

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Briefing on the Draft Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, D and H) Order 2016

January 2017

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

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

Contact

Bella Sankey

Director of Policy

Direct Line: 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line: 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

Silkie Carlo

Policy Officer (Technology & Surveillance)

Direct Line: 020 7378 5255

Email: silkiec@liberty-human-rights.org.uk

Sam Hawke

Policy Assistant

Direct Line 020 7378 5258

Email: samuelh@liberty-human-rights.org.uk

1. In March 2016, the Government set out proposals to amend the Codes of Practice which govern the use of police powers under the Police and Criminal Evidence Act 1984 (PACE). Liberty responded to the Government's consultation on these changes, and the Government returned its conclusions in late November 2016. The Government now proposes to implement these changes by of the Draft Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, D and H) Order 2016.
2. As we stated of the original proposals, 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. Liberty also welcomes the Government's rethink of proposal to remove references to their duties under the Equality Act 2010 from Code D. As was originally proposed, there was to be no longer any reference to the duties 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.
4. This radical change was proposed against the backdrop of longstanding discriminatory use of stop and search powers, for example, which has damagingly eroded trust in the police among BAME communities. These proposed changes represented a disturbing lack of respect for the importance of equal treatment and protection from discrimination, and Liberty welcomes the Government's change of view.
5. However, other aspects of the proposals remain of real concern, and we urge the Government to similarly think again. Liberty wholly opposes the disturbing intrusions made on the rights of vulnerable detainees to be supported by an appropriate adult, the new guidance on the use of live-link for detainee interviews, the extremely ill-conceived provisions as to electronic recording devices, and the unevidenced and unjustified removal of important guidance on the identification of suspects.
6. These problems are even more concerning in view of the extremely lengthy period which the Government took to respond to the consultation responses. Despite taking

around 8 months to consider the responses it received, the Government has failed to rectify the errors made in its original proposals.

7. The Government is seeking to implement these proposals by way of statutory instrument. In view of the fact that they cannot be amended, Liberty urges that they be rejected and the Government take the time to improve on its existing errors and introduce greater safeguards for vulnerable and better means of helping police with their work.
8. **Liberty urges Members of Parliament to call for the Government to think again, and to reject the draft Order implementing these mistaken and dangerous changes.**

Appropriate adults for vulnerable individuals in police custody

9. 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 otherwise considered vulnerable.
10. 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."¹
11. 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 he or she 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.
12. 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,

¹ 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/appropriateadults-guide.pdf/.

intimidating environment of a police interview room. Such circumstances are difficult for anyone, let alone those with serious vulnerabilities.

13. 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.
14. 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.
15. We have had serious concerns with the implementation of this scheme, and whether it works as an effective safeguard in practice. But changes which risk rendering the scheme weaker, or less effective, must be strongly resisted. The changes proposed by the Government risk doing just this.
16. The proposed changes to Code C permit a police officer to exclude a detainee's appropriate adult from an interview. This represents a very significant expansion of powers hitherto reserved only for cases in which offences relating to terrorism are alleged, replicating paragraph 11.10 of the existing Code H. Such an expansion is not justified.
17. 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. Since the consultation was concluded and the responses considered, the Government has still presented no evidence to justify these changes.
18. 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. The Government has presented no evidence to

suggest that paragraph 11.18 of the Code is insufficient to undertake interviews fairly and effectively.

19. Whilst the conduct of officers in interview can later be challenged through legal action, and evidence unfairly obtained sought to be excluded,² 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. Even where it is, officers risk the evidence being excluded at trial. Real safeguards are needed at the time of interview.
20. Since the consultation, the Government has included one only additional requirement to ensure the rights of detainees are not infringed. Under the new proposals, the allegation of obstruction must be made to the appropriate adult and they must be given an opportunity to respond. There is, in addition, paragraph 11F in the 'Notes for Guidance', but which consists chiefly of repetition from the previous material and gives two very obvious examples of 'obstructive' behaviour.³ It states that officers only "may" need to give the suspect's solicitor an opportunity to comment where they witnessed what took place.
21. If officers are to have these wide-ranging powers, far greater safeguards must be introduced:
 - a. A separate, freestanding test of 'serious harm' should be introduced for such circumstances: vulnerable individuals should only be deprived of their appropriate adult where 'serious harm' is threatened were officers to do otherwise.
 - b. 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.
 - c. 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.

² Evidence obtained in the absence of an appropriate adult, where one is required, can be excluded by sections 76 or 78 of PACE.

³ As it provides, "Examples of unacceptable conduct include answering questions on a suspect's behalf or providing written replies for the suspect to quote."

22. We have also recommended that the Government introduce clear guidance setting out the following important considerations in the exercise of their proposed power:

- a. 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.
- b. 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.
- c. 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.
- d. What constitutes the 'prevention or unreasonably obstruction' of proper questioning in paragraph 11.17A of Code C and paragraph 11.10 of Code H.
- e. 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.
- f. The process by which officers will appoint a new appropriate adult where the original appropriate adult has been excluded according to those sections, and highlighting the paramount need to replace the excluded appropriate adult with a new one.
- g. 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.

23. 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.⁴ 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 – rather than introduce these unevidenced and sweeping changes.

24. 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. As they stand, these changes are unsafe, and we urge Members of Parliament to reject them.

The use of live-link for detainee interviews

25. 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.
26. 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 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.
27. 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 even more so in the highly pressurised, intimidating environment of police interview, in which suspects will find communication that much more difficult.

⁴ See, for example, 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/wp-content/uploads/2013/03/Dept-of-Health-Bradley-Report-ExecSummary.pdf>.

28. 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 can present their side of the story to investigators – even more important for it forming the basis of their case on which they will later be examined in court.
29. 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.
30. 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 the interpreters for which are not readily available and to wait for their presence in the room will wrongly prolong detention. However, the Government has produced no evidence to suggest that these circumstances are particularly prevalent, much less that they are a sufficiently significant problem to justify the changes proposed.
31. Despite extremely lengthy consultation, these proposals have been barely altered. The only change is to reiterate the existing legal requirement that solicitor-client confidentiality be respected. No changes have been made to mitigate the serious problems with the proposals.
32. Liberty urges the Government to consult further as to the potential need for live-link interpretation 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.
33. Were live-link to be used in the manner proposed by the revised Code C, or in any manner, greater safeguards would be 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.

34. If live-link is to be used for such purposes, the following minimum safeguards should be added:
- a. 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.
 - b. A requirement that the suspect's solicitor and/or appropriate adult be asked for their views as to the suitability of live-link interpretation.
 - c. 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.
 - d. 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.
35. 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.
36. 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.
37. Without the additions we propose to ensure that the rights and interests protected by the Code are safeguarded, the changes proposed by the Government should be resisted as untested and unsafe.

Changes to the rules on pocket books

38. 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.
39. 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.
40. 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 or her reaction to being arrested.
41. For those reasons, the evidence contained in a pocket book requires strong safeguards against tampering and other interference. There are a number of rules, with 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.
42. These rules protect the interests of the prosecution, defence, and victim. Evidence that is gathered in pocket books in accordance with their rules is more insulated from criticism as to its reliability than otherwise. Suspects are better assured against police malpractice. By placing the best possible evidence before magistrates and juries more effective, efficient trials are ensured and victims' rights are protected.
43. 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 Government has provided 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.
44. The Government has also provided nothing in the way of safeguards on the use of such 'electronic recording devices'. There is no provision to require that the rules on pocket books will apply in terms to 'electronic recording devices', and there is nothing to indicate 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.

45. 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.
46. 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 on a smartphone? Or will they record their observations through a Dictaphone? The fact that such a wide range of potential devices may fall under the vague category of 'electronic recording devices' is indicative of the apparent failures to properly plan these changes. The Government has failed 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.
47. The most worrying feature of these changes is the lack of recognition of the problems inherent to some 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.
48. 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? 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? Will the even times of each edit be securely recorded to stop changes being made to a document after the fact? The Government has provided no answers to these elementary questions.
49. In its consultation response, Liberty urged the Government to drop this sweeping, unevicenced change. We urged 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.

50. Despite the responses that the Government received during the consultation, it has failed to rectify these errors. Its only change is the addition of the following sentence to paragraph 2.11:

“Chief officers must be satisfied as to the integrity and security of the devices, records and forms to which this paragraph applies and that use of those devices, records and forms satisfies relevant data protection legislation.”

51. Once more, nothing is provided as to what kinds of safety measures will be taken to ensure the integrity and security of the devices in question. Will the records be encrypted? Will edits or other changes be securely recorded and monitored? How will the data be stored and used?

52. Liberty is deeply concerned that the inclusion of platitudinous language as to chief officers’ “satisfaction”, and rote references to “relevant” legislation, will do nothing to solve the serious problems with its current guidance. The problems identified above will remain if these untested and unsafe changes go forward. In an age in which hacking and other forms of interference with electronic devices is commonplace, police guidance on the use of such tools must be sophisticated and detailed. These changes are far from meeting even a basic standard of digital literacy. They must be rejected.

Removal of references to Annexes A and E

53. 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 eyewitnesses, 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 safeguards a defendants’ right to a fair trial and to ensure the best evidence is presented in court.

54. 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.

55. Without more, no positive case for these changes have been made, and Liberty therefore urges that the changes be withdrawn. In our consultation response, we stated that, were such a sweeping amendment to the Code to be suggested in future, it would be reasonable to expect that evidence would be proffered in support of it.

56. None has been provided. Indeed, in response to the consultation, the Government has repeated, unchanged, its original proposals. We remain seriously concerned that they will remove a significant safeguard on defendants’ rights and the preservation of best evidence – things that will make the work of police officers harder, not easier.

Liberty urges Members of Parliament to call for the Government to think again, and to reject the draft Order implementing these mistaken and dangerous changes.

Sam Hawke