

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's briefing on the Policing and Crime Bill for Second Reading in the House of Commons

June 2016

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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.

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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. Liberty welcomes the opportunity to brief on the Government's wide-ranging Policing and Crime Bill. The Bill will have its Second Reading on Monday 4 July 2016. This briefing focuses on provisions relating to changes to the police complaints and discipline systems, changes to pre-charge bail, treatment of 17 year olds under PACE, extended police powers for maritime enforcements, and the requirement to confirm nationality in criminal investigations and proceedings.
2. The Bill would make significant changes to police complaints and discipline. While we support the Government's stated aim of increasing integrity in the police complaints system, we fear that this is a missed opportunity to develop a consistent and independent system of police complaints which garners the confidence of the public. Although some changes are commendable, the continued involvement of local police forces in a significant number of investigations and proposals to grant elected PCCs some complaint-handling and appellate functions is disturbing and undermines many of the more positive changes. The IPCC needs to be supported and reformed to allow it to re-establish itself as a credible, independent and effective complaints handler. Under a change introduced in the House of Commons, while the organisation's name will change to the Office for Police Conduct along with aspects of its structure and governance, the Bill is silent on the many practical ways in which this body could be made more effective and independent and instead risks police complaint handling becoming more fragmented and inconsistent.
3. Liberty has long called for a statutory time limit on police bail and the Bill purports to introduce a 28 day limit. However, it at best amounts to a regular review of bail rather than constituting an effective limit. It seems likely that the proposed system will exacerbate rather than address the institutional drivers and inefficiencies that lead to long delays in the investigation of crimes and will certainly not offer increased certainty to victims or suspects.
4. We are concerned by proposals to grant police new maritime enforcement powers which could be exercised to require a ship to be taken to a port in England and Wales or anywhere else in the world and detained there. These proposals have the capacity to be used against foreign ships which are discovered to contain, or are suspected of containing, refugees and others in need of international protection. This risks violating a

number of the UK's international obligations to protect those in need and will expose already vulnerable individuals, including children, to human rights violations.

5. Also of concern is the proposal to require individuals to declare their nationality upon arrest and in court, with a penalty of one year imprisonment for failing to comply. The vast majority of criminal offences have nothing to do with immigration enforcement. These proposals constitute a poisonous conflation of the immigration considerations and the criminal justice system, and risk inflaming racial tensions in the UK.
6. More positively, we welcome proposals to amend PACE Codes to ensure that 17 year olds are treated as children rather than adults. This follows a court ruling which found that treating 17 year olds as adults breaches Article 8 of the Human Rights Act.

POLICE COMPLAINTS

Role of Police and Crime Commissioner

7. Police and Crime Commissioners were created under the Police Reform and Social Responsibility Act 2011 to replace police authorities in England and Wales. There are now 37 PCCs directly elected to hold the police to account. For the Metropolitan Police, the equivalent role is performed by the Mayor of London and MOPAC.
8. Clause 12 of the Bill would require PCCs to take on certain new functions, and would enable them to take on others if they chose to do so. PCCs will be required to take on the role of appellate body for appeals against complaint decisions which under the current complaints system are heard by chief officers of local forces. In addition, PCCs are able to elect to take on responsibility - as a package - for receiving and recording complaints; contacting complainants to discuss the issue; and resolving complaints currently deemed appropriate for local resolution. PCCs can additionally act as single point of contact for communication for a complaint through the processing of a complaint, unless the complaint involves the IPCC. PCCs will not be able to require police forces to resolve a complaint in a particular way, but will be able to recommend to a police force how it should resolve a complaint. PCCs can delegate any of these functions to another person other than police constables and police staff.

9. These proposals are deeply concerning. In our democracy, decision-making about complaints and appeal hearings must be undertaken by an independent and impartial body. It is wholly unconstitutional for these functions to be undertaken by an elected representative. It risks the politicisation of quasi-judicial functions and jeopardises the fair functioning of the complaints system. It could also dissuade many individuals from wishing to make a complaint in the first place, undermining the efficacy of the system. Take for example a PCC who has made negative comments about a particular community or group of individuals – would someone from that minority group feel comfortable appealing to the PCC? A further concern is that PCCs – who campaign for election – will prefer to make promises to devote resources to front-line policing rather than complaint handling, in particular given the fact that many of those who use police complaints systems may be marginalised and vulnerable and not broadly represented across the electorate. This risks complaints turning into a Cinderella service rather than treating it as a vital component of state accountability. There are also serious questions as to whether PCCs would have the necessary skills and experience to undertake complaint-handling and appellate functions. These roles can be complex, technical, with each case different from the next.
10. It is also confusing that the complaints that PCCs are being given to resolve are those most susceptible to resolution by local police forces. In any complaints system, there must be the option for local forces to take steps to put certain simple matters right themselves and then the option of an independent review. The proposed system fulfils neither of those roles, with police being removed from putting things right themselves and individuals being denied a truly independent review.
11. A further concern is the fact that the legislation grants PCCs broad discretion to decide which type of powers they wish to take on. This will lead to a patchwork of complaints handling processes across England and Wales. Fair and consistent handling of complaints against the police is essential to faith in our policing system. It is unacceptable to leave decisions as to how this system works to the whims of individual PCCs. To do so creates confusion and a postcode lottery for individuals who wish to raise complaints.
12. The legislation also grants PCCs the option to delegate any of its complaint handling functions to another person. This approach risks further fragmentation of the complaints system and raises significant questions as to which organisations or individuals will be entrusted with this vital function. Will large organisations such as G4S, who were placed

under investigation by the Serious Fraud Office for overcharging the Ministry of Justice for tagging contracts be entitled to apply? Or former police officers? The identity of complaint handlers is central to the credibility of the system. To leave this once again to an arbitrary decision is irresponsible and has potential to do huge damage to both the resolution of complaints and confidence in the policing system.

13. While we welcome attempts to make complaint handling and associated appeals independent from the police, passing responsibility for a quasi-judicial function to a directly elected individual is a constitutional novelty and could have dangerous ramifications. A much better use of public resources would be to invest more funding in the IPCC to allow it to undertake a greater number of independent investigations.

Recording of complaints

14. In the current complaints system, not all complaints have to be recorded. Schedule 5 of the Bill would require that all complaints be recorded unless the complainant withdraws the complaint or it is decided that the complaint should be addressed informally. Schedule 5 also lists the circumstances in which it is prohibited for a complaint to be resolved informally. These include: when the complainant insists that a complaint be recorded, complaints involving death or serious injury, complaints involving allegation of criminal or disciplinary conduct, and complaints where there may have been an infringement of articles 2 or 3 of the European Convention on Human Rights.
15. While proposed changes to the recording of complaints are clearly intended as an improvement on the current system, we are confused by the broad exemptions provided and are concerned that the discretion it creates leaves room for abuse. The recording of complaints is a necessary safeguard in the police complaints system, helping to ensure that complainants are not just dismissed or ignored. In addition, having clear records of all complaints made helps the relevant authorities to identify trends, better understand where things are going wrong, and makes it easier to work out how to deliver a better service. Therefore it makes sense that all complaints should be recorded, without exception. The fact that a complaint is then withdrawn or resolved informally does not reduce the utility of the authorities having this information. The proposed approach also places undue emphasis on the individual to require that a complaint is recorded – it should be automatic, a complainant should not have to “insist”.

16. We are also concerned by proposals to remove the appeal right against decisions not to record a complaint. It is clear that there remains scope for the non-recording of a complaint. Unfortunately, a legal provision requiring that complaints must be recorded if the complainant insists is no guarantee that this will take place. In addition, complaints may in fact break down into a number of different problems with behaviour or conduct and the legislation offers no guarantee that the full nature of a complaint will be recorded. The maintenance of an appeal right is therefore essential.

Definition of complaints

17. A complaint is currently defined as “any complaint about the conduct of a person serving with the police”. Clause 13 of the Bill would replace this definition with “*Any expression of dissatisfaction with a police force which is expressed (whether in writing or otherwise) by or on behalf of a member of the public.*” We welcome the decision to expand and simplify the definition of a complaint. The current system is restrictive and confusing for individuals.

Processes for handling complaints

18. At the moment, the complaints system operates as follows:

“A member of the public makes an allegation about someone serving with the police. The allegation may be raised with a variety of organisations, but all allegations are referred to police forces, who take a decision about whether the allegation should be recorded as a complaint. Once a complaint is recorded by the police force, efforts are made to resolve the allegation raised by the member of the public, either by local resolution, following local investigation or following an investigation by (or overseen by) the IPCC. The IPCC’s role in an investigation is triggered if the complaint concerns a death or serious injury, if it meets one of the mandatory referral criteria or if the IPCC requests that it is referred to them. Although a complaint may satisfy one of those conditions, this will not always be sufficient for the IPCC to become directly involved in an investigation. If a member of the public is unhappy with the way that their complaint has been handled, the system has a series of appeal points which allows them to challenge a decision. There are five points at which an appeal can be lodged: following a decision about whether an allegation should be recorded as a complaint; following the outcome of a local resolution; following the outcome of a local investigation; plus two further points relating to the investigation of a complaint.”¹

¹ Home Office, Improving police integrity: reforming the complaints and disciplinary systems, December 2014, page 10.

19. These different processes will be replaced with an overarching duty on police forces to take “*reasonable and proportionate action*” to resolve complaints. The categories of complaint that must be referred to the IPCC remain (see below).
20. Complainants will then have a single right of appeal on the grounds that an outcome was not “reasonable and proportionate”. PCCs will act as the appeal body for complaints where an appeal would previously have been heard by a Chief Constable. The IPCC will remain the relevant appeal body for dealing with the most serious and sensitive cases investigated. This will include complaints that have been investigated under ‘special requirements’, i.e. if the conduct complained about were proved, it would justify the bringing of criminal or misconduct proceedings or would involve the infringement of Article 2 or 3 of the European Convention on Human Rights.
21. While we welcome attempts to simplify and clarify the complaints system, Liberty is concerned that this new approach grants too much latitude to police forces as to how to handle complaints which involve themselves. Not only is there once again considerable risk of great divergence in treatment in complaints across the country, but in the absence of clearer directions there is huge scope for police forces to fail to take complaints seriously or address them adequately. There will be an urgent need for much greater clarity and detail as to what constitutes “reasonable and proportionate” in different types of cases. The fact that in many cases there is no appeal to the IPCC, only to an elected PCC, exacerbates these concerns. The continued major role played by local police forces in handling a huge number of complaints with no recourse to an independent review serves to undermine the independence of the system. In order to have a truly independent complaints system which commands confidence of the public, the majority of cases should be handled or reviewed by a reformed IPCC.

Changes to the role of the IPCC

22. Primary legislation and Regulations set out the cases which must be referred to the IPCC. These include all cases involving death or serious injury, cases involving serious assault, serious sexual offences, serious corruption, criminal behaviour, misconduct, and discrimination. The IPCC can also request that police forces refer cases to them. It will remain the case that these cases will be referred to the IPCC, who will decide whether to investigate the case themselves or whether to refer back to the local police force.

23. Currently, if the IPCC decides that it should be involved in the complaint, it will choose between one of three procedures: investigate using its own independent investigators; supervised investigation, which is conducted by police force using terms of reference set by the IPCC; or a managed investigation, which is conducted by police force under the direction and control of the IPCC. Under the new legislation, these different routes will be abolished. Instead, the IPCC must first decide whether having regard to the seriousness of the case and the public interest it is appropriate for the relevant police force to conduct the investigation on its own behalf. If it concludes that it is appropriate, the case can be referred back to the police force. Otherwise, the IPCC can undertake the investigation itself or can initiate a Directed Investigation. A Directed Investigation is intended to take place when the IPCC cannot conduct an investigation without police help, and the IPCC will be under a duty to keep under review the need to conduct a Directed Investigation rather than an independent investigation and must switch when police help is no longer required. A Directed Investigation would be similar to a supervised investigation, but IPCC would make certain key decisions such as the type of procedure to be followed.
24. Liberty agrees with the Government's assessment that the processes under the current legislation create confusion and undermine confidence in the ability of the IPCC to conduct its investigations in an independent manner. However we remain concerned that while managed and supervised investigations are to be scrapped, the creation of directed investigations will perpetuate this confusion and mistrust. Instead of continuing to make the IPCC dependent on the police forces it investigates, Parliament should take the opportunity afforded by this Bill to grant the IPCC the capabilities it needs to conduct full investigations.
25. In addition, central to the question of public confidence in the IPCC system is the extent to which it refers cases back to local police forces to investigate. This is clearly a question of the IPCC's funding and the criteria it uses to make these decisions. While there has been an increase in IPCC funding in recent years to enable it to undertake more independent investigations, it is regrettable that the changes in this Bill will create a fragmented approach rather than consolidate funds and powers in the IPCC.
26. Clause 16 would enable the IPCC to start an investigation into any matter of concern that comes to its attention without the need for a police force to make a referral. It is imperative that the IPCC is adequately funded to allow it to continue to deal with the complaints it receives as well as start its own investigations.

Super-complaints

27. Clauses 24 and 25 would grant the Secretary of State power to designate bodies as having “super-complainant” status. Super-complaints would be made to HMIC. Clause 26 provides that the Secretary of State may set out how this system will operate in secondary legislation.

28. Liberty has no principled objection to this proposal but do have many questions as to how it will work in practice, in particular given the complete absence of any detail in the primary legislation. We have concerns that the list of designated bodies will be restrictive, limiting the use of the power. We also must reiterate our concerns about funding and diversion of resources from an already stretched system. It is unclear why HMIC rather than IPCC has been given the task of receiving the complaints.

POLICE DISCIPLINE

Whistle-blowing

29. Clause 27 would give the IPCC powers to look at concerns raised by a whistle-blower without the whistle-blower first raising these concerns with their force. A concern cannot relate to conditions of service or something that could be dealt with as a complaint. In addition, a matter which indicates that a person serving with the police may have committed a criminal offence or behaved in a way which would justify the bringing of disciplinary proceedings must be referred back to the relevant force.

30. Whistle-blowers play a vital role in holding the state to account and as such we welcome these provisions. However we do not understand the significant restrictions placed on the type of concerns that may be considered by the IPCC, which appear to significantly undermine the value of this protection. We urge MPs to probe the Government on the reasons for this at Second Reading.

POLICE CIVILIANS AND VOLUNTEERS

31. In addition to warranted constables, the police force is supported by a range of civilian staff and volunteers. Schedule 10 of the Bill sets out core powers which only a police officer would be able to exercise. These include powers of arrest, stop and search powers, and anti-terrorism powers. Clause 37 will reduce the four existing categories of civilian staff from four to two, creating a community support officer and a policing support officer. It will also create a statutory basis for police volunteers as either community support volunteers or policing support volunteers. Under clause 37, chief officers will then be free to give civilian staff and volunteers any policing powers other than those listed in schedule 10. Under schedule 11, community support officers and community support volunteers may also be given additional special powers.

32. Liberty has longstanding concerns about the blurring of the line between constables and the citizenry, in particular when it comes to the use of volunteers. It is inevitable that non-core staff will not be given the same training nor have the same experience as warranted constables, and yet they may be given significant powers under the provisions set out in this Bill. The wide discretion given to chief officers as to which powers are granted to which individual has huge potential to lead to confusion and misuse or even abuse of powers. Members of the public will have no way to know which powers an individual is entitled to use. This risks damaging undermining confidence in modern policing and undermining social cohesion. In 2010 the Police Federation observed that the level of non-warranted officers in the police *“has led to a fundamental transformation of the approach to policing in the UK”* and also raised significant concerns that the change in workforce has affected its diversity such that in some areas it is no longer reflective of the wider public. More recently, concerns have been expressed that expanding the role of civilian staff and volunteers is driven by cost-cutting and jeopardises the professionalism of our police force.

PRE-CHARGE BAIL

Presumption of release without bail and provisions for re-arrest

33. The Police and Criminal Evidence Act 1984 (‘PACE’) sets limits on the length of time for which suspects can be detained without charge. The basic time limit is 24 hours (section 41(1)). An officer ranked superintendent or above can extend this to 36 hours in some circumstances (section 42(1)). Finally, the Magistrates’ Court may allow a suspect to be detained for up to 96 hours (section 43(1)). The police speak of a suspect having a certain amount of time left on their “custody clock”: this refers to time remaining until the suspect reaches the maximum time for which they can be detained without charge under

PACE. A suspect's "custody clock" is paused when they are granted police bail, and only starts again when they are brought back into detention.

34. Part 4 Chapter 1 establishes a new regime for pre-charge bail, also known as police bail. Clause 51 onwards amends the Police and Criminal Evidence Act (PACE) to create a presumption that where detention is not necessary but an investigation continues or a charging decision is made, the suspect should be released without bail being imposed.
35. Clause 64 would explicitly extend the definition of "new evidence" for the purpose of re-arresting an individual. The definition of "new evidence" would include information which may have previously been in the police's possession, but which they could not reasonably have been expected to have analysed before the suspect's release from custody. In a previous consultation on this issue, information stored on a computer which is in the possession of police was the example given for how this definition would apply.
36. Combined, these two proposed reforms are framed as a means of reducing incidences of police bail and focusing police attention on the operational necessity for a grant of bail. Whilst it is possible that the Government's proposal would reduce the use of bail where not operationally necessary, Liberty is concerned that these changes would increase instances of re-arrest on the basis of existing evidence (albeit evidence which had not been analysed prior to an individual's release) and do nothing to address the prolonged legal limbos experienced between arrest and decisions to charge or take no further action. A grant of police bail helps to ensure that the detention time limit is not exceeded for an individual in relation to a single criminal investigation. A scheme which reduces the circumstances in which police bail is used whilst increasing the possibility of successive arrests, each clearing the custody clock, replaces one set of civil liberties concerns with another. Liberty considers that encouraging the use of release without bail could lead to situations where the detention clock is effectively extended in relation to one criminal investigation. More concerning still is the prospect that, in cases where the custody clock is running out, the proposed changes could be seen as an encouragement to release with a view to re-arrest on the basis of a loose and flexible definition of "new evidence". Whilst we appreciate the merits of an approach which would ensure bail is only used in cases where it is operationally necessary, we are concerned about the potential to constructively extend periods of pre-charge detention.

Police bail

37. Bail will be imposed when certain conditions are satisfied. Clause 51 requires that bail must be necessary and proportionate, and must be authorised by an officer of the rank of at least inspector, and any representations made by the suspect or the suspect's representative must be considered.
38. The Bill then sets out time limits on pre-charge bail. Clauses 61 and 62 establish that there will be an initial bail period of 28 days in standard cases and of 3 months in SFO cases. The initial period in standard cases can be extended to 3 months by a senior officer of at least the rank of superintendent. In order for this extension to be granted, four conditions must be met. There must be: (i) reasonable grounds to suspect the person on bail is guilty of the offence for which they were arrested and are on bail; (ii) reasonable grounds for believing that further time is needed for a police charging decision or that further investigation is necessary; (iii) reasonable grounds for believing that the decision-making on whether or not to charge or the continuing investigation is being conducted diligently and expeditiously; and (iv) continuing bail is both necessary and proportionate. This period can be further extended by three months if authorised by a magistrates court on the same grounds and further extensions of three or six months may be granted by a magistrate. Applications for an extension will be considered by the Magistrate on the papers unless she deems an oral hearing necessary in the interests of justice or if the extension would take the bail period beyond 12 months and either party requests an oral hearing. The suspect and their legal representative may be excluded from any part of the hearing and information may be withheld from them. The Bill also provides for an "exceptionally complex case" procedure, under which an officer of the rank of chief constable, having consulted with a senior prosecutor, may extend bail for six months after arrest. Where a charging decision is to be made by the CPS, the time limits will be disapplied.
39. Liberty considers that a statutory time limit on bail is an indispensable feature of a fair and efficient system, delivering protection and greater certainty to both victims and suspects. Liberty has long been aware of, and concerned about, the damage caused by this legal limbo, both to suspects, victims and their families. During the passage of the *Police (Detention and Bail) Bill* in 2011 many parliamentarians voiced similar concerns and pressed the Government on the problems of principle and practice created by an effectively indefinite police bail period.² Public unease at the lack of statutory backstop

² For the Opposition, the Shadow Home Secretary, Yvette Cooper, said "*the House should also have concerns about the possibility of the use of endless police bail. There are cases, and there have been cases, where people have been left on police bail, including with conditions, long after another*

has since grown. The problem attracted significant media and public attention in light of the prolonged police bail periods for journalists suspected of involvement in the phone-hacking scandal. In September 2013, *The Sun* expressed concern over the time that suspects in Operations Elveden and Tuleta had spent on bail: it reported that 39 suspects remained on bail without charge after two years.³ *The Guardian* reported the Metropolitan Police's response to this, in which it admitted that "*there is genuine concern on our part about the length of time that some of those arrested have been bailed*".⁴

40. Liberty struggles with the claim that the Government's proposal is a limit in any meaningful sense. While an initial 28 day period is set, unlimited further extensions would be possible. In effect, the Bill would introduce a review of police bail, but certainly not a time limit on it.
41. Whilst the prospect of review may offer some benefits by encouraging police to engage, at regular intervals, with the ongoing legitimacy of bail, judicial involvement in this process is unlikely to have practical impact. Given that the grounds for extending bail broadly relate to operational factors, and will be presented to a Magistrate without challenge, it seems unlikely that Magistrates will be quick to interfere with the decision of the police. It is extremely difficult for a judge to assess the efficiency and effectiveness of internal procedures, particularly in the context of a paper based analysis or short hearing. It will also spread unwelcome and unnecessary secrecy into our judicial system, as defendants will be locked out of hearings relating to their own criminal cases. Currently, in cases where a suspect is subject to lengthy police bail, he or she has the option to make a habeas corpus judicial review application to the High Court. However, in practice, the courts have shown significant deference to the police's conduct of investigations. This was made clear in the case of *R (on the application of C) v Chief Constable of 'A' Police and another*,⁵ where the claimant, who had been given six and a half months' bail, invited the court to order that the investigation against him be halted, citing among other factors the "*unduly leisurely timetable*" which the police had followed. The court refused to do so, stating that it would only close down a police investigation "*in*

suspect has confessed to the offence. There are other cases where investigations have run dry but action was not taken to end the bail arrangements. Long bail can sometimes mean that delays are allowed to develop, and they eventually become counter-productive in securing justice" (Hansard, 7 July 2-11: Column 1690). In response, the Government made clear its intention to address these concerns (Hansard, 12 July 2011: Column 609).

³ "Axe endless bail", *The Sun*, 1 October 2013.

⁴ "Liberty calls for bail time limit as journalists and others left on bail for up to two years", *The Guardian*, 29 September 2013: <http://www.theguardian.com/law/2013/sep/29/liberty-bail-limit-hacking-suspects>.

⁵ [2006] EWHC 2352 (Admin).

the most exceptional cases". This judicial deference leaves bailed suspects largely at the police's mercy.

42. Liberty is also seriously concerned by the suggestion that evidence disclosed to the courts in the context of a bail authorisation process could be withheld from the individual concerned and his or her legal representative. Any system which allows the police service to have a private conversation with the judge about material used to support its case, excluding the opportunity for an individual to challenge or even review evidence, is incompatible with the bedrock principles of our justice system.
43. As an alternative, Liberty has consistently argued that a six-month statutory limit be placed on police bail. Just as there is a finite limit on the period that someone can be detained without charge – 96 hours for most criminal suspects and up to 14 days for terrorism suspects – so too should there be a finite limit on the period for which suspects can be subjected to conditions while on police bail.

Conditions on police bail

44. Clause 6 provides that individuals who are released on bail can be subject to conditions. Clause 60 of the Bill would allow an officer to arrest without warrant any person released on pre-charge bail who the officer suspects of breaching the bail conditions.

TREATMENT OF 17 YEAR OLDS

45. Clause 72 further updates the Police and Criminal Evidence Act 1984 ('PACE') as a result of important litigation under Article 8 of the Human Rights Act, *R (on the application of HC (a child, by his litigation friend CC)) v Secretary of State for the Home Department and another*.⁶
46. The facts are summarised in the judgment as (at paragraph 1):

"Four weeks after his 17th birthday at 3.55pm, on 19 April 2012, the Claimant was arrested on suspicion of robbery of a mobile phone on a bus. Shortly after he was taken to Battersea Police Station he asked that his mother be informed. That was not allowed. She did not learn that he was in custody for about four and a half hours after he had been arrested, at 8.30pm. She was not allowed to speak to him. The Claimant was

⁶ [2013] EWHC 982 (Admin).

released after 11½ hours in custody, on 20 April 2012. One month later he was informed by letter that his bail was cancelled. No charges were ever brought against him. The Claimant had never been in trouble before.”

47. Had the claimant been properly treated as a child, in light of his age, his time in custody would have been very different. He would have had a right to have his mother informed about his whereabouts, and the police would have been required to include his mother in the process and let her speak on his behalf.
48. As a result of the litigation, the Government amended PACE in a number of ways to treat 17 year olds as children in the context of the criminal justice system. These amendments continue to do the same. As the judge found (at paragraphs 85-6):

“It is difficult to imagine a more striking case where the rights of both child and parent under art 8 are engaged than when a child is in custody on suspicion of committing a serious offence and needs help from someone with whom he is familiar and whom he trusts, in redressing the imbalance between child and authority. The wish of a 17 year-old in trouble to seek the support of a parent and of a parent to be available to give that help must surely lie at the heart of family life which, quite apart from article 8, the government seeks to maintain and encourage. Once it is accepted that article 8 is engaged then treatment of a 17 year-old as an adult seems to me to be not capable of justification.”

LIVE LINK DETENTION EXTENSION

49. Clause 73 would introduce powers to allow for applications to detain an individual for longer than 24 hours to be granted via video link, either by an officer for up to a period of 36 hours or by a magistrate for up to 96 hours. Proceedings will be able to take place via live link rather than in person when: (i) a custody officer considers the use of the link to be appropriate; (ii) the arrested person has had legal advice on use of the link; (iii) appropriate consent has been given; (iv) it is not deemed contrary to the interests of justice.
50. The current requirements that officers be present at the police station at which they authorise an extended detention and that for longer extensions detainees are brought to court mark an important safeguard against arbitrary detention. They also provide an essential opportunity to ensure that a detainee is not being ill-treated. Clause 73

therefore marks a worrying reduction in the protections offered to detained individuals in our criminal justice system.

POLICE POWERS: MARITIME ENFORCEMENT

51. Chapter 5, Part 4, of the Policing and Crime Bill includes clauses giving police, customs officials and others powers to conduct enforcement operations at sea. These are additional to the powers granted by Schedule 2 of the Modern Slavery Act 2015 and the further powers introduced as part of the recent Immigration Act 2016 in its clause 71 and Schedule 13.
52. Clause 82 of the Policing and Crime Bill creates ‘maritime enforcement powers’ in relation to, among other things, foreign ships in any waters. . Clause 86 gives law enforcement officers the power to (i) stop a ship, (ii) board a ship, and (iii) require a ship to be taken to a port in England and Wales or elsewhere and detained there. These powers are exercisable where the police have “reasonable grounds to suspect” that (a) an offence under the law of England and Wales is being, or has been, committed on one of the above-listed ships or (b) such a ship is otherwise being used in connection with the commission of an offence under that law.
53. These powers go significantly further than those already in UK law. The otherwise similarly-worded powers included in UK law by Schedule 2 of the Modern Slavery Act, and proposed to be included as part of Schedule 13 of the Immigration Act, are only exercisable (or proposed to be exercisable) in respect of a small sub-set of offences under UK law. In the case of the Modern Slavery Act, they include only certain slavery-related offences. In the case of the Immigration Act, they include only offences listed in Schedule 13. These are the offences of assisting unlawful immigration to an EU Member State, helping an asylum-seeker enter the UK, and assisting entry to the UK in breach of a deportation or exclusion order.⁷ By contrast, the provisions of this Bill extend to any offence.
54. However, the most important difference is that the Modern Slavery Act and Immigration Bill powers do not include a power to require a ship to be taken to a port in England and

⁷ Contrary to sections 25, 25A, and 25B of the Immigration Act 1971, respectively.

Wales or elsewhere. The inclusion of “or elsewhere” in the Bill grants the wholly new power to divert foreign ships to a port *anywhere in the world*.

55. On the face of the Bill, this power would apply in cases in which foreign ships are discovered to contain, or are suspected of containing, refugees and others in need of international protection. Those in need of international protection may have entered countries in breach of immigration rules. Therefore, on the terms of the Bill, the police may have cause to suspect, upon the discovery of a boat on which refugees were suspected or found, that either (i) immigration law was being or had been broken or (ii) the ship is otherwise being used in connection with those breaches. Thus the power to divert ships may be engaged.
56. As examined further below, those in need of international protection have a right not to be returned to situations in which they face a real risk of persecution or other ill-treatment. They have a right to have their claims for protection fairly determined before they can be returned. To use the proposed powers in Chapter 4, Part 4, of this Bill to divert ships containing those who may be in need of international protection to foreign ports would amount to a serious breach of the Refugee Convention and the European Convention on Human Rights (‘ECHR’). The requirement of Clause 86(3) that the Secretary of State authorise the diversion of any ship to a foreign port provides no safeguard.
57. Concerns about the possibility of powers being used to divert refugees were raised with the Immigration Minister during Commons Committee stage consideration of the Immigration Bill currently before the House of Lords. In response to these worries, the Government made clear that the powers contained in the Immigration Bill could not be used in the manner feared. As the Minister assured, “*The powers in the Bill do not permit officers to turn vessels back. Under the power, vessels may be diverted only to a port in the UK. Upon arrival in the UK an individual wishing to claim asylum may do so and will be processed in the ordinary way. As is the case for all persons arriving in the UK, they will be subject to an immigration examination under the Immigration Act once they have arrived on land, and may also be detained under relevant provisions pending an immigration decision.*”⁸

⁸See Commons Debate, 13th sitting, 10 November 2015, accessible here: <http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151110/am/151110s01.htm>. Emphasis added.

58. The Policing and Crime Bill therefore proposes to introduce powers which the Immigration Minister expressly assured Parliament were not being introduced in other legislation only months ago. It is all the more extraordinary for such dangerous new immigration powers to be introduced as part of a Policing and Crime Bill, and so swiftly after consideration of an Immigration Bill.

Refugees and non-refoulement

59. Article 33 of the Refugee Convention states, “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This fundamental duty of non-refoulement is one of the central pillars, if not the central pillar, of the Refugee Convention. The government is bound by this duty as a matter of domestic and international law. This includes a duty not to remove refugees to a third party state which risks sending them back to their home countries or itself subjects them to ill-treatment.⁹

60. As the world’s foremost authority on the Refugee Convention, James Hathaway, states, “Refugee status determination does not make a person a refugee”.¹⁰ This is echoed by authoritative guidance provided by United Nations High Commission on Refugees (UNHCR).¹¹ Any person who has left their country and has a well-founded fear of persecution for one of the reasons listed by the Convention is a refugee. They must be treated as such until they have their status determined by competent national or international authorities. They therefore cannot be returned to their countries of origin until such a determination as to their status has been fairly and conclusively made.

61. Once a refugee is within the UK’s jurisdiction, which includes its territorial waters, it is required to honour the terms of Article 33. Again, they can only be returned to their countries of origin if their claims for asylum have been lawfully refused. This includes anyone found on UK territory, whether it be land or sea. Any enforcement action which involves the summary removal of individuals from UK territory in the absence of the fair processing of their claims for asylum would be a serious breach of the duty of non-

⁹ See, for example, *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477.

¹⁰ *The Law of Refugee Status*, 2nd ed., Hathaway, J., and Foster, M., Cambridge: Cambridge University Press, 2014, pp. 25-7.

¹¹ UNHCR *Handbook*, paragraph 28.

refoulement. This has been recognised by widespread state practice and international opinion,¹² and also by the UK's House of Lords.¹³

62. The ECHR also lays down a fundamental requirement of non-refoulement. In particular, under Articles 2 and 3, those who claim to face a real risk of death, torture, or inhuman or degrading treatment in their countries of origin cannot be summarily removed without the fair determination of their asylum claims. Strasbourg has held, for example, that Italy breached Article 3 by its push-back policy of intercepting refugees in Italian and international water to return them to Libya.¹⁴ The Court found that the ECHR applied not only to a state's enforcement activity within its own territory but extraterritorially to its actions in international waters.
63. Moreover, such operations may be in breach of the EU Dublin III Regulation (which recently replaced Dublin II). Whilst the Regulation permits the UK government to return refugees to whichever Member State processed them first, the UK is still required to determine whether refugees are so removable for the purposes of the Regulation. In cases where no other Member State has processed the individual, leaving the UK as the state obliged to process them. They therefore cannot be summarily removed from the territory of the UK.
64. Even if a Member State has already processed a refugee, there may be bars to their return within the framework of Dublin III. These would be breached by summary removal. The UK Supreme Court, the ECHR, and the Court of Justice of the European Union ('CJEU') have ruled that refugees are not removable by way of the Dublin system where doing so would return them to conditions in the relevant Member State that breach human rights.¹⁵
65. The CJEU has ruled that refugees could not be returned to Greece, for example, since the conditions in which they would be forced to remain gave rise to a risk of inhuman and degrading treatment.¹⁶ The same is banned under the ECHR.¹⁷ Indeed, the European Court of Human Rights has recently held that returns to Italy may violate the ECHR on

¹² See, for example, the material cited in Goodwin-Gill, G., and McAdam, J., *The Refugee in International Law*, Oxford: Oxford University Press, 2009, Chapter 5, but in particular p. 232.

¹³ *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport* [2004] UKHL 55, paragraph 26.

¹⁴ *Hirsi Jamaa and others v Italy* (Application no. 27765/09).

¹⁵ *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12.

¹⁶ : C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*.

¹⁷ *MSS v Belgium and Greece* (Application no. 30696/09).

much the same basis.¹⁸ The CJEU has also held that unaccompanied children with no family in the original Member State – very likely found in boats intercepted at sea – cannot under any circumstances be removed via the Dublin system.¹⁹

66. In order to live up to our international obligations to refugees, it is imperative that powers to remove ships to anywhere else in the world are removed from this Bill.

REQUIREMENT TO CONFIRM NATIONALITY

67. Clauses 139-141 introduce new requirements to state or prove nationality in a criminal justice setting, creating a poisonous conflation of the immigration considerations and the criminal justice system. The vast majority of criminal offences have nothing to do with the immigration system, rendering details of a person's nationality completely irrelevant. Should an individual ultimately be convicted of an offence, the question of deportation may arise, but this should not be a matter of concern for police officers whose concern is with enforcing the criminal law. This provision will help to reinforce the concern that police are involving themselves in the enforcement of the immigration system, an assumption which has historically inflamed tensions between police and minority ethnic communities.

68. Where an individual is arrested for any offence, clause 139 allows police and immigration officers to demand that he or she state her nationality "*where the immigration officer or police constable suspects that the individual may not be a British citizen*".²⁰ A written record will then be made of the individual's nationality. Proposed new section 43B would make it a criminal offence to fail to comply with the requirement to state nationality, punishable by a year in prison. Clause 140 applies in circumstances where an individual has been arrested on suspicion of committing any offence and is then released with or without bail pending a charging decision, or released after being charged with an offence. Before the individual is released, he or she could be required to produce a nationality document within 72 hours. Again the power is to be used where the immigration officer suspects that an individual may not be a British citizen. Under proposed new Section 46B, police and immigration officers can retain documents whilst they continue to suspect an individual of being unlawfully resident or in order to facilitate

¹⁸ *Tarakhel v Switzerland* (Application no. 29217/12).

¹⁹ Case C-648/11, *MA and others v Secretary of State for the Home Department*.

²⁰ Clause 139, proposed new section 43A(2).

removal. An offence of failing to produce a nationality document would be punishable with up to 12 months in prison.

69. Clause 141 of the Bill requires a defendant in any criminal court proceeding to provide details of nationality at any specified point in the proceedings, a failure to comply is once again a criminal offence punishable by a year's imprisonment.

70. Clause 142 would amend Schedule 8 to the Anti-social Behaviour, Crime and Policing Act 2014, which sets out powers to seize invalid passports and other invalid travel documents. The amendment extends intrusive, in-country search and seizure powers to include use not only by constables, but immigration officers, and in respect of not only UK passports (in the limited circumstances of paragraph 3 of Schedule 8 to the Anti-social Behaviour, Crime, and Policing Act 2014) but to any non-UK travel document. It also gives the police new powers to forcibly enter and search any premises for travel documents they reasonably believe to be invalid (they already have the power to conduct raids when they suspect a crime (e.g. fraud) has been committed).

71. These clauses follow close on the heels of provisions of the Immigration Act 2016 which would place obligations on police to enforce immigration rules in a way which risks seriously damaging the relationship between police and the communities they serve. Former Deputy Assistant Commissioner of the Metropolitan Police, Lord Paddick and anti-discrimination campaigner Baroness Doreen Lawrence were amongst the Peers vigorously opposing a new offence of 'driving whilst an illegal immigrant' to be enforced by police conducting roadside stops. Lord Paddick, who policed the Brixton riots as a constable in the 1980s, stressed:

“...“The police will come under pressure to proactively enforce immigration law for the first time in almost 30 years—30 years after the police service made a conscious decision to back away from proactive immigration law enforcement because of the damage that it was causing to police community relations.”²¹

72. The National Black Police Association has also condemned provisions in the Immigration Bill which will embroil police in immigration enforcement. The NBPA has expressed real

²¹ Lords Hansard - 1 Feb 2016 : Column 1590

alarm at the potential of these provisions to undermine decades of vital work promoting good relations between police and the communities they serve, warning of:

“an unwelcome return to the bad old days of SUS Laws...The potential impact of this legislation will be an undermining of community cohesion and a stirring up of racial hatred and suspicion between different racial and religious groups....and will result in the police becoming the whipping boy for the immigration service.”²²

73. In exactly the same way, the provisions of this Bill will create the widespread perception that police conducting duties ordinarily unconnected with the immigration system are embroiled in questions of immigration status. In relation to enforcement of the new driving offence, the Government has explained that police conducting traffic stops will make routine immigration enquiries – this is how a suspicion that an individual may be illegally present in the UK will be generated. It is not clear how the provisions set out in this Bill will operate. If they are to operate in a similar fashion to powers in the Immigration Bill, immigration checks would become a routine aspect of every police engagement with a suspect. It is difficult to think how suspicion will be generated if this is not the intended model, short of the police making assumptions about an individual's status on the basis of appearance or accent. In the seventeen years since the Stephen Lawrence inquiry reported institutional police racism, some - but in no way sufficient - progress has been made. Requiring police to make clumsy assumptions and ask provocative questions about a person's nationality on arrest is a toxic recipe for race relations in our towns and cities.

Sara Ogilvie
Rachel Robinson
Sam Hawke

²² NBPA Press Release, Monday 14th December 2015: <http://www.nbpa.co.uk/wp-content/uploads/2015/12/Final-NBPA-Press-statement-Immigration-Bill-14-December-2015.pdf>.