

LIBERTY

PROTECTING CIVIL LIBERTIES
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**Liberty's briefing on the Government
Consultation on Police and Criminal
Evidence Act 1984 Codes of Practice C, D,
and H**

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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 Policy

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

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Introduction

1. The Government is proposing to amend the Codes of Practice which govern the use of police powers under the Police and Criminal Evidence Act 1984 (PACE). This briefing contains Liberty's response to some of the proposed changes which have been made subject to public consultation.
2. Liberty welcomes some of the Government's suggested changes, such as its amendment to treat 17 year-olds within the criminal justice system as children.
3. However, other aspects of the proposals are of real concern. For example, Liberty wholly opposes the disturbing intrusion on the rights of vulnerable detainees to be supported by an appropriate adult. In addition, we raise concern at the apparent replacement of the range of the police's equality duties with a reference only to section 149 of the Equality Act 2010.

The exclusion of discrimination, harassment, and victimisation

4. The Government's proposed changes to Code D include the removal of the previous duty on police officers not to discriminate against, harass, or victimise any person on the grounds of any 'protected characteristics' – namely, age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership, or pregnancy and maternity. These requirements reflect longstanding prohibitions in equality and human rights law, which compel officers to treat all with whom they come into contact with equal dignity and respect.
5. These requirements have been replaced by a reference to the requirements and objectives of section 149 of the Equality Act 2010, which institutes what is known as the public sector equality duty. This requires all public authorities – which include the police force – to have due regard to the need to (i) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act, (ii) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and (iii) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
6. Discharging the police's obligations under section 149 of the Equality Act is integral to any successful community engagement and is an essential component of the UK's model of policing by consent. Including reference to the public sector equality duty in all PACE Codes to which it is relevant is an important and worthwhile goal, and one

that can be hoped will further the goal of responsive and inclusive policing. It is important that the police recognise the need to foster good relations with communities so as to overcome historic problems of community engagement and accountability, such as its relations with black and ethnic minority groups. Indeed, the first public sector equality duty in relation to race was introduced in 2001 following the Stephen Lawrence Inquiry Report.

7. However, the public sector equality duty is plainly not a substitute for other relevant provisions of the Equality Act. It is therefore perplexing that any reference to the requirement not to discriminate against, harass, or victimise any persons on the basis of any protected characteristic has been excised from the proposed paragraph 1.1 of Code D.
8. The duty to have regard for the need to eliminate unlawful discrimination, for example, is plainly not the same as the duty to refrain from unlawfully discriminating against someone. The latter amounts to a stronger and more immediate obligation, providing more effective protection. Again, the same is true of harassment and victimisation, with the latter all the more important in light of the police's record of dealing with complaints of rape, in which the duty to avoid victimisation of those targeted because of their gender is paramount.
9. Further, the future continuing existence of the public sector equality duty is not guaranteed. In 2012 the Coalition Government commissioned a review of the duty as part of its 'red tape challenge'. The results were inconclusive and the review recommended a further review being instituted at a future date.¹ If the public sector equality duty were repealed then the proposed new direction in Code H would fall away.
10. This radical change in policy takes place against the backdrop of new and sweeping police powers that many have warned risk encouraging race discrimination on the policing frontline.² The Policing and Crime Bill currently before Parliament, would give police and immigration officers the power to order those who have been arrested to state their nationality and, on pain of criminal sanction, to provide proof of their right to be in the UK within 72 hours. Lord Paddick, a former Scotland Yard chief, has said

¹ Review of the Public Sector Equality Duty, 6 September 2013, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf.

² *Bill forcing people to prove nationality slammed as discriminatory*, The Guardian, 4 May 2016, available at - <http://www.theguardian.com/uk-news/2016/may/04/bill-forcing-people-to-prove-nationality-slammed-as-discriminatory>.

that this measure “is likely to undo decades of work trying to rebuild police and community relations.” He has recalled how “in the late 70s, when I was a PC, the way some officers dealt with difficult black youth on the street was to arrest them for being an over stayer.”³ Similarly, the National Black Police Officers Association has warned that the myriad sweeping powers in the Immigration Act 2016 will make the police the “whipping boy for the immigration service”.⁴

11. Against this context, Liberty is deeply concerned about the removal of the long-standing direction to police not to discriminate against, harass, or victimise protected groups. It is essential that this groundless removal is corrected, restoring the essential level of protection offered by the Codes to the position in which they have been for a number of years.
12. Liberty recognises that these changes are already reflected in paragraph 1.0 of Code C. However, in light of the above, Liberty urges the Government to also amend that paragraph of Code C to include refer to the full range of the police’s duties under the Equality Act, as described above.

Appropriate adults for vulnerable individuals in police custody

13. Of very serious concern is a proposed change to Code of Practice C, relating to the use of ‘appropriate adults’ for vulnerable individuals in police custody. This is found at paragraph 11.17A of the proposed revised Code C. An ‘appropriate adult’ is a person assigned to an individual in police custody who is either 17 years-old or younger, or an adult identified as suffering from a mental disability, mental disorder, or is considered otherwise vulnerable.
14. The Government’s February 2011 Guidance on the role of an appropriate adult enjoins such persons in mandatory and unequivocal terms:

“You are not simply an observer. Your role is to assist the detainee to ensure that they understand what is happening at the police station during the interview and investigative stages.”⁵

³ Ibid.

⁴ Press Release National Black Police Association Immigration Bill 2015 - ‘An unwelcome return to the bad old days of SUS Laws’, December 2015, available at - <http://www.nbpa.co.uk/wp-content/uploads/2015/12/Final-NBPA-Press-statement-Immigration-Bill-14-December-2015.pdf>.

⁵ Home Office and the Appropriate Adult Network, ‘Guide for Appropriate Adults’. February 2011, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117682/appropriate-adults-guide.pdf/

15. Indeed, the policy behind the role of the appropriate adult is clear: it is to act as a support to the vulnerable individual, without which the individual will be unable to properly or fairly participate in the proceedings. Without such support, the rights and interests of vulnerable individuals in police custody risk being prejudiced. The risk of false confessions and resultant miscarriages of justice is obvious.
16. Children and other vulnerable persons may be less able to process information given to them, and questions asked of them, in what will invariably be the pressured, intimidating environment of a police interview room. Such circumstances are difficult even for adults without mental disabilities.
17. The numerous safeguards in PACE –backed up by the rights enshrined in the Human Rights Act – are crucial for those in police custody. Suspects must, for example, be informed of their right to have a legal representative present during their interview, and the right to have someone informed of their arrest. These rights will be empty if not effective in practice. This is precisely what the involvement of the appropriate adult seeks to achieve.
18. Appropriate adults permit the vulnerable person to themselves participate properly in the proceedings. An appropriate adult, therefore, is not an interloper whose participation is an optional extra. Rather, they are an integral part of the vulnerable person's presence during the interview. In other words, to exclude an appropriate adult is, in a very real sense, to exclude the interviewee themselves.
19. The proposed changes to Code C anticipate that police officers could exclude a detainee's appropriate adult from an interview. This would replicate paragraph 11.10 of the existing Code H which permits officers, in certain circumstances, to exclude from an interview a detainee's appropriate adult, in cases involving offences relating to terrorism.
20. The consultation provides no evidence for the need to extend these powers to *all kinds of offences*, as the revisions to Code C propose. It is surely to be expected that some evidence base in support of such a sweeping change would accompany this consultation. Nor has any evidence been presented to suggest that police officers wish to have these powers.
21. The wording of proposed paragraph 11.17A is worryingly unclear, a lack of clarity carried over from the original wording of paragraph 11.10 of Code H. Where the appropriate adult is deemed to require exclusion from the interview, it is stated that

the consulted officer “will decide if the interview should continue without the attendance of that appropriate adult”. Where the consulted officer “decide[s] it should not [continue], another appropriate adult must be obtained before the interview continues”, unless the interview is urgent for the purposes of paragraph 11.18.

22. It is unclear, therefore, what is required where the consulted officer decides that the interview “should continue without the attendance of that appropriate adult”. From the wording of the provision, it is not clear whether, in those circumstances, the requirements of paragraph 11.18 should apply, as it will where the officer decides that the interview should not continue. If an officer reads the provision and concludes that paragraph 11.18 is irrelevant, then paragraph 11.17A would allow him or her to summarily override the original determination that the interviewee requires an appropriate adult, for no reason other than that the officer thinks that “the interview should continue without the attendance of that appropriate adult”.
23. This is plainly wrong. Both proposed paragraph 11.17A of Code C, if it is to remain in any form, and paragraph 11.10 of Code H must not permit officers to summarily deprive interviewees of their rights to an appropriate adult. Another appropriate must be found before any further interview can begin.
24. The risk of the abuse of these powers is real. Officers already have the power by way of paragraph 11.18 of the Code to conduct interviews in the absence of an appropriate adult in circumstances of urgency. At the very least, there is a real risk of over-hasty exclusions of appropriate adults leading to interviews in the absence of the required support for the suspect.
25. And whilst the conduct of officers in interview can later be challenged through legal action, and evidence unfairly obtained sought to be excluded,⁶ there is no guarantee of its exclusion. The operational value in conducting an interview without the benefit of an appropriate adult, or an appropriate adult trusted by the suspect, is likely to be low. Such an interview is extremely unlikely to generate reliable or useful evidence on which it is fair for police to rely. Real safeguards are needed at the time of interview.
26. Therefore, Liberty believes that a necessary condition for the introduction of paragraph 11.17A to Code C is the disapplication of paragraph 11.18 to circumstances in which an appropriate adult has been found but excluded by way of

⁶ Evidence obtained in the absence of an appropriate adult, where one is required, can be excluded by sections 76 or 78 of PACE.

paragraph 11.17A. At the very least, far greater safeguards must be introduced on decision-making pursuant to paragraph 11.18. Liberty believes that a separate, free-standing test of 'serious harm' should be introduced for such circumstances, to heighten the threshold of urgency as a result of which a person can be deprived of their appropriate adult.

27. Liberty notes that the decision to remove an appropriate adult is proposed to be subject to a senior officer's approval. However, greater safeguards are needed. Before an appropriate adult can be excluded, the suspect's solicitor should be present and have an opportunity to explain the matter to the suspect and, if appropriate, the appropriate adult, before a final decision is made as to the appropriate adult's exclusion. The suspect, through his solicitor, should be given a chance to discuss with the appropriate adult the behaviour in question and thereby be given an opportunity to avoid the appropriate adult's exclusion.

28. Moreover, the Government should set out very clear guidance as to:

- i. The objectives of the provision of appropriate adults, including the vulnerabilities of children, those with mental disabilities, and those suffering mental illness, and a reminder of the police's duties under the Equality Act 2010.
- ii. The adverse impact on the suspect of the removal of his or her appropriate adult, especially in circumstances where the appropriate adult has been chosen by him or her on the basis of their relationship, history, trust, and other matters. In such circumstances, officers must be particularly mindful of the truly exceptional circumstances required for the removal of the appropriate adult.
- iii. The fact that removal of a person's appropriate adult can only be justified in exceptional circumstances, and not simply on the basis of matters such as officer's interrogation techniques, the appropriate adult's legitimate pursuit of the suspect's best interests, and other matters not falling clearly within the Code's regime for the removal of appropriate adults.
- iv. The process by which a decision to exclude an appropriate adult is to be made, including guidance on the role of the suspect's solicitor as described above.

- v. What constitutes the 'prevention or unreasonably obstruction' of proper questioning in paragraph 11.17A of Code C and paragraph 11.10 of Code H.
 - vi. The process by which officers will appoint a new appropriate adult where the original appropriate adult has been excluded according to those sections.
 - vii. What constitutes the threshold of urgency sufficient to justifiably deprive a suspect of their appropriate adult as per paragraph 11.18 of Code C and 11.10 of Code H.
29. Liberty sees no justification for the proposed changes. It urges the Government to refrain from introducing them and instead introduce guidance encouraging the use of appropriate adults, clarifying the exceptional circumstances required before an appropriate adult can be removed, and setting out a mandatory process for a replacement appropriate adult to be appointed in a timely manner.
30. More broadly, Liberty is concerned that these changes appear to run counter to Government's professed intention to provide greater support for those with mental health problems. Successive reviews have identified that provision and uptake of appropriate adults is inconsistent and coverage is patchy.⁷ Rather than creating more gaps in the system via the changes proposed, Liberty urges Government to consider putting the duty to provide an appropriate adult for vulnerable adults on a statutory footing and make necessary resource allocations to ensure availability of trained appropriate adults nationwide.

The use of live-link for detainee interviews

31. The role of an interpreter during the interview suspects whose primary language may not be English is essential across the criminal justice system. An interpreter enables individuals to properly and fully participate in proceedings, understanding the offences of which they are suspected, their rights whilst being interviewed and in custody, and the questions being asked of them in interview.
32. Liberty is concerned that the use of live-links to conduct interpretation – as proposed in amended paragraph 13.12 of Code C and paragraph 13.1ZA of Code H – will erode the role of an interpreter, prejudicing the rights and interests of suspects, and will lead to poorer criminal justice outcomes overall. Liberty has the same concerns

⁷ See for example the *The Bradley Report, Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*, April 2009, available at - <http://www.mac-uk.org/wped/wp-content/uploads/2013/03/Dept-of-Health-Bradley-Report-Exec-Summary.pdf>.

with the use of live-link interpretation in any circumstance in which suspects are to be informed of their rights. The same concerns apply with even more force to suggestions that the same may be conducted using only audio communication without any visual feed.

33. It is widely known that interview over live-link is a poor substitute for in-person translation. The wide range of social cues, gestures, and other non-verbal aspects of communication are most fully grasped in face-to-face interviews. This is all the more so in the highly pressured, intimidating environment of police interview, in which suspects will find communication that much more difficult.
34. The crucial importance of preserving the best means of information transfer during the interview setting is obvious. This is firstly for the protection of suspects' rights and interests, chiefly to ensure that they are able to present their side of the story to investigators – all the more important for it forming the basis of their case on which they will later be examined in court.
35. But it is also of crucial importance for the preservation of the evidence on which police and prosecutors will rely. Much time and costs stands to be wasted in unnecessary fights over the reliability of poorly-interpreted evidence as a result of the use of live-link facilities. An initial investment in proper, face-to-face interpretation plainly pays dividends: it will lead to suspects being faced with accurate records of their account of the facts from which they cannot resile, and which will lead to stronger and more efficient prosecutions and convictions.
36. Liberty recognises that there may be circumstances in which it is in the best interests of the suspect and the criminal justice system that live-link interpretation be used, such as when a suspect speaks a language interpreters for which are not readily available and to wait for their physical presence will wrongly prolong detention. However, it is clear that these circumstances are rare. Liberty urges the Government to consult further as to the potential need for live-link interpretation, before imposing these changes, to present an evidence-backed case for their introduction. The powers should not be introduced as a general matter; rather, guidance should be introduced specifically tying them to the specific circumstances in which the evidence demonstrates that they are needed.
37. Were live-link to be used in the manner proposed by the revised Code C, or in any manner, greater safeguards are necessary. As the proposed changes stand,

inspectors can authorise the use of live-link *even where* there is doubt as to the suspect's ability to cope with those arrangements.

38. If live-link is to be used for such purposes, Liberty urges the Government to include in its revised Code D the following safeguards:

- i. A requirement that, if it at any time during the interview it becomes apparent that to anyone present, including the suspect's solicitor and/or appropriate adult, the suspect is having real difficulty understanding the interpreter, the interview be halted. An interpreter's physical presence must be arranged before the interview can continue.
- ii. A requirement that the suspect's solicitor and/or appropriate adult be asked for their views as to the suitability of live-link interpretation.
- iii. A requirement that representations from the suspect, with the assistance of his or her solicitor and/or appropriate adult, if present, be actively acquired and taken into account by the officer making the decision *prior to* any such decision being taken.
- iv. Guidance as to the process by which the interpreter is to send a copy of the written statement to the interviewer via the live-link for the suspect to confirm and sign. Where the suspect has instructed a solicitor and/or his or her appropriate adult is present, the statement, prior to signing, must be sent to them.

39. Annex N of Code C and Annex L of Code H detail factors which must be taken into account in deciding whether to use live-link interpretation facilities. However, as the Annex makes clear, European Union Directive 2010/64⁸ lays down no obligation to use such facilities, only a permission to do so. Liberty therefore urges the police to opt not to use such facilities in *any* circumstances in which a suspect or other interviewee is being read their rights, nor to use such facilities in *any* interview with a suspect.

40. Liberty's concerns stated above as to the use live-link interpretation facilities in respect of crimes not related to terrorism are surely intensified by the proposed use of those facilities in respect of terrorism-related offences as per amended Code H.

⁸ See Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>.

Fingerprinting of vulnerable detainees

41. Liberty welcomes the confirmation – in Code D paragraph 1.8 – that the PACE Codes do not authorise the taking of fingerprints or samples from those detained solely for the purposes of assessment under section 136 of the Mental Health Act 1983. However, we urge the Government to include in Code D further safeguards for those lacking capacity and otherwise vulnerable due to a mental illness or disability.
42. The Code should reflect the provisions of the Mental Capacity Act 2005, and in particular section 1 to 4, setting out the principles underlying assessments of capacity, along with provisions as to which persons lack capacity, the test for a person's inability to make decisions, and what constitutes their best interests. But in addition the Code should include provision recognising the unique vulnerability of individuals detained under section 136, as reflected in case law of the European Court of Human Rights in which mistakes and delays in the processing of such people have resulted in treatment contrary to their human rights.⁹
43. Moreover, the Code should explicitly acknowledge that individuals detained for these purposes may lack capacity under that Act to consent to the taking of fingerprints or samples.

Changes to the rules on pocket books

44. Liberty is extremely concerned as to the proposed changes to Code C at paragraph C1.17 to extend all references to 'pocket books' so as to include electronic recording devices.
45. Police pocket books provide a means of recording officers' observations during their investigations. Their contents form a crucial part of the evidence of police officers during trial. Officers, for instance, may use the contents of pocket books to refresh their memories prior to or whilst giving evidence at trial.
46. The importance of such evidence hardly requires stressing. Pocket books provide a contemporaneous note of the police officer's observations at the time of the arrest of a suspect, for example, detailing the officer's view of the suspect's behaviour, such as his reaction to being arrested.
47. For those reasons, the evidence contained in a pocket book requires strong safeguards against tampering and other interference. There a number of rules, with

⁹ See, for example, *MS v the United Kingdom* (App. No. 24527/08).

which officers are familiar, as to the manner in which entries in pocket books can be completed. For example, the day, date, and year of entry must be recorded at the head of each entry, along with time and location of each observation. Moreover, pages must not be torn out, nor may entries be overwritten.

48. These rules protect the interests of the prosecution, defence, and victim. Evidence that is gathered in pocket books in accordance with their rules is that much more insulated from criticism as to its reliability. Suspects are better assured against police malpractice, and more effective, efficient trials are ensured by placing the best possible evidence before magistrates and juries.
49. The proposed amendments contained in paragraph 1.17 of Code C suggest that 'electronic recording devices' may substitute for pocket books for the purposes of any provision of the Code. Liberty is extremely concerned with this proposal. The consultation documents provide no evidence as to the need for this sweeping change, which, on its face, will affect every single reference to a 'pocket book' in the Codes without apparent regard for whether the change is necessary or appropriate.
50. The consultation documents also provide nothing as to the safeguards applicable to the use of 'electronic recording devices'. Nothing is provided to suggest that the rules on pocket books will apply in terms to 'electronic recording devices', nor indeed whether those rules will be appropriate to them. There is no apparent recognition that different rules will be required for methods of recording entirely different in form and kind from pocket books.
51. Indeed, there is not even specification of what constitutes an 'electronic recording device' for the purposes of these changes, nor what software these devices will use to record officers' observations. Plainly, this is of real significance to the viability of the proposed changes, as no assessment of their appropriateness can be made without individual consideration of the devices and software proposed. Is it suggested that officers will write notes using a word-processing program on a laptop computer? Or will they record their observations through a Dictaphone? The consultation documents fail to provide any indication of which devices and what software officers may use. Without more, the public has no idea whether the proposed changes are at all appropriate.
52. The most worrying feature of these changes is the lack of recognition of the problems inherent to other forms of recording device. Pocket books, with the rules drawn up for their use, provide a safeguard against tampering and other interference in providing a

physical record which can be checked for changes after the fact. Similarly, entries which fail to conform to the rules – for example, by failing to provide a date or time – can be disregarded at trial.

53. By contrast, nothing is provided in the consultation document to suggest how it is that ‘electronic recording devices’ will be safeguarded from tampering and other interference. How is it that electronic documents will record the timing of each amendment made? Can the programs proposed to be used by the police effectively do so? Even if they can, how will they be safeguarded against tampering or other interference, for example, by hacking the devices in question to undetectably alter the contents of the notes? The consultation documents provide no answers to these elementary questions.
54. In addition, no consideration appears to have been given to the police’s obligations as ‘data controllers’ for the purposes of the Data Protection Act 1998, and the safeguards that forces must put in place to protect any data falling under the provisions of that Act.
55. Liberty therefore urges the Government to drop this sweeping, unevidenced change. If such a change is proposed in future, Liberty urges the Government to provide detailed specification of the devices and software proposed to be used. Without this, even the most basic assessment of the appropriateness of the changes is stultified. Nonetheless, there are clear concerns that need to be allayed, and which the consultation documents fail to address.

Removal of references to Annexes A and E

56. Liberty is also concerned with the removal of Annexes A and E, contained in the proposed changes to paragraph 3.35 in Code D. Annexes A and E detail the principles applicable to video identification and the showing of photographs to eye-witnesses, respectively. Plainly, the integrity of these proceedings must be vigorously preserved. The principles of Annexes A and E work to ensure that the identification of suspects in these circumstances is not prejudiced. It hardly requires stressing the paramount importance for defendants, prosecutors, and victims that the integrity of these proceedings be preserved, both to safeguard a defendants’ right to a fair trial and to ensure the best evidence is presented in court.
57. The claim is made in the consultation document that these principles are “[n]ot appropriate” and “unreasonably restrict” investigating officers “from arranging

viewings at short notice in response to genuine operational urgency.” No evidence is provided to support this blanket assertion. Nor is any attempt made to specify which principles of Annexes A and E are inappropriate or unreasonably restrict officers arranging viewings at short notice, or to what extent. Far from “unreasonably restricting” the carrying out of viewings, the existing paragraph 3.35 provides that officers must “as far as possible” follow the principles set out in Annexes A and E. It is clear therefore that the existing system permits flexibility and allows the principles to be applied differently in circumstances of real urgency.

58. Without more, no positive case for these changes have been made, and Liberty therefore urges that these amendments be withdrawn. Were this amendment to be suggested in future, it is reasonable to expect that evidence would be proffered for the changes and a consultation with the benefit of a positive case for them be undertaken.

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