Proposed changes to PACE Codes C, D and H

Consultation response: Police Action Lawyers Group (PALG)

May 2016

Introduction: The Police Action Lawyers Group (PALG)

The Police Action Lawyers Group (PALG) is a national organisation comprised of lawyers who represent complainants against the police throughout England and Wales. PALG was formed in 1991 and its members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, judicial review and compensation claims.

PALG members hope that by upholding our clients' rights and highlighting poor practice, improvements will be made to police services and other state authorities against whom our clients bring claims.

In our experience, the primary objective of many of the clients who instruct PALG lawyers is a desire to ensure that the responsible police officers are held accountable for their conduct, and that lessons are learnt and improvements made so that others do not suffer the lack of care, abuse, indignity and ill-treatment that they have suffered.

PALG members have been involved with numerous notable police complaint cases, civil claims and inquiries. These cases typically involve allegations of false imprisonment, assault and malicious prosecution (often aggravated by discrimination), but are not limited to such work. Some of the most distressing cases we deal with are on behalf of families whose relatives have died in police custody. Many of our members are also active within the INQUEST Lawyers Group.

Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of complainants against virtually every force in England and Wales. Membership is contingent on lawyers only acting for complainants, to ensure that we provide a wholly independent space to discuss complainants' concerns.

All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome for our clients, many of whom have suffered the most serious abuse at the hands of the police. A

s a group we have also been in a position to liaise with other organizations representing complainant interests, including INQUEST, Liberty, Justice and MIND. We have also developed a lobbying role, particularly in relation to the police complaints system. To that end our members have attended before Select Committees, met with Ministers, and prepared regular briefings.

More information can be found on our website (http://www.palg.org.uk/).

Revised Codes C and H (Detention)

Live-Link Interpretation

The main changes to Code C, which are mirrored in Code H, concern live-link interpretation. The purpose is to enable interpretation services to be provided by interpreters based at remote locations using live-link communication technology. This 'live-link interpretation' is allowed for, but not required, by EU Directive 2010/64 in which Article 2(6) provides "Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings." The revisions therefore require the interpreter's physical presence unless certain conditions are satisfied and allow 'live-link interpretation'

It is important to highlight that live-link interpretation is allowed for but not required and it should therefore be the exception rather than the norm. Translation and comprehension is a highly specialised skill that depends as much on appreciating intonation and body language as it does on understanding the words and phrases used. The further the distance between the individual and the interpreter, the greater the risk that some of the potentially importance nuances of language could be lost. This is something that officers must be alert to in deciding what fairness requires. We would also deprecate the use of live link without specific consideration of its suitability on a case-by-case basis. At the very least, it will almost always be preferable for translation to take place face-to-face.

However, we also recognised that live link interpretation could assist in cases where the spoken language of the suspect is particularly rare and the relevant interpreter is unable to be physically present. In such cases the use of live link interpretation could prevent the suspect from being detained for an unreasonable length of time.

Annex N, paragraph 2

As part of the decision about whether or not a suspect is likely to be adversely affected if the interpreter is not physically present the following provisions should be inserted to form part of the officer's considerations….

> *"the suspect's solicitor (in any case where legal advice is requested) and the appropriate adult (for any juvenile or mentally vulnerable suspect) must be asked for their views."*

Currently under paragraph 4 the suspect is able to make representations against the use of live-link interpretation once the officer has decided to use it but the views of the solicitor and/or appropriate adult should form part of the officer's initial decision.

Paragraph 9 (b) and Code C paragraph 13.4(b).

This provides that the interpreter must send a copy of the written statement to the interviewer via the live link for the suspect to confirm and sign. However, there is no provision for how or when this is carried out. This should be rectified.

In practice, a suspect signs a written statement before it is provided in an interview. Without further clarification there is a risk that interviewing officers may obtain a tactical benefit from a live-link interview by obtaining an unsigned copy of statement before it has been approved by the individual. The potential for serious injustice is manifest. The Code should set out the exact process to be followed to facilitate the signing of statements and it should do so to ensure that the unsigned statement is handled by an entirely independent person. Where an solicitor is instructed, the statement ought to be sent directly to them. Reasonable provision must also be made for suspects of are not represented.

Under Part 1 of Annex N

As a further safeguard, we believe that proactive steps must be taken to deal with situation where the means of communication in the live-link breaks down. One option might be something along the following lines:

> "If at any time during an interview in which live-link interpretation is being used it becomes apparent to any of those present that the suspect is unable to communicate with the interpreter then the interview will be terminated and an interpreter will be required to be physically present."

Code C, paragraphs 13.2A and 13.6

We welcome the additional safeguards concerning juveniles, mentally disordered or otherwise vulnerable suspects to whom this provision applies.

Juveniles in Detention

Age of 'Juvenile'

The changes in the Codes implement the amendment to section 37(15) of PACE effective from 26 October 2015. This raises the age threshold which defines 'juvenile' for the purposes of the detention provisions in Part IV of PACE and the Codes, from under 17 to under 18. This is a welcome, if significantly belated, change.

There is no reason why the appropriate consent provisions should not also be amended to remove the anomaly that remains in the legislation which provides that a 17 year old can provide "appropriate consent" without the involvement of a parent or guardian. The law is now clear that 17 year olds should have the same protections

as other juveniles. The law and practice in this area must now be properly updated and amended to give effect to this.

Local authority accommodation

The amendment means that the requirement in section 38(6) for a juvenile detained after charge to be moved to local authority accommodation applies to all 17 year olds.

Code C paragraph 16.7 states that when a juvenile is charged and detained, the custody officer must make arrangements for the juvenile to be taken into the care of a local authority to be detained pending appearance in court unless it is impracticable to do so or there is no secure accommodation available. This paragraph has been amended to include that the reasons why it is impracticable <u>must</u> be set out in the certificate that <u>must</u> be produced at Court and the operation of this provision is subject to supervision and monitoring by an officer of the rank of inspector or above.

This changes are very much welcomed but do not go far enough. In practice, juveniles who are charged and detained are rarely placed in local authority accommodation and regularly remain in police cells pending their court appearance. It is suggested that this provision of the Codes should be further amended to include the appropriate steps to be taken by custody officers to find local authority accommodation and that all attempts made to source local accommodation should be set out in the certificate which is then produced at Court.

Code C paragraph 11.17A

The prospective for the removal of an Appropriate Adult is a serious cause for concern. Whilst in principle, we would not object to the removal of an Appropriate Adult (or any else) from an interview whose conduct was reasonably described as obstructing the fair and effective course of an interview (which would be inconsistent with the Appropriate Adult's responsibilities), the proposed draft does not obviously recall the critical role that an Appropriate Adult has in safeguarding the interests of a vulnerable person.

All those involved in a decision such as this must be directed to consider the functions that an Appropriate Adult is there to pursue and be reminded that removal is an exceptional course of action and one that would not be justified simply because an interviewing officer(s) object to a robust approach by them.

It is equally important that those involved in the decision-making process are mindful of the potential impact of removing the Appropriate Adult on the suspect. On our reading of the relevant provisions, a replacement Appropriate Adult must always be appointed if the original one is removed. However, regard should be had to the suspect's apparent willingness or ability to be supported by a different Appropriate Adult, particularly in light of the nature of their vulnerability and/or the strength of any pre-existing relationship.

Therefore, consideration might be given to offering further guidance on the steps to be followed prior to the removal of an appropriate adult, such as providing appropriate warnings and/or discussing difficulties with the solicitor, if one is present.

Given the role of the Appropriate Adult, we find it difficult to envisage circumstances in which there would be an emergency that would warrant a decision not to replace an Appropriate Adult.

Voluntary Interviews

A number of provisions contained within Codes C and H have been amended to require that the interviewer is responsible for confirming an interviewee has given agreement to be interviewed voluntarily (Code C, paragraphs C3.21(b) and C10.2).

Such a change is welcomed, especially in light of the increasing practice by Police Forces to interview potential suspects on a purportedly voluntary basis.

Code C, paragraph 4.4

States that any record made of property held by a detainee shall be treated as being part of the custody record for the purposes of the Codes of Practice.

Whilst it is positive that all records of property will be treated as part of the custody record, we would suggest that this paragraph be reworded, to state something such as:

"It is a matter for the custody officer to determine whether a record should be made of the property a detained person has with him or had taken from him on arrest. Any record is treated as being part of the custody record and it is required that this is kept as part of the custody record. Whenever a record is made the detainee shall be allowed to check and sign the record of property as correct. Any refusal to sign shall be recorded."

This will help to maintain the best records and a single reference point for the relevant documentation.

Code C, paragraph 1.17

We recognise that advances in technology have inevitably created a range of electronic devices that can be used by officers to make records. However, we are concerned that the definition of "electronic devices" is fairly broad. In our experience, obtaining copies of relevant records can be one of the most challenging practical issues in advising clients. We are concerned that unless attempts are made to limit the existing definition, it may become even more difficult to be assured that all the relevant information has been provided.

We also note that are no obvious safeguards proposed to deal with the fact that electronic devices are particularly susceptible to tampering. It is also pertinent to recall the obligations on Police Forces under the Data Protection Act 1998, as "data controllers", in this regard. This must be remedied before this guidance comes into force.

Equality Act matters

In Code C, paragraph 3.20A, and Note 3G, it is required that a girl under the age of 18 must be under the care of a woman whilst being detained.

Inclusion of this provision is welcomed. However, this clearly should have been recognised in the Codes long before now. It is hoped that this provision and the guidance available to officers will be brought to the attention of all officers responsible for detained persons.

Code C and H 1AA (*Notes for Guidance*) needs to be amended to include 'marriage and civil partnership' as one of the protected characteristics under the Equality Act 2010.

Code H 11ZA (*Notes for Guidance*)

Inserts a new provision whereby the requirement for a suspect to be given sufficient information about the nature of their suspected involvement in the commission, preparation or instigation of acts of terrorism offence applies prior to the interview and whether or not they are legally represented.

The last line of the provision states that this aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly. However, we are concerned at the obvious risk that the opposite may occur, with suspects trying to defend themselves or explain their actions without a solicitor present or having received legal advice. Therefore, the guidance should also require officers to remind suspects of the caution and the fact that any explanation or other comment(s) they make could be used against them and as such, they may want to exercise their right to legal advice.

Revised PACE Code D (Identification) 2016

Whilst there are some positive changes, there remain areas for improvement.

1.1

We note the purported amendment to this paragraph “to reflect the corresponding provisions in Code C”. Nevertheless, it is not clear why the explicit reference to provisions of the Equality Act 2010 making it unlawful for *police officers* to discriminate against, harass or victimise any person on the grounds of the protected characteristics has been removed.

In very broad terms, the 2010 Act imposes to two sets of duties – the specific duty not to engage in any of the forms of discriminatory behaviour as defined by the Act on the one hand and the general duty to “have regard” to the Public Sector Equality Duty in s149. The proposed draft replaces one of set of duties with the other. There is no obvious reason why both should not be set out clearly and unambiguously.

Whilst this might be viewed as a matter of semantics, this would be mistaken. This change might be seen as an attempt to dilute the importance of the provisions of the 2010 Act in so far as they apply to the police, this is particularly so bearing in mind that the duty to “have regard” in section 149 is a general, often more nebulous duty than the provisions relating to the prohibitions on discrimination etc. To avoid any such suggestion, we would strongly encourage the Home Office to retain the relevant wording as it appears in the current version of the Code and simply add an additional reference to provisions relating to s.149.

1.8

We are pleased to see explicit confirmation that the Code does not authorise the taking of fingerprints or samples from those detained solely for the purposes of assessment under section 136. However, in our view, the guidance on this point does not go as far as it should. This part of the Code should also:

- Explicitly recognise the vulnerability of those detained under section 137
- Explicitly acknowledge the fact that by virtue of their prospective detention, individuals held under this power may lack capacity to provide fully informed consent, and, therefore may not be able to authorise the taking of fingerprints or samples by consenting
- Reiterate the impact of the Mental Capacity Act 2005, particularly sections 1 -4 in this context.

3.2(d)

In so far as the changes in Part 3 reflect the developments in the case law summarised in the explanatory note provide increased safeguards to individuals, we welcome them. On that basis, the extension of eye-witness procedures is a positive

step. Whilst we understand the need for a trigger for the adoption of formal identification procedures, the Code should also recognise and provide guidance the risk that officers could influence the ability of a witness to identify a suspect during seemingly informal stages with the effect that the formal procedure provides nothing more than a rubber-stamp and thereby negating the safeguards envisaged by the Code (see for example – A. Roberts, "R. v Lariba (Billal): evidence - identification - Police and Criminal Evidence Act 1984 Code D para.3.36(k)" *Crim. L.R. 2015*, 7, 534-538).

3.11

We have a number of concerns about the potential delegation of ID Officer functions. Firstly, we believe that any delegation ought to be exceptional – any other approach risks diluting the vital role that the ID Officer plays in ensuring the proper application of the Code.

With that in mind, we consider that the Guidance should stress that delegation should not only be a question of convenience. Instead, we would advocate further amendments which stipulate that before an ID Officer delegates any functions in this area, she or he must consider that it is reasonable to do so having regard to:

- the nature and purpose of the function that it is proposed to delegate
- the relevant experience of the person(s) to whom it is proposed to delegate
- the implications for the fairness to witnesses and suspects of doing so; and
- the ability of the ID Officer to retain *meaningful* and effective supervision over the process (but see below).

It is right that the Identification Officer ought to retain overall responsibility for compliance with the Code. However, we are concerned that the idea that she or he can supervise effectively potentially complex procedures which are taking place at arm's length may prove illusory.

3.13

We suggest amending the draft to provide guidance on the sorts of when it is envisaged that it might otherwise be "useful" to use an eye-witness procedure.

3.17

More specific guidance ought to be provided in the Code on the factors that an ID Officer should consider in deciding whether or not to use photographs provided by a suspect. In addition, there should be an express requirement for an officer who refuses to use such pictures to note down their reasons for refusing and any comments from the suspect of their solicitor, which they ought to be invited to provide.

3.34

Given the importance of the ID Officer's role, it is not clear why there is no obligation to consult with her or him before any identification procedure is offered to a non-eyewitness. As the case summaries in the explanatory note to this draft illustrate, circumstantial evidence, including the identification of potential suspects can play a crucial role in the outcome of an investigation, and ultimately, a prosecution. The absence of any requirement to involve the ID Officer here significantly underestimates this. We would urge this proposal to be dropped and for the ID Officer to be given a formal role in all types of identification procedure – if necessary, with reasonable amendments to account for any practical differences which may arise in the context of non-eyewitness procedures.

3.35

We are concerned about the removal of the references to Annexes A and E. It is asserted that this is because they are "not appropriate & unreasonably restricts investigating officers from arranging viewings at short notice in response to genuine operational urgency". We are concerned by any assertion that the safeguards in the Codes should ever be dispensed with because they are operationally inconvenient. This is particularly so in this instance given that the assertion misrepresents the impact of the relevant annexes. Far from "unreasonably restricting" the carrying out of urgent viewings, the current version of paragraph 3.35 provides that the principles of Annexes A and E only apply "so far as possible". We are also struck by the fact that no evidence or examples are offered to support this change.

The extensions to D3.35 do not, in and of themselves justify this proposal. We are also sceptical that the "modelling" on two paragraphs of Annexe A could sufficiently replace the safeguards of two whole annexes.

Unless a proper evidence base can be provided, this proposal should be withdrawn. If this proposal is to be pursued then consultees should be offered a further opportunity to respond.

PART (C) recognition by uncontrolled showing of films etc.

Despite the heading to this part, we note that it applies not only to identification but also to "tracing" suspects. In this respect, we note that this carries a real risk of undermining the safeguard in 3.3, which prohibits the use of photographs, computerised images etc. where the suspect is "known and available". We infer that where a suspect is to be traced, their identity is known but they are not immediately available. Given the potential prejudice to the individual from circulation of their likeness in the media and the need to give all potential suspects the option of participating in a formal identification procedure, we consider that the Code should require officers/staff to take reasonable steps to trace suspects themselves before the publication of photos etc. to the media etc.

4 Identification by fingerprints and footwear impressions etc

Whilst the Code correctly states that the various forms of samples covered by sections 61-63 can only be taken with a person's written consent, unless one of the statutory exemptions applies, we note that it is proposed that the hitherto suggested form of words to record consent will be deleted and no replacement offered. There is no obvious justification for this and is particularly concerning given that the current form of words explained the consequences of providing consent in terms of the use that could be made of the relevant data.

Whilst we would emphasise that no standard form of wording should be relied upon to replace a meaningful and effective explanation of an individual's rights by an officer, providing that information orally and in writing can make an important contribution to safeguarding those rights. For one thing, it may provide an individual with an opportunity to test any inconsistency between an oral and written explanation of the relevant powers. The potential for confusion or inconsistency arising from an oral explanation is all the greater given the complexity of the relevant provisions.

We are also concerned that the removal of any standard form will inevitably lead to inconsistent practices across police stations and increase the likelihood of disputes about whether or not a person providing consent has been properly informed about the basis for and effect of doing so.

Therefore we would strongly recommend that a suitable form of words is retained.

As we have indicated in respect of Mental Health Act 1983, s.136 above, we also believe that this Code (but equally the other Codes) would be significantly improved by more fulsome guidance on dealing with individuals who lack or appear to lack mental capacity. On the issues in this part of the Code more specifically, we believe that officers should be told of the need to take at least preliminary steps to assess whether or not a person giving consent actually has the capacity to do so and in the event of any doubt that consent should not be relied upon. We appreciate that officers are not trained clinicians but we do not consider that this would impose an unreasonable burden on them. Indeed, in certain circumstances there may be a legal duty on officers to take these sorts of reasonable steps, most obviously, although by no means exclusively, under the Equality Act 2010.

5.13 and 5.14

These provisions lack clarity, particularly bearing in mind that they would authorise the removal of a relevant item if the individual refused to do so voluntarily. An individual should only be required to remove an item, and therefore potentially subject to force, where that is a necessary and reasonable to meet purpose for which a photograph is to be taken, which we assume would be on the basis of the prevention and detection of crime (PACE 64A(4)(a)). This is evidently a very broadly based justification. In practice, we think it would be unlikely to require the removal of

any item unless and to the extent that it could reasonably be said to obscure the person's identity or some other material attribute or feature.

We note the reference to Note 5F at the end of paragraph 5.14. We believe that the considerations set out in that Note which allude to potential religious, cultural or gender sensitivities should go further. An officer should be reminded that she or he is legally required to consider these sorts of concerns as part of their overall decision-making process – from the initial assessment of, the need to require removal of a particular item and the reasonableness or otherwise of a refusal and not just on the way in which she or he might exercise "reasonable force". This is clear not just as a consequence of the Public Sector Equality Duty but also the more specific prohibitions against the forms of discrimination set out in the Equality Act 2010. Therefore, we recommend that the reference to Note 5F follows paragraphs 5.13 and 5.14 but also that the extent of the duties on an officer are more clearly set out.

In view of this latter point, we would reiterate our concerns about the proposed draft of paragraph 1.1 of this Code (see above).

Annexe A – 9 and Note A1

Obscuring the identity of witnesses and officers involved in an identification procedure has potentially serious implications for open justice and safeguarding against collusion or procedural impropriety. This is particularly so when the view is taken that viewing the recording of a video identification procedure will be the default and primary means of ensuring fairness to the suspect. Therefore, the paucity of guidance on when this might be "justified" is particularly worrying.

At the outset, we note that paragraph 9 refers to "serious crime" but the Note for Guidance refers to "serious <u>organised</u> crime". This inconsistency needs to be resolved to avoid further confusion. Moreover, whatever term is finally adopted, further guidance must be offered on what it might include.

We also consider that it is imperative for the guidance to stress that the concealment of the identity of witnesses or officers must be exceptional. With this in mind, there is a risk that a requirement of "reliable evidence" of a material risk may set the bar too low – in our view the evidence should be, in effect "clear and compelling".

In this regard, there is also a possibility that showing a risk of "threat" "or "harm" may also set the bar too low. Clearly there is a balance to be struck against risk of harm to an individual(s) and any principle of open justice. However, we would incline to the view that more robust qualifications should be imposed on the ID Officer's powers here. As such, a requirement for the evidence to show a threat to cause or an intention to cause *serious* harm may be more appropriate.

Whatever test is adopted, there should be an explicit link between the threat or harm that is contemplated and the identification of the witness or officer.