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Liberty's Briefing on the Policing and Crime Bill Committee Stage in the House of Lords - Part 4 Chapter 4, relating to Sections 135 and 136 of the Mental Health Act 1983

November 2016

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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SUMMARY

Liberty is very concerned that the Policing and Crime Bill does not do enough to ensure that individuals suffering from mental health crisis, but subject to coercive police powers, will be protected. Worse, in some cases the proposals represent truly retrograde steps in the safeguarding of individuals with mental disabilities and mental illness. Liberty urges peers to amend the Bill to ensure that vulnerable individuals receive the care they need, rather than lengthy detention by police.

Liberty supports the following changes to the Policing and Crime Bill:

- **Amendment 190: A total ban on the use of police cells as 'places of safety'**
- **Amendment 191: A prohibition on the use of a person's home as a place of safety**
- **Amendment 192: Any detention time-limit must start at the point of detention**

This briefing also sets out a number of additional areas where further amendment is required:

- **A stronger duty on police to consult with mental health professionals**
- **A 12 hour limit on detention in any 'place of safety', with up to 12 hours' renewal**
- **Giving detainees the right to an Independent Mental Health Advocate**
- **A ban on the disclosure of sections 135 and 136 detentions by criminal record checks**

Introduction

1. The Policing and Crime Bill presents a real opportunity to improve protections for those with mental illness and mental disabilities caught up in the criminal justice system, and to improve mental health provision across the country.

2. Liberty welcomes some of the Government's proposals in the Bill, such as the ban on the detention of children in police cells as a 'place of safety' under sections 135 and 136 of the Mental Health Act 1983 (MHA).

3. However, Liberty is very concerned that other proposals do not go far enough to ensure that individuals subject to these powers will be protected. Worse, in some cases the proposals represent truly retrograde steps in the safeguarding of individuals with mental disabilities and mental illness. Liberty urges peers to amend the Bill to ensure that vulnerable individuals receive the care they need, rather than lengthy detention by police.

Sections 135 and 136, and the urgent need for change

4. Section 135 allows police to apply for warrants to arrest an individual in any location, including private premises, and remove them to a 'place of safety'. This power can be used in respect of any person with a mental disorder – as defined in the MHA – whom the magistrate has reasonable cause to suspect (a) has been, or is being, ill-treated, neglected, or kept otherwise than in proper control, or (b) is living alone and is unable to care for themselves. Medical professionals must accompany police officers during the execution of any warrants under section 135.

5. Section 136 allows police to arrest without a warrant anyone found in any public place who appears to be suffering from a mental disorder and "in immediate need of care or control". Officers may do so where it appears necessary "in the interests of that person or the protection of other persons" to remove the individual to a 'place of safety'.

6. Section 135(6) of the MHA provides a list of places which can serve as 'places of safety'. These are as follows: residential accommodation provided by a local social services authority, a psychiatric hospital, a police station, an independent hospital or care home for "mentally disordered persons", or "any other suitable place the occupier of which is willing temporarily to receive the patient".

7. The problems with sections 135 and 136 are serious, and they have been known for several years. The Government-commissioned Bradley Report – a review of people with mental health problems or learning disabilities in the criminal justice system – identified over 5 years ago that detention in police custody "has the effect of criminalising people for what is essentially a health need". As the Report found, it "may exacerbate their mental state, and in the most tragic cases can lead to deaths in custody."[1]

8. As a joint report of Her Majesty's Inspectorate of Constabulary, Her Majesty's Inspectorate of Prisons, the Care Quality Commission, and Healthcare Inspectorate Wales found in 2013:

> *"Those detained under section 136 have not committed any crime; they are suspected of suffering from a mental disorder. They may be detained for up to 72 hours, without any requirement for review during this period. In contrast, a person arrested for a criminal offence may generally only be detained for up to 24 hours, 8 with their detention regularly reviewed to ensure that it is still appropriate."*[2]

9. And as stated in academic commentary cited by the Government's 2014 review into the uses of sections 135 and 136:

> "*S136 is the only part of the Mental Health Act 1983 where one person, acting without medical evidence or training, has the authority to deprive another person of their liberty."*[3]

10. No similar powers exist for individuals without mental disabilities or mental illness. It is likely that the existence and use of such powers continues to generate false and

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[1] Lord Bradley, 'The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system', April 2009, available here: http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098698.pdf, p. 45.

[2] Her Majesty's Inspectorate of Constabulary, Her Majesty's Inspectorate of Prisons, the Care Quality Commission, and Healthcare Inspectorate Wales, 'A Criminal Use of Police Cells? The use of police custody as a place of safety for people with mental health needs', 2013, available here: http://www.justiceinspectorates.gov.uk/hmic/media/a-criminal-use-of-police-cells-20130620.pdf, p. 6.

[3] See Department of Health and Home Office, 'Review of the Operation of Sections 135 and 136 of the Mental Health Act 1983': Review Report and Recommendations', December 2014, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389202/S135_and_S136_of_the_Mental_Health_Act_-_full_outcome.pdf, p. 66, including footnote 205, and 'Summary of Evidence', 2014, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389198/S135_and_S136_of_the_Mental_Health_Act_-_responses.pdf, pp. 82-4. Citing Latham, A., 'The Cinderella section: room for improvement in the documentation and implementation of S136 of the Mental Health Act 1983', *Journal of Clinical Forensic Medicine* 4, 1997, pp. 173-5.

stereotyped assumptions as to links between mental health and criminal offending, and is likely to breach the UK's domestic and international commitments to stamp out discrimination against those with mental disabilities. This is in addition to risking serious harm to those subject to the use of the powers, who are often placed in wholly inappropriate police custody instead of a hospital bed.

11. The risk of discrimination in the use of section 136 has been known for many years, with longstanding and unacceptable over-representation of black and minority ethic individuals among those detained. In fact, black and minority ethnic groups are over-represented in all areas of mental health provision, but particularly in the use of compulsory powers and police intervention.[4] Combating racial stigma in the provision of mental health is urgently needed. Reforming the detention of individuals in mental health crisis under sections 135 and 136 is a crucial step in that direction.

12. Liberty believes that individuals with urgent mental health needs must be dealt with by those trained to give them with real and urgent treatment. Police are not mental health professionals – nor should they be. Whilst there may be a role for police to intervene to deal with threats of serious harm, individuals with mental illness must be safeguarded through medical care, not by police detention.

The case of MS

13. The case of *MS* demonstrates what can be the disastrous and completely avoidable consequences of section 136 detention.[5] The case concerned a person suffering from a serious psychotic episode. He was alleged to have assaulted a family member, potentially warranting the bringing of criminal charges against him, but was found to be clearly suffering from a mental illness.

14. He was deemed unfit to be interviewed or charged with any offence, owing to his mental state, and was detained under section 136 in a police cell. Whilst police waited to see if his condition might improve so as to interview or charge him, medical professionals and social workers argued over what should be done. He was detained in police custody well in excess of the statutory maximum of 72 hours.

15. Available medical professionals had diagnosed him early in the process, declaring him to require hospital treatment. In their view, he should have been detained for an absolute maximum of 24 hours before being taken to hospital for treatment of his illness. On the second day of his detention the CPS considered there to be

[4] See the Literature Review of the Government's 2014 report, pp. 30-3.
[5] *MS v. the United Kingdom* (App. No. 24527/08).

insufficient evidence with which to charge him, and yet he continued to be kept in a police cell.

16. As his mental state worsened, his detention under section 136 became increasingly unacceptable – to the point of causing severe suffering, even degradation. From the first day onwards, he had repeatedly banged his head against the wall and drank from his toilet. By the third day, he began smearing himself in his own excrement.

17. He took his the case to the European Court of Human Rights, which found a breach of Article 3, the right against torture and inhuman or degrading treatment. The Court found that his detention in a police cell under section 136, especially taking into account his acute vulnerability as a person suffering from mental illness, constituted "an affront to human dignity".

Amendment 190: The need for an outright ban on police cells as 'places of safety'

18. The example of *MS* demonstrates the serious risks in detaining those with mental illness in police cells. Individuals with mental illness have even been found dead in police custody, sometimes in connection with the use of excessive restraint by officers – all in potential violation of the right to life under Article 2 of the Human Rights Act.[6]

19. As the Independent Police Complaints Commission (IPCC) continues to stress, it has been known for over a decade that around half of those who die in police custody have some form of mental health problem.[7] Shockingly, over half of all those found dead in police custody had known mental health problems.[8]

20. A complete ban on the use of police cells as 'places of safety' is urgently needed. Carrying unacceptable risks to mental and physical health, the detention of those suffering mental health crisis in the severe and stigmatising setting of a police cell is never appropriate.

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[6] See cases detailed in Scott, K., 'Section 136 of the Mental Health Act 1983 and human rights violations: police procedure and the practice of using custody as a "place of safety" for vulnerable individuals', *Criminal Law Review*, 2015, pp. 2-3.

[7] See Docking, M., Grace, L., and Bucke, T., 'Police Custody as a 'Place of Safety': Examining the use of Section 136 of the Mental Health Act 1983', Independent Police Complaints Commission Research and Statistics Series, Paper 11, 2008, available here: https://www.ipcc.gov.uk/sites/default/files/Documents/section_136.pdf, pp. 3-4.

[8] IPCC, 'Deaths during or following police contact: Statistics for England and Wales 2015/16', available here: https://www.ipcc.gov.uk/sites/default/files/Documents/research_stats/Deaths_Report_1516.pdf.

21. It is clear that nothing less than a real ban will work to safeguard those with mental illness and mental disability. Despite guidance available to police officers which repeats that detention in police stations must be exceptional, the practice continues.[9] It remains the case that between a tenth and a quarter of all detentions under section 136 are in police cells.[10] This is far from 'exceptional', and is deeply wrong.

22. Whilst there appears to be an average national decline in the use of police cells, there remains shocking variation among police authorities. Some forces, for example, appear to use police cells as 'places of safety' in between 53 and 69% of cases.[11] And some forces have actually increased their use of police custody since 2015. Indeed, some of the apparent decline in the use of police custody is in part a result of a general reduction in the number of instances of police intervention under section 136, whichever kind of 'place of safety' is used. A ban will leave the authorities with no option but to take individuals to appropriate medical care.

23. The length of time in which individuals are detained in custody is also unacceptable. Studies in 2012 and 2013 found that the average period for which a person is detained in police custody as a 'place of safety' was between 10.5 and 11 hours.[12] Most worryingly, this amounted to an increase from the reported average in 2008 of 9.5 hours.[13] 10 and a half hours is far too long for a person suffering mental health crisis to be spending without access to mental health treatment, much less sitting alone in a police cell. These studies even suggest that individuals with mental illness are kept in police custody more than 2 hours longer than criminal suspects – this cannot be right.[14]

24. There have further been worries from the Care Quality Commission and others that people are sometimes held under section 136 simply for want of beds in psychiatric

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[9] See, for example, PACE Code C, paragraph 3.16.
[10] See NHS Information Centre, 'Inpatients Formally Detained in Hospitals under the Mental Health Act 1983 and Patients Subject to Supervised Community Treatment – England, 2014-2015, Annual Figures', Department of Health, 2015, available here: http://digital.nhs.uk/catalogue/PUB18803, and National Police Chiefs' Council, 'Fall in use of police custody for those in mental health crisis', 8 June 2015, available here: http://news.npcc.police.uk/releases/fall-in-use-of-police-custody-for-those-in-mental-health-crisis, and 'Use of police cells for those in mental health crisis more than halves', 9 September 2016, available here: http://news.npcc.police.uk/releases/use-of-police-cells-for-those-in-mental-health-crisis-more-than-halves.
[11] See Review Report 2014, p. 43.
[12] See Kemp, V., Balmer, N. J., and Pleasence, P., 'Whose time is it anyway? Factors associated with duration in police custody', *Criminal Law Review*, 2012. For abstract, see here: http://discovery.ucl.ac.uk/1377832/, p. 8, and 'A Criminal Use of Police Cells? The use of police custody as a place of safety for people with mental health needs', 2013, p. 35.
[13] See Docking, M., Grace, L., and Bucke, T., 2008.
[14] See Kemp, V., Balmer, N. J., and Pleasence, P., 2012, p. 2.

hospitals.[15] If true, this is a wholly inappropriate and likely unlawful use of the police's power to detain under section 136. Data summarised in a 2014 Government Review suggested that 46.7% of Thames Valley Police's uses of section 136, for example, were motivated by the health service's lack of capacity, or a refusal, to admit the individual.[16]

25. An absolute ban is not a novel suggestion. Calls to stop police stations being used as 'places of safety' have been made for decades. A Government review in 1999 recommended a ban,[17] as did the Government's Bradley Report 10 years later.[18] The practice cannot continue.

26. Policing bodies – organisations representing those with the most professional experience of section 136 – have been supportive of calls for an outright prohibition as well. This is surely unsurprising, police officers being individually and institutionally unequipped to deal with individuals suffering mental health crisis. In addition, the detention of such individuals diverts significant resources from primary police functions, given the supervision that they require.

27. The Police Federation, giving evidence to the Government's 2014 Review, recommended that police cells be prohibited from being used as 'places of safety', stating:

> "…when a person is in a mental health breakdown situation it is a health crisis and as such should be attended by health practitioners as first responders and not police officers. Trained health practitioners…have a far greater chance of de-escalating the crisis to a point where the use of 136 powers may not be required."[19]

28. And as the Police Superintendents' Association of England and Wales states in their recent evidence to the Policing and Crime Public Bill Committee, "The Association welcomes Clause 60, regarding the removal of a police station as a place of safety

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[15] Care Quality Commission, 'Monitoring the Mental Health Act 2011/12', 2013, available here: http://www.cqc.org.uk/sites/default/files/documents/monitoring-the-mental-health-act-in-2011-12-full-report.pdf, p. 54.
[16] See 2014 Review Report, p. 43.
[17] Department of Health, Churchill, R., Wall, S., Hotopf, M., Buchanan, A., and Wessely, S., 'A Systematic Review of Research Relating to the Mental Health Act 1983', 1999, available here: http://www.health.wa.gov.au/mhareview/resources/documents/Systematic_Review_of_MH_Legislation.pdf.
[18] See Bradley Report, p. 47.
[19] See Review Report 2014, p. 58, in particular footnote 189, and p. 59, in particular footnote 190.

for a child; however, we would wish to have seen the use of a police station as a place of safety removed *entirely* from the legislation."[20]

29. As they forcefully argued, "Police officers are not medical professionals. Where people are suspected to be mentally ill, then we believe that the last place they should be detained is in a police station." And they had the following to say as to the Government's proposals in the current Bill:

> "We acknowledge that Section 136A (2) seeks to reduce further the use of police stations as a place of safety for adults by enabling the Secretary of State to introduce regulations that can specify the circumstances in which adults may be detained at a police station, and how they are treated should this situation arise. The danger here is that the 'approved' circumstances may include those where an individual is resistant, aggressive or apparently under the influence of alcohol or drugs. It is our view that it is in just such circumstances as these where a health-based place of safety is actually a safer place for an individual who is detained purely for a mental health assessment."

Liberty strongly supports calls for an end to the use of police cells as a 'place of safety'. We urge Peers to support the amended Clause 190 tabled by Baroness Walmsley, Baroness Howe of Idlicote and Baroness Hamwee prohibiting the use of police stations as 'places of safety' for the purposes of sections 135 and 136.

Amendment 191: A prohibition on the use of a person's home as a place of safety

30. Clause 79 of the Policing and Crime Bill would amend the MHA to include, as a 'place of safety' (for the purposes of both sections 135 and 136), "a house, flat or room where a person is living", whether or not he or she is occupying the place, and provided at least one of the other occupiers agrees.

31. Liberty believes that individuals facing mental health crisis should be given immediate mental health treatment in an appropriate, therapeutic environment. Awaiting medical professionals in a private home after being arrested by police

[20] See 'Written Evidence of the Police Superintendents' Association of England and Wales (PCB 17)', available here: http://www.publications.parliament.uk/pa/cm201516/cmpublic/policingandcrime/memo/pcb17.htm.

cannot substitute for proper assessment, care, and treatment in a genuine medical setting.

32. Indeed, for many, being detained by police in their home, whilst suffering mental health crisis, is a frightening prospect. The home is a place of sanctuary and safety. Police intervention will likely amount to a serious breach of the integrity and safety of the private sphere.

33. In addition, there is a real risk that police will over-rely on the use of private homes as 'places of safety' for reasons of perceived necessity or convenience, where appropriate medical facilities are available. At a time when much more must be done to improve mental health outcomes for vulnerable people, such a change would reverse gains made in providing real health-based places of safety.

34. In fact, the amendment would collapse the important distinction between section 135 and section 136. Given the paramount need to protect the integrity and privacy of a person's home, section 135 rightly requires that police can only enter with a warrant and accompanied by a mental health professional. Section 136 requires no such authorisation nor on-the-spot medical assistance. Rightly, therefore, it does not permit an officer to enter a person's home. To allow officers to use private homes as places of safety risks undermining this crucial distinction.

35. The amendment is premised on what amounts to a false choice. It would be unsurprising if many find detention at home to be preferable to detention in a police cell, for example. But being detained at home is no solution. With no medical professionals on hand, and outside any appropriate physical setting, a person's mental health can only deteriorate further, with potentially serious consequences. They must instead assessment in an appropriate medical environment.

Liberty urges peers to support the new Clause tabled by Baroness Walmsley and Baroness Hamwee to ensure that police cannot use private homes as 'places of safety' for the purposes of section 136 of the MHA.

Amendment 192: Starting the detention clock

36. The time limit on detention in any 'place of safety' must begin to run at the appropriate time. This is at the point at which the decision to detain is made, and no other. Clause 80 of the current Bill proposes that time will begin to run when the person arrives at the 'place of safety'. This is inappropriate as a matter of law and practice.

37. Any person is detained from the point at which the officer decides to detain them and prohibits them from leaving his or her custody. Any person held by police will experience their detention as occurring from that point onwards – even more so with vulnerable individuals facing the authority of a constable entering their home or intercepting them in public.

38. Moreover, the reasons for limiting police detention of those with mental illness apply just as strongly to any period of detention imposed whilst in transit to a 'place of safety'. It cannot be right to detain people beyond what is appropriate and without legal limits simply because they are detained 'in transit'.

39. There is no reason to exclude this period of detention from the time limit – whatever those time limits are. Clause 80 must be amended to provide that the time-limit begins from the point at which the decision to detain is made.

Liberty urges Peers to support the amended Clause 192 tabled by Baroness Walmsley and Baroness Hamwee to ensure that the time limit runs from the point at which an individual is detained.

RESIDUAL GAPS IN THE BILL

40. Even with the above amendments, there would remain gaps in the Bill and in current law. Below, we detail crucial areas in which further provision is necessary.

A more effective and appropriate time limit on detention under section 136

41. Even where a police cell is not used as a 'place of safety', there remains significant concern about the use of section 136. Detention under section 136 still involves a person's arrest by police – it is treated as such for the purposes of the Police and

Criminal Evidence Act (PACE).[21] They are then kept in police custody until a mental health professional has assessed them and made arrangements for their treatment and care.

42. Liberty believes that, as a bare minimum, police detention in any kind of 'place of safety' must be used only exceptionally and subject to strong safeguards. It still involves detention by police, wherever conducted – a scary, stigmatising experience for those with mental illness. In particular, detention under section 136 in any 'place of safety' still goes on for far too long to be acceptable. A more stringent time limit is urgently required.

43. Clause 80 of the Policing and Crime Bill would reduce the permitted period of detention in any 'place of safety' from 72 hours to 24 hours. Liberty welcomes the Government's willingness to strengthen this safeguard, but its proposals are not enough. 24 hours remains far too long a period for individuals to be detained prior to an assessment of their mental health, wherever they are detained. Worse still, the proposals provide for the extension of detention for a further period of 12 hours.

44. There remains no justification for such a lengthy detention power. Individuals with urgent mental health needs have just as much a right to acute and emergency healthcare as anyone else. Were any other form of emergency healthcare provided only within a window of 24 or 36 hours, it would rightly provoke a national outcry. To suggest that individuals in mental health crisis can be detained whilst they wait for services to become available is a discriminatory and arbitrary abuse of the power to detain.

45. Liberty instead urges that the time-limit be brought down to 12 hours, with the possibility of extending detention by up to 12 hours further on the authority of the registered medical practitioner responsible for the person's examination under the MHA.

46. Where there are exceptional circumstances in which arrangements cannot be made within the time permitted, an extension can be granted. But a 12-hour general time limit will generate a strong incentive to improve the mental health treatment individuals receive – something which all recognise is urgently required.

Greater participation of mental health professionals

[21] See, for example, PACE Code C, paragraph 1.10, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117589/pace-code-c-2012.pdf.

47. Liberty believes that it must be mental health professionals, and not police officers, who identify and respond to mental health need in communities. Where police intervene in response to threats of serious harm, it must only be with the assistance of mental health professionals. Just as for those suffering physical illness, emergency first-responders should be trained medical professionals, not police officers.

48. Clause 78(5) of the Policing and Crime Bill would require that constables "consult", where "practicable", one of several different mental health professionals before exercising their powers under section 136 MHA. This is something that the Government's own review into the topic recommended over two years ago in 2014.[22]

49. However, Liberty is seriously concerned that these basic requirements are not strong enough to ensure that police interventions are appropriate and effective. The duty thus far proposed is one of consultation which need only be discharged where "practicable".

50. Instead, the amendment must require that officers may only avoid their duty where absolutely necessary in the interests of avoiding serious harm. No less serious circumstances can permit an officer to avoid consulting with those who have expertise in dealing with those with mental health needs.

51. This is especially important in light of the Government's Clause 79 proposal that police officers may decide that any location may be used as a 'place of safety' with the agreement of the constable. These are precisely the matters on which police officers must receive consultation from those with the training and expertise to effectively and safely intervene.

The importance of Independent Mental Health Advocates

52. Independent Mental Heath Advocates (IMHAs) are available to provide independent advocacy and advice to individuals subject to other powers in the MHA, such as those liable to psychiatric detention or who have received community treatment orders.[23] Among other important functions, they help individuals obtain information about their detention and/or treatment and support them in understanding what is happening to them.

[22] See 2014 Review Report, p. 11.
[23] See sections 130A-D of the MHA for the statutory regime governing IMHAs. Section 130B sets out the services provided by, and remit of, IMHAs. Section 130C defines who can receive their services.

53. Most importantly, IMHAs help the individual understand and enforce their rights. However, individuals detained under sections 135 and 136 MHA do not have a right to an IMHA.

54. Detention in any place of safety is just another feature of the mental health regime, and one in which independent advocacy, advice, and assistance is most strongly required. It is plainly unacceptable that individuals convicted of no crime, but detained for their own safety, can be so treated without access to the independent advocacy and assistance to which they would be entitled during other mental health interventions.

55. This is even more troubling given that sections 135 and 136 can be used against individuals who, as a result of mental illness or mental disability, lack capacity and therefore cannot consent, object to, or even understand their detention. There is no justification for these anomalies.

56. Liberty does not consider that the extension of the appropriate adult scheme – which purports to offer protections to vulnerable children and adults in police custody – is suitable, as this is just yet another extension of the criminal justice system into mental heath provision rather than developing mental health specific responses.

Disclosure and Barring Service checks

57. For the purposes of PACE, a police intervention under sections 135 and 136 is treated as an arrest. Moreover, any police involvement in taking a person to a place of safety generates information held by police as to that person's mental health history, including the mere recording of a police intervention by way of sections 135 or 136.

58. The Disclosure and Barring Service (DBS) provides the system whereby an individual's criminal record may be checked and, where relevant, disclosed to prospective employers. Ordinary DBS checks result in cautions and convictions being revealed, where permitted. However, under Enhanced DBS checks, other information held by police as to their involvement with that individual – what is known as "soft intelligence" – may be disclosed as well, where the officer responsible "reasonably believes" it to be "relevant" and that it "ought to be" disclosed.[24]

59. Police will hold information as to any arrests they conduct and any involvement they have in taking a person to a 'place of safety' under sections 135 or 136. The mere

[24] See section 113(B) of the Police Act 1997.

fact of police intervention in response to a person's mental health crisis is therefore liable to be disclosed.[25] The forced disclosure of what amounts to private health data – revealing, for example, that they suffered a mental illness which required medical assessment – is discriminatory and deeply wrong.

60. Liberty has campaigned for and brought legal challenges on behalf of those whose records have unjustly barred them from employment, training, and volunteering opportunities. In the case of *P*, for example, Liberty's client committed two extremely minor offences in 1999 whilst suffering from an undiagnosed mental illness. More than 16 years later – when applying for voluntary positions in pursuit of a career as a teaching assistant – she was required to disclose them. The High Court found that these rules breached Article 8 of the Human Rights Act 1998, since it contained no provision to disregard more than one minor, historic conviction where appropriate.[26]

61. It is even more important that section 136 detentions not be disclosed as part of DBS checks. It amounts to both the enforced disclosure of private medical records and the stigmatising of mental illness as an indicator of dangerousness, as if it amounts to an offence in itself. This is a discriminatory invasion of privacy, and must stop.

62. Since August 2015, new guidelines have been in force requiring constables to only disclose, as part of such checks, records that they "reasonably believe to be relevant".[27] As to sections 135 and 136, the new guidelines provide that:

> "The fact of detention under sections 135(1) or 136 of the Mental Health Act 1983 is unlikely, in itself, to be sufficient to justify disclosure. Sections 135(1) and 136 provide the police with powers to remove a person to a place of safety when the person is believed to be suffering from a mental disorder and is in need of care or control. Such a detention under the Mental Health Act

[25] See, for example, Rethink Mental Illness, 'Criminal record checks by employers – What information is included on a DBS certificate?', available here: https://www.rethink.org/living-with-mental-illness/money-issues-benefits-employment/criminal-record-checks-by-employers/what-is-included.
[26] See Liberty, 'Disproportionate criminal records disclosure scheme declared unlawful after Human Rights Act challenge by Liberty', 22 January 2016, available here: https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/disproportionate-criminal-records-disclosure-scheme-declared.
[27] For more detail on the changes, see Mental Health Cop, 'The Disclosure and Barring Service', available here: https://mentalhealthcop.wordpress.com/2015/08/09/the-disclosure-and-barring-service/.

does not constitute a criminal investigation and should therefore be treated with great caution when considering relevance for disclosure."[28]

63. This change was called for after interventions from a number of groups, including Members of Parliament such as Charles Walker, who stated:

> "I am aware of a number of people who have had mental health problems and have been detained for a short while. The police became involved, because they took those individuals into detention or to hospital. They go for a job perhaps as a counsellor or working in the charitable sector. They have a clean record but under 'Any other relevant information' [as part of an enhanced DBS check] the chief constable can say, 'We are aware that this person was detained for a mental health problem at this institution. We are not aware that they are a threat to adults or children.' That is that…I am afraid that in our ultra risk-averse world, that is a career death sentence for those people [sic]. We need to sort that out."[29]

64. A Government-appointed Commission – as far back as 2008 – called for a complete ban on the disclosure of a person's detention under section 136 as part of DBS checks. At the very least, it recommended the drawing up of new guidance to render their disclosure truly exceptional.[30]

65. However, the new guidance does not properly address this serious problem. Further, police officers are not mental health professionals, and there is nothing in the guidelines to require them to seek the advice of such professionals before making a decision as to the relevance of a person's mental health. There is a real danger that police will continue to disclose mental health records on the basis of false or stereotyped assessments of the connection between criminality and mental health.

66. Information relating to criminal investigations may still be deemed relevant as part of such checks. Where a person is processed through the criminal justice system, information relevant to criminal matters may be disclosed as part of an enhanced

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[28] Home Office, Statutory Disclosure Guidance, August 2015, paragraph 37, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452321/6_1155_HO_LW_Stat_Dis_Guide-v3.pdf.

[29] Quoted in Care Quality Commission, 'Monitoring the Mental Health Act 2011/12', 2013, available here: http://www.cqc.org.uk/sites/default/files/documents/monitoring-the-mental-health-act-in-2011-12-full-report.pdf, p. 32.

[30] Mental Health Act Commission, 'Risk, Rights, Recovery: Twelfth Biennial Report 2005-2007', 2008, available here: http://www.lemosandcrane.co.uk/bluesalmon/resources/Mental%20Health%20Act%20Commission%20-%20Risk,%20Rights,%20Recovery%20-%20Biennial%20Report,%202005-2007.pdf, para 2.149.

DBS check. However, the forced disclosure of an individual's medical history is an entirely different matter. The mere fact of a person's detention under sections 135 or 136 cannot rightly be deemed relevant to such checks.

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