provision originally made in the Immigration and Asylum Act 1999 would have provided for automatic bail hearings within the first eight days of detention,<sup>25</sup> but it was repealed in 2002 before it could be brought into force. Liberty supports the calls of the cross-party Parliamentary Inquiry into the Use of Detention in the UK for the introduction of a “*robust system for reviewing the decision to detain early in the period of detention.*”<sup>26</sup> Increased judicial oversight will ensure that the decision to detain is treated with the gravity it deserves. **All decisions to detain must be subject to automatic, regular and early judicial oversight.**

### **Vulnerable people in detention, adults at risk and Rule 35**

15. The Shaw review recommended that there be a presumption against detention for victims of rape and other sexual and gender based violence, those diagnosed with Post Traumatic Stress Disorder, those with learning disabilities and people who are transgender.<sup>27</sup> Shaw further recommended a ban on the detention of pregnant women and a revision to Home Office guidance which suggested that serious mental health conditions could be effectively managed in detention.<sup>28</sup> More broadly, the review recommended that, *in addition to* the categories of vulnerability identified in previous Home Office guidance, a catch all provision should be introduced to reflect “*the dynamic nature of vulnerability*” and capture “*persons otherwise identified as being sufficiently vulnerable that their continued detention would be injurious to their welfare*”.<sup>29</sup>

16. In response, the Government laid amendments during the passage of the Immigration Act 2016 requiring the Home Office to publish guidance. The legislation requires the guidance to specify the matters to be taken into account in determining whether an individual would be vulnerable to harm if they remained in detention and, for those identified as vulnerable, whether they should be detained.<sup>30</sup> The Adults at Risk Statutory Guidance (“the Guidance”) became operational on 12 September 2016. Following the implementation of the Guidance, Liberty was one of a number of signatories to an open letter which warned that:

---

<sup>24</sup> APPG on Migration and APPG on Refugees, *Report of the Parliamentary Inquiry into the use of immigration detention in the UK*, 3<sup>rd</sup> March 2015. Page 45-46.

<sup>25</sup> Original s44 of the Immigration and Asylum Act 1999 now repealed.

<sup>26</sup> *Report of the Parliamentary Inquiry into the use of immigration detention in the UK*, page 9.

<sup>27</sup> *The Shaw Review*, recommendation 9, 12, 13, 14.

<sup>28</sup> *The Shaw Review*, recommendation 10.

<sup>29</sup> *The Shaw Review*, recommendation 16.

<sup>30</sup> Immigration Act 2016, s59.

*'The policy limits the definition of torture, meaning that those tortured at the hands of Isis, Boko Haram and others may no longer be included. The policy increases the burden of evidence on vulnerable people and balances vulnerability against a wider range of other factors. We fear this will lead to more vulnerable people being detained for longer.'*<sup>31</sup>

17. In October 2017, the more restrictive definition of torture, excluding those whose ill-treatment was at the hands of non-state actors, was ruled unlawful in *Medical Justice & Ors v SSHD, ECHR intervening [2017] 2461 (Admin)*. The Home Office is now in the process of revising and reissuing the policy and have recently put draft guidance before Parliament.<sup>32</sup> NGOs have expressed concern that the new guidance and definition of torture is too complex to apply for caseworkers and medical professionals. Freedom from Torture argued that the new definition has no *'accepted clinical or legal foundation'* and that it allows for the exclusion of the very people that the policy is intended to protect. Ultimately the new definition could still result in torture survivors being detained.<sup>33</sup> However, the problems with the Guidance are deep and structural, extending far beyond the definition of torture. In a number of important ways it actually reduces protections for vulnerable people.

#### *The Adults at Risk Guidance*

18. The Adults at Risk Guidance identifies a wider range of vulnerabilities as indicators of risk and includes a recognition that *"there may be other, unforeseen, conditions that may render an individual particularly vulnerable to harm if they are placed or remain in detention."*<sup>34</sup> The Guidance specifies that evidence shall be ranked at levels one to three. A self-declaration of vulnerability is ranked at level one and accorded *"limited weight"*, those who have professional or official evidence suggesting they meet one of the indicators of risk have "level 2" evidence, which is to be given more weight than a self-declaration, but not as much as a professional evidence of both risk and the fact that a period of detention would be likely to cause harm (such evidence is level 3 and should be afforded *"significant weight"*). Under Chapter 55.10 of the Enforcement Instructions and Guidance ("the previous policy"), once an individual had produced evidence to show she fell within a risk category, the Home Office was required to demonstrate that there were "very exceptional circumstances" justifying detention. The Guidance abandons the "very exceptional circumstances" threshold, replacing it with a looser balancing test under which officials are explicitly given the discretion to "weigh" immigration factors against indicators of vulnerability.

---

<sup>31</sup> New immigration detention policy for 'adults at risk' needs urgent review, The Guardian, 11 September 2016

<sup>32</sup> <https://www.gov.uk/government/publications/draft-revised-guidance-on-adults-at-risk-in-immigration-detention>

<sup>33</sup> 'Stop the closed-door policy making on immigration detention,' Freedom from Torture Petition

<sup>34</sup> Home Office, *Immigration Act 2016: Guidance on adults at risk in immigration detention*, August 2016, paragraph 12.

19. A further problem with the Guidance is that it requires not only the existence of a vulnerability but also a forward-looking assessment of whether detention will harm an individual. The previous policy excluded those with independent evidence of torture and ill-treatment from detention unless “very exceptional circumstances” were present. Survivors of torture or ill-treatment needed to show independent evidence of their experience, but there was no additional requirement to provide evidence that their continued detention may be injurious to their health. Under the new guidance, for significant weight to be attached to evidence, it must indicate that detention will lead to harm. This may be difficult for a medical professional to demonstrate in advance. The NGO Medical Justice has warned that *“detention centre doctors don’t feel this is something they can determine. The only way doctors can evidence deterioration is by waiting for the deterioration to come about.”*<sup>35</sup> More generally, in focusing on evidence of vulnerability and harm, the policy fails to provide a mechanism for highlighting the severity of a vulnerability.

20. Statistics on the use of Rule 35 medical reports lend weight to our concerns about inadequacies in the new guidance.<sup>36</sup> Rule 35 is the principle current mechanism to identify victims of torture and those with suicidal intentions in the detention estate, as well as to assess cases where a detained person’s health is likely to be injuriously affected by continued detention. Following the introduction of the new guidance in September 2016, Home Office statistics show a steep fall in the number of individuals released after a Rule 35 report is written. Whereas 35% of those in receipt of a Rule 35 report were released in Quarter 3 of 2016, only 15% were released in Quarter 3 of 2017.<sup>37</sup> This suggests that the balancing exercise contained in the new guidance has raised the threshold for the release of vulnerable people. This is a concern shared by HMIP which, following an inspection of Yarl’s Wood IRC concluded: *“The effectiveness of the adults at risk policy, which is intended to reduce the detention of vulnerable people, was questionable given that almost a fifth of those in detention were assessed by the Home Office to be at the higher levels of risk.”*<sup>38</sup>

**21. A newly formulated Adults at Risk policy must do much more than incorporate a new and legal definition of torture. As a bare minimum of protection, it must reincorporate the “very exceptional circumstances” threshold for detaining those falling within categories of risk, or those who display vulnerabilities not included**

---

<sup>35</sup> NGO engagement meeting with Stephen Shaw, 7<sup>th</sup> November 2017.

<sup>36</sup> Rule 35 of the Detention Centre Rules 2001.

<sup>37</sup> Immigration Enforcement data: November 2016: Quarter 3 2017 and Quarter 3 2016

<sup>38</sup> HMIP, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre*, 5–7, 12–16 June 2017 . Page 5.

**within a recognised category. It should abandon the counter-productive “evidence level” model.**

*Reliance on Rule 35 and demonstrating harm*

22. The Shaw review recommended that *“the Home Office should immediately consider an alternative to the current rule 35 mechanism”*.<sup>39</sup> As part of this recommendation, Shaw urged the Home Office to consider whether *“doctors independent of the IRC system (for example, Forensic Medical Examiners) would be more appropriate to conduct the assessments as well as the training implications”*.<sup>40</sup> Yet Rule 35 remains the central mechanism for identifying those who may be harmed by detention. Requirements in the new guidance to provide evidence that detention will lead to harm make the Rule 35 process even more central to the assessment of vulnerability. The flaws of the Rule 35 system were once again picked up by HMIP in the report of a recent inspection of Yarl’s Wood IRC. The report found that:

*‘The quality of Rule 35 reports had improved but was still poor overall. Reports often took too long to complete, lacked detail and did not indicate sufficient attention to the symptoms of post-traumatic stress disorder. In some cases, the Home Office refused without explanation to accept rape as torture...we were concerned that, in many of the cases we reviewed, detention of vulnerable detainees was maintained despite the acceptance of professional evidence of torture.’*<sup>41</sup>

23. The problems identified in this recent report mirror those described in the cross-party report of the Parliamentary Inquiry into the use of Immigration Detention in 2015. The Inquiry concluded that *“a number of failings in the [Rule 35] process means that the safeguard is not working as it should...We are also concerned by evidence that caseworkers respond to Rule 35 reports in ways that are not in accordance with Home Office policy.”*<sup>42</sup> Similar concerns have been raised by this Committee,<sup>43</sup> the United Nations Committee Against Torture,<sup>44</sup> and in a Joint Report by the Chief Inspector of Borders and Immigration and the Chief Inspector

---

<sup>39</sup> *The Shaw Review*, Recommendation 31.

<sup>40</sup> *The Shaw Review*, Recommendation 31.

<sup>41</sup> HMIP, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre*, 5–7, 12–16 June 2017 . S12, page 14.

<sup>42</sup> *Report of the Parliamentary Inquiry into the Use of Immigration Detention in the UK*, page 64.

<sup>43</sup> Home Affairs Select Committee, *The work of the Immigration Directorates (Q1 2016): Sixth Report of Session 2016–17*, published July 2016, paragraph 73.

<sup>44</sup> Medical Justice, *BRIEFING: RULE 35 SAFEGUARD IN DETENTION: Written evidence submitted by Medical Justice to the Shaw Review*, p. 2.

of Prisons.<sup>45</sup> **Government must heed these recommendations and replace the discredited Rule 35 procedure with a more reliable model incorporating independent medical professionals. This new model must reflect a revised Adults at Risk policy and provide for medical concerns to be reported when someone in detention falls into a risk category or is otherwise vulnerable.**

### *Pregnant women*

24. Section 60 of the Immigration Act 2016 specifies that, where the Secretary of State is satisfied that a woman is pregnant, she may only be detained where the Home Office is satisfied that she will shortly be removed from the UK or there are “*exceptional circumstances which justify the detention*”. In these circumstances, she may be detained for 72 hours, or up to a week if authorised by a Minister. Repeat detentions are also expressly permitted by the Act—meaning that the time limits set in the Act can be rendered meaningless through successive renewed orders of detention.<sup>46</sup> A Detention Services Order (DSO) was published in November 2016 governing the care and management of pregnant women in detention. The DSO reflects and amplifies the limitations of section 60. Time spent in detention prior to the point that the Secretary of State is satisfied that a woman is pregnant will not count towards the new time limit and protections “*will not apply to pregnant women detained at the border (whether held in port holding rooms or transferred to IRCs or residential Short Term Holding Facilities) pending examination or further examination to determine entry to the UK, pending a decision to cancel leave to enter, on embarkation, or as a person liable to arrest/subject of an arrest warrant*”.<sup>47</sup> While this reflects the statutory provision, the restrictions on scope fall short of Ministerial assurances. During the parliamentary passage of the Immigration Act 2016, Government spokesperson Lord Keen reassured the House of “*the Government’s absolute commitment and desire to ensure pregnant women are detained only when it is absolutely necessary and as a last resort, with their health and welfare being a foremost consideration whenever a decision is made in respect of their detention...*”.<sup>48</sup>

25. The DSO further fails to provide adequate reassurance that the healthcare needs of pregnant women will be addressed. Whilst it provides for an initial screening to be offered in the first two hours, GP appointments and full risk assessments need only be completed

---

<sup>45</sup> *The effectiveness and impact of immigration detention casework A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration*, December 2012, paragraph 1.10.

<sup>46</sup> Immigration Act 2016, s60(6).

<sup>47</sup> Home Office, *Detention Services Order 05/2016: Care and Management of Pregnant Women in Detention*, November 2016, paragraph 2.

<sup>48</sup> House of Lords Hansard, 10 May 2016, column 1662.

within 24 hours.<sup>49</sup> The guidance also neglects to make explicit the need for healthcare staff to communicate the time-limit on detention to the pregnant women and fails to firmly require that a medical escort be present during the transfer or removal of pregnant women.<sup>50</sup>

26. More broadly, the government's action in this area falls short of the absolute ban proposed by the Shaw review, which stressed that "*detention has an incontrovertibly deleterious effect on the health of pregnant women and their unborn children*".<sup>51</sup> The Home Office has further failed to publish complete data on the number of pregnant women still facing the ordeal of detention. After continual requests by the group Women for Refugee Women, the Home Office released piecemeal figures suggesting that whilst the numbers of pregnant women in detention have fallen since the introduction of a time-limit, the vast majority of these women continue to be released back into the community after detention rendering their ordeal not just harmful to their health, but also pointless.<sup>52</sup> **There should be an absolute ban on the detention of pregnant women in line with the recommendation of the Shaw review.**

### *Mental Capacity*

27. The Adults at Risk Guidance and the Rule 35 DSO are silent on the matter of mental capacity. The Shaw review identified the particular risks of indefinite detention, without effective judicial oversight, for those without capacity, stressing "*those who are most vulnerable should not languish in detention because they lack capacity to make a bail application*".<sup>53</sup> Outside of immigration detention, the system for detaining those without capacity to consent to treatment or care includes a series of safeguards. These include a mental capacity assessment and a best interests assessment to determine whether Deprivation of Liberty Safeguards (DoLS) should be granted. By contrast, the Centre for Mental Health has observed that screening in detention centres for learning disability, autism spectrum disorder or acquired brain injury was weak or very limited and that they would recommend reviews of a persons well-being after 30 days and thereafter at 3-month intervals.<sup>54</sup>

---

<sup>49</sup> Home Office, *Detention Services Order 05/2016: Care and Management of Pregnant Women in Detention*, November 2016, paragraphs 20-22.

<sup>50</sup> *Detention Services Order 05/2016: Care and Management of Pregnant Women in Detention*, paragraph 11.

<sup>51</sup> *The Shaw Review*, paragraph 4.30.

<sup>52</sup> Women for Refugee Women, *We are still here*, October 2017, pg 27.

<sup>53</sup> *The Shaw Review*, paragraph 10.26.

<sup>54</sup> The Centre for Mental Health, "*A mental health needs analysis of Immigration Removal Centres in England*", January 2017, page 27.

28. Outside of the immigration system, if DoLS authorisation is granted, a Relevant Person's Representative—in general an appropriate family member or friend— must be appointed to represent the person's interests. If no appropriate family member or friend is available, an Independent Mental Capacity Advocate must be appointed. DoLS authorisations are restricted to 12 months, after which a new authorisation must be sought. Each authorisation must set out its duration, be provided to the person and his or her representative, and be provided to every interested person consulted by the best-interests assessor. In immigration detention, by contrast, not only are those without capacity liable to slip through the net due to insufficient guidance around screening, but once detained the only automatic check is an internal Home Office review process.

**29. Arguments for a time-limit on detention, detailed alternatives to detention and a comprehensive system of automatic judicial oversight are compelling for all held in immigration detention, but become even more critical given the weak and inadequate screening and oversight procedures and the lack of consistent internal procedural guidance governing the treatment of those without capacity. As a bare minimum, sensitivity to capacity issues should be engrained in screening and safeguarding processes. Those without capacity should not be detained for immigration purposes.**

## **Recommendations**

30. Liberty's primary recommendation is that immigration detention should only be used in exceptional circumstances to facilitate immediate, lawful removal from the country. In the interim, we recommend the Government urgently:

- introduce legislation imposing a 28 day time-limit on immigration detention
- explore alternative to detention models that comply with international law
- introduce legislation creating a system of automatic, regular, judicial oversight of all decisions to detain and assess the impact of changes to the bail addresses procedure in Section 61 of the 2016 Immigration Act
- reformulate the Adults at Risk Guidance. As a bare minimum of protection the new policy should: (i) incorporate a lawful definition of torture, (ii) reincorporate the "very exceptional circumstances" threshold for detaining those falling within categories of risk, or those who display vulnerabilities not included within a recognised category, and (iii) abandon the counter-productive "evidence level" model

- replace the discredited Rule 35 procedure with a more reliable model incorporating independent medical professionals. This new model must reflect revised Adults at Risk Guidance and provide for medical concerns to be reported wherever an individual falls into a risk category or is otherwise vulnerable
- introduce legislation imposing an absolute ban on the detention of pregnant women and
- produce guidance engraining sensitivity to capacity issues in detention screening, monitoring and safeguarding processes. Those without capacity should not be detained for immigration purposes.