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PROTECTING CIVIL LIBERTIES  
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## **Liberty's briefing on the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B and D) Order 2010**

**February 2011**

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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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## Executive Summary

1. The Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B and D) Order 2010, laid in Parliament on 17<sup>th</sup> November 2010, will introduce a number of significant amendments including changes which will affect how police officers stop and search members of the public. Given that these changes significantly reduce monitoring of police powers and once again introduce the opportunity for discriminatory selection for stop and search under broad police powers, we are concerned by the very limited quasi-public consultation<sup>1</sup> which preceded the tabling of the order. This draft Order is scheduled to be approved by the House of Commons on 8<sup>th</sup> February 2011. In this briefing we set out our significant concerns about what is being introduced by this Order. We urge parliamentarians to object to its approval.

2. We do not, in this briefing, discuss all of the changes being made, rather we focus on the changes which have the most serious implications for human rights: the removal of the requirement to record statutory 'stops' by police where there is no search, the removal of the requirement to record a 'stop and account' and the changes to the guidance on when someone can be stopped and searched without suspicion under section 60 of the *Criminal Justice and Public Order Act 1994*.

### Recording 'stops'

3. Our primary concern with this Order is that, if brought into force, police officers will no longer have to record when they stop someone under statutory authority with a view to searching them but then decide a search is unnecessary nor when they stop a person and ask them to account for themselves. This will see a direct reversal of a recommendation of Sir William Macpherson's Inquiry into the death of Stephen Lawrence just over a decade ago which recommended that police officers record all stops, including the self-defined ethnicity of persons stopped, and that these records be monitored and analysed.<sup>2</sup> A reversal of the implementation of this important recommendation would be a big step indeed. It would also ignore recommendations of

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<sup>1</sup> The changes were made available to a select group of organisations, of which Liberty is one, by virtue of their membership of the PACE Strategy Review Committee. This consultation closed on 15<sup>th</sup> October 2010.

<sup>2</sup> Recommendations 61 and 62 of The Stephen Lawrence Inquiry Report by Sir William Macpherson, CM4262-I (February 1999), available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>.

later inquiries, including Sir Ronnie Flanagan's independent review of policing in 2008,<sup>3</sup> that this record be maintained, even in the context of rolling back centralised bureaucracy. The alternative suggested in the proposed amendments under this Order is to allow for recording of ethnicity during police stops on a voluntary force-by-force basis. The Explanatory Memorandum for the Order suggests that this will be an option for those communities where

*concerns exist around disproportionality (i.e. a greater proportion of people from a Black and Minority Ethnic background are stopped and searched than from the population as a whole).*<sup>4</sup>

4. As a substitute for a very effective check on police powers this vaguely worded suggestion does little to appease our concerns. Statistics published annually show dangerous trends in the use of stop and search powers; this kind of scrutiny is obviously uncomfortable for police and makes it unlikely that they will opt in to any system of recording stops, particularly if their counterparts in other communities are not required to do the same. In addition, recording in just one police force area will hardly provide the kind of holistic accountability we need across all UK policing. The risk of discriminatory policing is not tied to a particular geographical location, which is why it remains just as important to monitor stops where the disproportionate and discriminatory use of powers is not a local concern as much as where it is.

5. Our opposition to this proposed reform does not mean that we don't understand concerns that have been raised about excessive bureaucracy. Indeed we have shared many of these, including in relation to centralised targets and lengthy stop forms. We are broadly supportive of provisions introducing reduced reporting requirements for police stops under section 1 of the *Crime and Security Act 2010*, yet to be brought into force. But whilst we appreciate the need to reduce the burden on police imposed by overzealous centralised mechanisms, this must not mean that crucial safeguards are simply removed under the guise of efficiency. The Macpherson Inquiry determined that it is the disproportionate number of stops – as opposed to just the questioning, or the searching, which may then take place – which is so damaging to community relations with police. Recording a stop and ethnicity of the person stopped should not then be seen as a bureaucratic procedure easily done away with. It should be seen as quick

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<sup>3</sup> Sir Ronnie Flanagan, *The Review of Policing: Final Report* (February 2008), at para's 5.56 to 5.63. Available at [http://www.polfed.org/Review\\_of\\_Policing\\_Final\\_Report.pdf](http://www.polfed.org/Review_of_Policing_Final_Report.pdf).

<sup>4</sup> At paragraph 7.2 of the Explanatory Memorandum.

and easy, indispensable, reform which was put in place as a defence against the discriminatory misuse of police powers. Removing this requirement will also remove statistical evidence of both good and bad policing. The statistics to date have shown us that discrimination in the exercise of these powers is a very real concern. Without these statistics the full picture of police use of stop powers will not be available. This means that evidence of discriminatory and disproportionate use (as well as any improvements) will be lost and accountability, along with community trust and confidence, badly undermined.

### **Stop and search without suspicion under section 60**

6. This Order will also insert a new paragraph 2.14A into PACE Code A which will govern how a person is stopped and searched without suspicion under section 60 of the *Criminal Justice and Public Order Act 1994*. Section 60 provides for a police officer to stop and search in anticipation of, or after, violence, once an authorisation would be in place on the basis of reasonable belief and expediency. As originally drafted, this new guidance would have expressly allowed for ethnicity to be taken into account by an officer stopping a person with a view to searching them. Liberty responded to the Home Office consultation stating that it was our belief that this revision would breach police obligations under race relations legislation.<sup>5</sup> We were greatly relieved therefore that, following consultation, the Home Office removed the offending part of the paragraph. We do, however, have residual concerns about this new paragraph in the guidance and serious concerns about the breadth of section 60 itself.

7. Stop and search with suspicion is of course the paradigm stop and search power in any democracy. Liberty has always maintained that there is space for a stop and search “*without suspicion*” power on the statute book as long as the power is truly exceptional, tightly defined and as long as it does not give licence – directly or indirectly – to stops and searches based on stereotyping. We are concerned that the new paragraph 2.14A, even as amended, appears to give indirect licence to stops based on an unreasonable suspicion, prejudice or stereotype of “*those thought likely to be associated*” with the incident or weapon in question. The potential for discriminatory use of a power to stop and search without suspicion was one of the reasons for the

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<sup>5</sup> Specifically section 29 of the *Equality Act 2010* which re-enacted provisions in the *Race Relations Act 1976*

finding in *Gillan v United Kingdom*<sup>6</sup> that section 44 (similar to section 60 in many ways) breached the right to private and family life.<sup>7</sup> These concerns are strengthened by recent data which shows that under section 60, Black people are 26 times more likely to be stopped than White people.<sup>8</sup> While amendment of the definition and scope of the section 60 power is obviously not something that can be achieved through revision of PACE guidance, we would urge parliamentarians in the meantime not to pass an amendment which could do further harm by potentially encouraging the type of racial or stereotypical profiling that would only confirm the concerns set out in *Gillan*.

8. This Order introduces a number of significant changes to the PACE Codes. Liberty is extremely concerned about the removal of safeguards and insertion of guidance which may encourage discriminatory overuse of statutory stop and search powers which are already dangerously broad. As well as the potential for discrimination, the changes also represent a disjuncture in policy. On the one hand, the new Government has proposed radical policing reforms in the Police and Social Responsibility Bill, scrapping Police Authorities and replacing them with directly elected “Police and Crime Commissioners”, based on a perceived need for improved police accountability.<sup>9</sup> On the other, they are moving in this Order to eradicate a vital mechanism for accountability – the requirement to record all stops - retention of which has been repeatedly recommended even where other bureaucratic form-filling is scaled back. We accordingly urge parliamentarians to object to this Order being passed without even the shortest of parliamentary debate.

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<sup>6</sup> *Gillan and Quinton v United Kingdom* (Application No. 4158/05), European Court of Human Rights on 12 January 2010 available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860909&portal=hbkm&source=externalbydocnumber&tabl>.

<sup>7</sup> Under Article 8 of the European Convention on Human Rights as incorporated into UK law by the *Human Rights Act 1998*.

<sup>8</sup> See <http://www.guardian.co.uk/uk/2010/oct/17/stop-and-search-race-figures>. Based on analysis of the Ministry of Justice’s *Statistics on Race and the Criminal Justice System*, Supplementary tables 3.05a 0809 (June 2010) with population data taken from *Statistics on Race and the Criminal Justice System* published in 2008 and 2006/07. See <http://www.stop-watch.org/uploads/STOPWATCH-PACE.pdf>.

<sup>9</sup> See the Home Office consultation, *Policing in the 21<sup>st</sup> Century: reconnecting Police and the People* (July 2010). See Liberty’s detailed consultation response (September 2010) at <http://www.liberty-human-rights.org.uk/pdfs/policy10/policing-in-the-21stc-reconnecting-the-people-and-the-police-sept-2010.pdf>.

## Briefing

### Introduction

1. On 17<sup>th</sup> November 2010 the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B and D) Order 2010 was laid before Parliament. Following consideration in Committee the Order is scheduled for approval in the House of Commons on 8<sup>th</sup> of February, 2011.

2. These Codes of Practice (known as the PACE Codes) constitute guidance for police in undertaking their statutory duties and exercising their non-statutory powers. Included in these changes are provisions which will mean that police officers will no longer have to record all 'stops'; provisions which will change the way police select individuals to be stopped and searched; and provisions providing for the use of mobile fingerprinting technology. Liberty's main concern is that these changes may lead to greater discriminatory selection in the use of police stop and search powers, an already acknowledged trend which is likely to go by increasingly undetected because police will no longer have to record every 'stop'. We believe that these reforms risk causing further damage to the relationship between UK police forces and the communities they police.

3. This draft Order follows an extremely limited and unsatisfactory, quasi-public Home Office consultation on draft proposed amendments to the Codes, which closed on 15<sup>th</sup> October 2010. Had the proposals gone ahead as originally drafted in consultation, police officers would have been directed that ethnicity could be a factor in a decision to stop and search members of the public when using the section 60 power to stop and search *without suspicion*. In our detailed submission to the Home Office consultation,<sup>10</sup> we set out our belief that as well as writing direct discrimination into police guidance and badly undermining community relations, this proposed guidance, if relied upon, would have put police in breach of their obligations under race relations legislation.<sup>11</sup> Following the consultation period, the Home Office removed the offending part of the paragraph, and whilst we remain concerned with the potential for discriminatory stops and searches without suspicion under section 60, we welcome this retreat.

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<sup>10</sup> See *Liberty's response to the PACE Code Consultation* (October 2010) available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-pace-codes-consultation-october-2010.pdf>.

<sup>11</sup> Specifically section 29 of the *Equality Act 2010* which re-enacted provisions previously found in the *Race Relations Act 1976*.

4. The proposed changes requiring officers to have reasonable suspicion before exercising stop and search powers under section 44 of the *Terrorism Act 2000* is of course welcome. However, what is needed in relation to these powers is not a change in guidance but a change to primary legislation. This has become necessary after these overbroad and intrusive powers were struck down by the European Court of Human Rights following Liberty's successful challenge in *Gillan*.<sup>12</sup> Indeed, this was recognised by the Home Secretary in her statement of 10<sup>th</sup> June 2010 when she announced a review of section 44 and said that interim guidance would be put in place pending the outcome of the review. That review has now reported and in its recently published report on counter-terrorism and security powers on 26<sup>th</sup> January 2011 the Government committed to repealing section 44 and replacing it with a more tightly controlled stop and search without suspicion power. As primary legislation to amend section 44 is now expected imminently, temporary changes to the PACE Codes while the power remains suspended seems unnecessary.

5. Finally, we also welcome the express inclusion in this Order that police must have regard to the *Disability Discrimination Act 1996* when carrying out their stop and search functions under PACE Code A,<sup>13</sup> and the added requirement in PACE Code B that powers to search and seize must be used fairly, responsibly and with due respect for the people searched and without unlawful discrimination.<sup>14</sup> These are important principles which will now form key guidance as to how police should use their powers.

6. The proposed changes will only come into force when Parliament approves this Order.<sup>15</sup> Liberty has been dismayed by the minimal public consultation for these changes, and we are further concerned that significant revision of important statutory guidance can be brought into force with such limited opportunity for parliamentary debate. While Liberty supports a few of the proposed amendments, some are deeply unwelcome. Indeed one of the most positive changes (in relation to use of *section 44 of the Terrorism Act 2000*) is insufficient to comply with an outstanding Court judgment which requires an amendment to the statutory power on its face (and therefore an

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<sup>12</sup> *Gillan and Quinton v the United Kingdom* (Application no. 4158/05), European Court of Human Rights ('*Gillan*') on 12 January 2010 available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860909&portal=hbk&source=externalbydocnumber&tabl>.

<sup>13</sup> To be added to para 1.1 of PACE Code A. A similar requirement will be added to para 1.1 of PACE Code D.

<sup>14</sup> Additional para 1.3A.

<sup>15</sup> In accordance with Section 67(7A) of the *Police and Criminal Evidence Act (1984)*.

amendment of primary legislation). For these reasons we urge parliamentarians to object to the approval of this Order.

### **Exercise of stop and search powers under section 60 of the *Criminal Justice and Public Order Act 1994***

#### *The power under section 60*

7. Section 60 the *Criminal Justice and Public Order Act 1994* provides for a police officer to stop and search in anticipation of, or after, violence. A police officer the rank of inspector or above can authorise an area, for a specified period not exceeding 24 hours, in which stop and search powers can be used if he or she has a reasonable belief that an incident involving serious violence may take place which could be prevented by an authorisation and that it would be expedient to give an authorisation under this section to prevent their occurrence; that such an incident has taken place and that a dangerous instrument or offensive weapon is being carried and an authorisation would allow that weapon to be found; or that persons are carrying dangerous instruments or offensive weapons without good reason within the police area. This initial period can be extended by a further 24 hours by a police officer of the rank of superintendant or above. Once an authorisation has been given any police officer can stop and search any pedestrian for an offensive weapon or dangerous instrument, or stop and search any vehicle and its driver and passenger for the same. In conducting such a stop and search, the officer need not have any grounds for suspecting that they are carrying an offensive weapon or article. Anyone who refuses to be stopped and searched commits a criminal offence and is subject to up to one months' imprisonment or a fine or both.

#### *Proposed changes to PACE Code A*

8. Paragraphs 2.12 to 2.14 in PACE Code A govern how a stop and search under section 60 should be conducted, setting out the grounds in the Act which allow for an authorisation to be given, and what a written or oral authorisation must contain.<sup>16</sup> The proposed amendments will insert the following paragraph 2.14A:<sup>17</sup>

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<sup>16</sup> Which includes the grounds, the locality and the period of time the authorisation is in force.

<sup>17</sup> There will also be a new paragraph 2.14B, which provides that any driver of a vehicle stopped and any person searched under section 60 will be entitled to a written statement if they apply within 12 months of being stopped or searched.

*The selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons (see Notes 10 and 11).<sup>18</sup> The powers must not be used to stop and search persons and vehicles for reasons unconnected with the purpose of the authorisation. When selecting persons and vehicles to be stopped in response to a specific threat or incident, officers must take care not to discriminate unlawfully against anyone on the grounds of any of the protected characteristics set out in the Equality Act 2010 (see paragraph 1.1)<sup>19</sup>.*

9. This amendment is different to the original amending paragraph which the Home Office issued for consultation in October. The first draft expressly allowed a police officer to select a person to stop and potentially search on the basis of their ethnicity, although this could not be the sole reason for the stop. The former draft paragraph stated that whilst officers “*must also take particular care*” not to discriminate against minority ethnic groups in using their section 60 powers, it was envisaged that circumstances may arise where it would be “*appropriate for officers to take account of an individual’s ethnic origin...but this must not be the sole reason for the stop*”.<sup>20</sup> Liberty was dismayed with this draft amendment which would have given the green light to racial profiling in police stop and search and would have breached human rights and race relations legislation. We were relieved therefore to see that this phrase expressly allowing for racial discrimination has been removed from the section. We do, however, have residual concerns about the wording of proposed paragraph 2.14A in the context of such a wide stop and search power without suspicion.

10. Stop and search *with* suspicion is of course the paradigm stop and search power in any democracy. However Liberty has always maintained that there is space for a stop and search “*without suspicion*” power on the statute book as long as the

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<sup>18</sup> Notes 10 and 11 are not being amended.

<sup>19</sup> Para 1.1 states that powers to stop and search “*must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations (Amendment) Act 2000 makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationality or national origins when using their powers*”. The paragraph is being amended to add the duty enunciated in the *Disability Discrimination Act 1995*.

<sup>20</sup> See Liberty’s response to the PACE consultation at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-pace-codes-consultation-october-2010.pdf>.

power is truly exceptional, tightly defined and as long as it does not give licence – directly or indirectly – to stops and searches based on stereotyping. Section 60 does not sufficiently restrict the use of exceptional stop and search. Instead it gives a wide power to authorise stop and search without suspicion merely on the basis that an authorisation would be ‘expedient’; with little in the way of geographical limits. While flaws with the drafting of section 60 cannot, of course, be dealt with through amendments to guidance, bad guidance can make the use of an overly broad power worse, and exacerbate the potential for discriminatory use. Accordingly, while we were pleased that express reference to ethnicity as a ground for stopping without suspicion was removed from the new paragraph 2.14A, we remain concerned about the potential for discrimination given the wording of the guidance, in particular, the reference to the selection of “*individuals and vehicles thought likely to be associated with*” the incident or weapon in question. We are concerned that this phrase appears to give indirect licence to stops based on an unreasonable suspicion, prejudice or stereotype of “*those thought likely to be associated*” with an incident. If you have intelligence about the description of a suspected offender or articles they are carrying etc then a section 1 PACE Act stop and search is the proper avenue. If you do not have good intelligence but use exceptional stop and search powers, then the stops must be truly random or blanket (as at a security cordon). They should not be governed by guidance which gives the green light to clumsy and discriminatory stereotyping – albeit less overtly than by including instructions to discriminate on the grounds of race.

11. The fundamental problem with both section 44 and section 60 stops and searches is that if there is no need for reasonable suspicion and the search is not blanket nor random, it is essentially licence for unreasonable suspicion based on prejudice. Section 44 was found by the European Court of Human Rights to be powers which “*are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*”.<sup>21</sup> Section 60 was not under consideration by the Court, but it is a provision which mirrors the section 44 power in its basis and breadth. The use of section 60 is clearly on the rise – and may well increase in light of the Court finding that section 44 is unlawful and the consequent reforms. In 2008 the number of section 60 stop and searches of individuals in England and Wales rose by 19%.<sup>22</sup> We already

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<sup>21</sup> *Gillan* at paragraph 87.

<sup>22</sup> Ministry of Justice *Statistics on Race and the Criminal Justice System 2007/08* (April 2009), available at <http://www.justice.gov.uk/stats-race-criminal-justice-system-07-08-revised.pdf>. Note that the 2008/2009 Statistics bulletin published in June 2010 provided a provisional set of data; the finalised data will be published in Autumn 2011.

know that Black and Asian men are disproportionately more likely to be stopped and searched under this power – indeed, recent research indicates Black people are 26 times more likely to be stopped under section 60 than White people.<sup>23</sup> So while the discriminatory use of stop and search powers under section 44 may be curbed by the introduction of the guidance as outlined above and anticipated legislative amendment of the power, the threat under section 60 remains. The potential for discrimination was considered “*a very real consideration*” by the European Court of Human Rights in *Gillan*.<sup>24</sup> Accordingly even though the explicit references to ethnicity have been removed in this draft guidance, the breadth of this power under section 60, coupled with the amendments to PACE Code A which are being made, the risk remains that the power will be used in a discriminatory way potentially in breach of race relations legislation and Articles 8 (right to privacy) and 14 (non-discrimination) of the *Human Rights Act 1998*.<sup>25</sup>

### **A change to the recording requirements under PACE Code A**

12. Other proposed amendments to PACE Code A will make significant changes to the recording requirements for stop and search. Under the current Code, a police officer is required to make a record where they stop and detain an individual with a view to performing a search, but then does not carry out the search due to the grounds for suspicion being eliminated after questioning the person detained.<sup>26</sup> A record must also be made when a police officer requests a person in a public place to account for themselves (i.e. account for their actions, behaviour, presence in an area or possession of anything).<sup>27</sup> In both situations, the record must contain the person’s self-defined ethnic background.<sup>28</sup>

13. If amended, the Code will no longer require a record to be made where an individual is detained with the view to a search which is then deemed unnecessary following questioning.<sup>29</sup> There will also be no national requirement for a record to be

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<sup>23</sup> See “Black people are 26 times more likely than whites to face stop and search” Mark Townsend *The Observer* 17 October 2010, available at <http://www.guardian.co.uk/uk/2010/oct/17/stop-and-search-race-figures>.

<sup>24</sup> *Gillan* at paragraph 85.

<sup>25</sup> Articles 8 and 14 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

<sup>26</sup> Para 4.7 of PACE Code A.

<sup>27</sup> Para 4.12 of PACE Code A.

<sup>28</sup> Para 4.12A and 4.17 of PACE Code A. Para’s 4.12A to 4.17 outline the procedural requirements for the record, and Notes for Guidance 18 and 24.

<sup>29</sup> Para 4.7, amended as proposed.

made when a police officer requests a person to stop and account for themselves.<sup>30</sup> A new paragraph will instead be added, stating that where there are concerns in a particular area that make it necessary to monitor any local disproportionality, the local police force has a “*discretion to direct officers to record the self-defined ethnicity of persons*” who have been stopped and asked to account for themselves or who are stopped and detained with a view to searching but do not search. The Explanatory Memorandum states that police forces will be the ones to decide whether this monitoring is required on a local level

*where community concerns exist around disproportionality (i.e. a greater proportion of people from a Black and Minority Ethnic background are stopped and searched than from the population as a whole).*<sup>31</sup>

Guidance for such a search will then be provided locally and “*efforts made to minimise the bureaucracy involved*”. This discretionary recording can be suspended or reinstated as appropriate.<sup>32</sup>

9. As a substitute for a very effective check on police powers this vaguely worded suggestion does little to appease our concerns. Statistics published annually show dangerous trends in the use of stop and search powers; this kind of scrutiny is obviously uncomfortable for police and makes it unlikely that they will opt in to any system of recording stops, particularly if their counterparts in other communities are not required to do the same. In addition, recording in just one police force area will hardly provide the kind of holistic accountability we need across all UK policing. The risk of discriminatory policing is not tied to a particular geographical location, which is why it remains just as important to monitor stops where the disproportionate and discriminatory use of powers is not a local concern as much as where it is.

14. Liberty is entirely opposed to the removal of the need to record ‘stop and account’ and statutory stops where a search does not go ahead, especially given this will mean that the ethnicity of stopped persons will no longer be recorded. The Explanatory Memorandum states these changes are “*necessary*”,<sup>33</sup> but does not

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<sup>30</sup> Para 4.12, amended as proposed. Consequently, it is proposed that current provisions 4.12A to 4.20 will be removed.

<sup>31</sup> Explanatory Memorandum to The Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes A, B and D) Order 2010, at para 7.2.

<sup>32</sup> New para 22A.

<sup>33</sup> Para 7.2 of the Explanatory Memorandum, *ibid*.

identify any viable reason for this necessity. It states that changes are needed to implement reduced statutory recording provided for in amendments to section 3 of PACE by section 1 of the *Crime and Security Act 2010* (not yet in force). Nowhere in the 2010 Act, nor its accompanying Explanatory Memorandum, is the abolition of recording stops contemplated. In the Home Office Impact Assessment accompanying the Crime and Security Bill, it was concluded that while there were considerable savings in time and cost by reducing requirements and introducing mobile technology to do so, it was also considered “essential that any new approach to either the level or method of recording maintains the collation and reporting of the ethnicity of persons stopped”, and noted that the “changes being proposed here do not negate the need to have a record”.<sup>34</sup>

15. Our opposition to this proposed reform does not mean that we don't understand concerns that have been raised about excessive bureaucracy in policing. Indeed we have shared many of these concerns including in relation to centralised targets and lengthy stop forms. When the *Crime and Security Act 2010* was passing through Parliament Liberty was broadly supportive of the provisions reducing the amount of information required to be recorded when a person was stopped and searched.<sup>35</sup> We therefore take no issue to the changes to PACE Code A which reduce some of the bureaucracy surrounding the form, such as removing the need to record a person's name when they are stopped and searched.<sup>36</sup> But whilst we appreciate there is a broad need to reduce the burden on police imposed by overzealous centralised mechanisms put in place by the previous Government, this must not mean that crucial safeguards are simply removed under the guise of efficiency. Cutting bureaucracy is welcome; cutting the means to maintain police accountability, particularly when it comes to race relations, is regressive. The most recent report by Jan Berry, former head of the Police Federation and now the Reducing Bureaucracy in Policing Advocate, stated that while there is still a great deal of reform needed to minimise bureaucratic measures in the UK police forces, “*The police service is accountable and*

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<sup>34</sup> Home Office *Impact Assessment of reducing the Statutory Recording Requirements for Stop and Search* (30 September 2009), at page 4. Available at <http://www.ialibrary.berr.gov.uk/uploaded/IA%20Stop%20&%20Search.pdf>.

<sup>35</sup> See *Liberty's Second Reading Briefing on the Crime and Security Bill in the House of Commons* (January 2010), available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill.pdf>.

<sup>36</sup> Currently required under para 4.3(a) of PACE Code A.

*records need to be kept*”.<sup>37</sup> The record of police stops is one of these essential records.

16. Requiring police officers to record all stops, including the reason for the stop, the outcome and self-defined ethnicity of the person stopped, was recommended by Sir William Macpherson’s Inquiry into the death of Stephen Lawrence just over a decade ago. Macpherson also recommended that these records be monitored and analysed.<sup>38</sup> This recommendation from this landmark Inquiry was implemented by an amendment to PACE Code A in 2004.<sup>39</sup> A decision to reverse the implementation of his important recommendation would be a big step indeed. Indeed the important impact of the requirement on community trust and confidence and race relations was not lost on Sir Ronnie Flanagan who conducted an independent review into policing in 2008. His report recognised that even though the process of recording had become burdensome, and changes ought to be made to that process to make it less so, the need to have a record in place remained a crucially important safeguard. Despite repeated calls at the time of his Inquiry to scrap the requirement, Sir Ronnie *“remained convinced that there is a need for officers to demonstrate accountability to individual members of the public”*, and agreed with community representatives that *“building a national picture of our behaviour and actions as police officers is crucial”*. Further, he considered that stop and search figures ought to *“be given the weight they deserve at force level”*.<sup>40</sup> We can see no reason for the reversal of these important recommendations. Not only does this proposal run counter to the recommendations of successive independent reports, it also contradicts aspects of the radical policing reforms that are simultaneously being proposed by this Government – namely the scrapping of Police Authorities to be replaced by directly-elected Commissioners. Purporting to reinforce local accountability on the one hand, while taking away a vital tool of accountability on the other, is simply contradictory policy-making.

17. It is clear that if a ‘stop’ record is no longer required for a significant number of police stops it will remove a vital measure and indicator of both good and bad policing.

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<sup>37</sup> *Reducing Bureaucracy in Policing, Final Report* (October 2010), Jan Berry (Reducing Bureaucracy in Policing Advocate). Available at <http://www.homeoffice.gov.uk/publications/police/reducing-bureaucracy/reduce-bureaucracy-police?view=Binary>.

<sup>38</sup> Recommendations 61 and 62.

<sup>39</sup> The amendments were introduced in August 2004, to be implemented by all forces by 1 April 2005.

<sup>40</sup> Sir Ronnie Flanagan, *The Review of Policing: Final Report* (February 2008), at para’s 5.56 to 5.63. Available at [http://www.polfed.org/Review\\_of\\_Policing\\_Final\\_Report.pdf](http://www.polfed.org/Review_of_Policing_Final_Report.pdf).

The current data set has been crucial to highlight the problems associated with these overly broad stop and search without suspicion powers. Overall in 2007/2008 Black people were two and a half times more likely to be stopped and asked to account than White people;<sup>41</sup> under section 1 of PACE Black people were nearly eight times more likely to be stopped and searched;<sup>42</sup> under section 60, as noted above, Black people are 26 times more likely to be stopped than white people.<sup>43</sup> Without these records systemic problems will be difficult to recognise and act on. The removal of comprehensive monitoring will also leave open the potential for more liberal use of 'stop and account' and 'stop without a search' under sections 1, 44 or 60. The Macpherson Inquiry determined that it is the actual and perceived discriminatory use of police stop powers – not only the questioning, or the searching, which results – which is so damaging to community relations with police. Without comprehensive monitoring statistics the public is unable to know if there is discriminatory deployment of police stop powers.

#### **Amendments to PACE Code D: obtaining fingerprint data**

##### *The use of mobile fingerprinting*

18. PACE Code D will, among other things, be amended to give guidance in respect of the operation of section 61(6A) of PACE. This subsection, introduced by the *Serious Organised Crime and Police Act 2005*,<sup>44</sup> is not yet in force but we understand will be shortly brought into force. This will allow for fingerprints to be taken from a suspect, who has not been arrested, without appropriate consent if the constable reasonably suspects the person is committing or attempting to commit an offence or has already done so, and where the name of the person is unknown and cannot be readily ascertained by the constable or if the constable doubts the name given to them by the person.

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<sup>41</sup> Ministry of Justice *Statistics on Race and the Criminal Justice System 2007/2008*, *ibid*, at page 31

<sup>42</sup> Ministry of Justice, *ibid*, at page 28.

<sup>43</sup> See <http://www.guardian.co.uk/uk/2010/oct/17/stop-and-search-race-figures>. Based on analysis of the Ministry of Justice's *Statistics on Race and the Criminal Justice System*, Supplementary tables 3.05a 0809 (June 2010) with population data taken from *Statistics on Race and the Criminal Justice System* published in 2008 and 2006/07. See <http://www.stop-watch.org/uploads/STOPWATCH-PACE.pdf>.

<sup>44</sup> Under section 117(2).

19. PACE Code D will be amended to govern the use of this section, and will provide for fingerprints to be taken using a mobile device and then checked on the street against the national fingerprint database. It also states that fingerprints may be subject to a speculative search, and that fingerprints cannot be retained under this power after the check has been undertaken. Before exercising the power the officer should inform the person of the suspected offence; give every reasonable opportunity for the suspect to establish their identity; and where applicable inform the person why their name is not known or the grounds for doubting the validity of the name provided.

20. Liberty welcomes the guidance on the exercise of these powers. We are, however, still concerned that the new technology, whilst being helpful for police performance, ought to be more strictly curtailed. Police officers must be absolutely certain they take fingerprints only when the individual is suspected of an offence and cannot establish his identity. Further, the prospect of 'speculative' fingerprint checking leads to further concerns that a system of mobile fingerprinting could be open to overuse, and potentially misuse and abuse. We have written in detail elsewhere about our concerns.<sup>45</sup>

#### *Taking fingerprints under immigration law*

21. Paragraph 4.10 will be amended to provide for a person's fingerprints to be taken and retained for the purposes of immigration law enforcement and control. The paragraph requiring the person whose prints are being taken to be informed why they are being taken, and that copies of their prints will be destroyed, will be deleted.<sup>46</sup>

22. Liberty has long been concerned about the amount of information, including significant biometric information, being held by the Government.<sup>47</sup> Vast amounts of personal information are provided by applicants for visas, including now ten images of their fingerprints. This is far more than currently required under the relevant European

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<sup>45</sup> See *Liberty's response to the National Policing Improvement Agency Equality and Private Impact Assessments: MIDAS and Mobile Fingerprinting Projects* (September 2009), available at <http://www.liberty-human-rights.org.uk/pdfs/policy09/consultation-response-to-mobile-fingerprinting.pdf>.

<sup>46</sup> Paragraph 4.13 will be deleted, as will Annex F, paragraph (b), which outlines how fingerprints taken for immigration enquiries must be destroyed.

<sup>47</sup> See *Liberty's Second Reading Briefing on the Identity Documents Bill in the House of Lords* (October 2010) available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-identity-documents-bill-second-reading-lords-october-2010.pdf>.

Council Regulation.<sup>48</sup> We understand that this biometric information is retained by the Home Office on a vast database of biometric and other personal information in respect of foreign nationals, which is poorly regulated and has no statutory basis. The database is the by-product of powers found in immigration legislation which enables biometric and other personal information to be taken when a person requires leave to enter and remain in the UK.<sup>49</sup> Ascertaining who has access to the personal information held on the database is very difficult as it is spread across various pieces of immigration legislation and general common law principles. There is also no detail on how long this information is retained for. We understand that if a person becomes a British citizen the information is no longer retained, but otherwise it seems that it may be retained almost indefinitely. We understand that all biometric and personal information on visa applicants is considered to remain of use even after a person has left the UK – as there is a chance that they may return some years later.

23. Liberty believes that if a person has left the UK at the expiry of their visa or residence permit and no application has been made for a new visa, their biometric information should be destroyed. We are accordingly concerned about these changes to the Code which not only adds that this biometric information is to be retained, but takes away the paragraph requiring the immigration officer taking the print to inform the individual why their prints are being taken in the first place. We are unsure as to why this part of the Code is being deleted. Even though we understand that biometric data is lawfully taken, unless these provisions are now in another Code or guidelines for the officers to whom this provision applies, we would hope that the officer would continue to be mandated by this Code to be required to give the person whose prints are being taken an explanation of the safeguards that are in place to protect their biometric data and what will be done with it. More broadly, we also believe that there needs to be an urgent review of the amount of information currently held on the foreign visa database with a view to scaling back, rationalising and better regulating.

### **Sophie Farthing**

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<sup>48</sup> See Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals and the amendments to this by Council Regulation (EC) No 380/2008 of 18 April 2008, which the UK has voluntarily adopted.

<sup>49</sup> See in particular the *Immigration Act 1971* which provides that certain non-nationals require leave to enter and remain in the UK, the *Immigration Rules*, and the *UK Borders Act 2007* which sets out requirements for biometric information to be taken.