

The United Kingdom's Police and Criminal Evidence Act (PACE) as an example of a legal framework to prevent short-term enforced disappearances.

Just Planet contribution to project of **joint statement on the notion of short-term enforced disappearance**. For the consideration of the Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances.

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INTRODUCTION

This input aims to respond to **Question B** of the *Call for inputs with a view to issuing a joint statement on the notion of short-term enforced disappearance* (“Call for Input”) published by the Committee on Enforced Disappearances (“Committee”) and the Working Group on Enforced or Involuntary Disappearances (“Working Group”). In particular, this submission seeks to address the second part of Question B, specifically: **which are the legal frameworks and practices that might prevent short-term enforced disappearances?**

BACKGROUND

Enforced disappearance is the arrest, detention, abduction or any other form of deprivation of liberty, by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹ This definition does not contain the words ‘for a prolonged period of time’ (or words to that effect), and therefore does not impose a particular period of elapsed time upon the definition. Indeed, the drafters of the Convention considered that an enforced disappearance should be constituted from the moment of the arrest.² Thus, the notion of short-term enforced disappearance sits comfortably within the Convention’s definition and comprises enforced disappearances of a limited duration.

The definition points to the substantive question being that of whether a person is deprived of their liberty in circumstances where the State or its agents conceal the fact of their detention, and/or the place they are detained, and/or the condition and state of the detainee. Enforced disappearances are the occurrence of such detentions, even though they may exist for relatively short periods of time. It is the concealment of knowledge and the fact of the

¹ Article 2 Convention.

² Maria Clara Galvis Patiño, ‘The Work of the Committee on Enforced Disappearances’, Graduate Institute of Geneva, August 2021, Part 2 page 8.

detention that lie at the heart of the violation, and not the length of time that this occurs within.

To address such violations, measures for prevention need to be utilised that provide for a process of regulating arrest, detention, and trial of persons by the State and its agents. These regulations need to be connected to the operation of the recognised criminal law of the State and must limit the exercise of any powers of arrest or detention to regulated officials. This process needs to ensure that regulated officials are supervised by senior officials and courts, both during and after the time of detention. It should mandate that officials formally record events surrounding arrest and detention and provide for known and identifiable places where detention takes place. It must also provide time limits for detention and provide codes of practice for the treatment of persons detained. **This is what the Police and Criminal Evidence Act 1984 (PACE) does within the domestic law of England, Wales, and Northern Ireland.**

THE POLICE AND CRIMINAL EVIDENCE ACT IN ENGLAND, WALES AND NORTHERN IRELAND: AN EXAMPLE OF A MODEL FOR PREVENTING SHORT-TERM ENFORCED DISAPPEARANCES

Introduction to PACE and PACE Codes of practice

In England, Wales, and Northern Ireland, police powers of investigation (which include arrest, detention, interrogation, entry and search of premises, personal search, the taking of samples, and identification procedures) are governed by primary legislation, namely the **Police and Criminal Evidence Act 1984 (PACE)**.³ **Section 66** (s.66) of this Act requires the Secretary of State to issue Codes of practice ("**PACE Codes**") that regulate the exercise of police powers⁴.

An excerpt from s.66 of PACE is provided below, and can be read in full at

[https://www.legislation.gov.uk/ukpga/1984/60/section/66:](https://www.legislation.gov.uk/ukpga/1984/60/section/66)

³ Blackstone Criminal Practice (Blackstone), paragraph D1.1.

⁴ PACE section 66.

The Secretary of State shall issue codes of practice in connection with—

(a) the exercise by police officers of statutory powers—

(i) to search a person without first arresting him; .

(ii) to search a vehicle without making an arrest; or

(iii) to arrest a person;

(b) the detention, treatment, questioning and identification of persons by police officers;

(c) searches of premises by police officers; and

(d) the seizure of property found by police officers on persons or premises.

PACE Codes are detailed regulations that the police must comply with. Individual officers and police services can be held to account for breaches of PACE, in accordance with supervisory and disciplinary processes, as well in the courts, in connection with civil or criminal liability that may arise from egregious violations. Furthermore, in circumstances where evidence against a detainee is obtained as a result of a fundamental breach of a Code, the courts have the power to render such evidence as inadmissible. As such, the PACE Act, combined with the Codes issued under it, provides an example of an effective legal framework, which seeks to protect detainees from abuse of power by regulating and recording the circumstances, condition and duration of each detainee's arrest and detention in police custody.

Underpinning principles and protections in the PACE framework

The PACE framework is both detailed and expansive. However, it is based upon several clear principles, specifically:

1. Only detaining a person for a recognised criminal offence, on reasonable suspicion of it,
2. Only permitting detention at clearly known and identified places with sufficient and appropriate facilities that allow safe detention,
3. Closely monitoring and recording all that occurs to and in respect of the detainee whilst they are under arrest and in detention,
4. Keeping the detainee safe from harm whilst detained,
5. Keeping questioning of the detainee fair and free from oppression or undue influence,

6. Making sure that the whereabouts of the detainee and fact of detention are known to the detainee's family or loved ones, *and*
7. Making sure that the detainee has the benefit of legal advice and assistance in person at the place of detention if they wish for it.

The above principles standardise the way in which all detainees are to be treated when held in police custody. PACE firmly places them within the protection of the law from start to finish of their detention. For detention in police custody to be lawful, individual police officers (of varying ranks) are responsible and accountable for acknowledging and recording the deprivation of a detainee's liberty and their whereabouts, as well as their treatment and condition whilst in custody.

Relevance of PACE to the prevention of short-term enforced disappearance

PACE Codes **A** and **C** are most relevant to the issue of prevention of enforced disappearance. These Codes provide the standards and rules for the conduct of arrest and detention, treatment of the detainee whilst in custody, and questioning. **The most material of these Codes to the issue of enforced disappearance is PACE Code C.**

PACE Code C (read with the PACE Act) provides detainees with the following protections:

- I. A person must only be arrested on reasonable suspicion of the commission of a **criminal offence within domestic criminal law.**
- II. A person who is arrested should be brought to the **designated place of detention (a police station)** as soon as practically possible,⁵ and **must not be questioned until they have been taken and formally received there**⁶.
- III. Once in the designated place of detention, the detainee is to be placed in the hands of a **custody officer** who is a separate entity from those who have arrested the detainee and those who are investigating the detainee's alleged offence⁷.

⁵ PACE section 30(1A).

⁶ PACE Code C part 11.

⁷ PACE Code C paragraph 3.1.

- IV. The custody officer begins a **documentary record of all aspects of the detainee's detention** and is responsible both for maintaining the record in a close and detailed way, for the care of the detainee whilst in detention, and for compliance with PACE and the Codes of practice⁸.
- V. The detainee must have the **opportunity to notify someone close to them of their whereabouts and situation** and must also have the **opportunity to arrange legal representation**.
- VI. There are **limits on the time for which the detainee may be held at the police station** before being released or brought before the court. At court, the detainee can make application for bail.⁹
- VII. The **longest time for which a detainee may be held before being released, or charged with an offence and brought before the court, is thirty-six hours, subject to an extension of the period of detention before charge by the court**¹⁰.
- VIII. During the detainee's stay in the police station, they must be given food and refreshment, they must be held in sanitary conditions, and their **health needs must be attended to with the assistance of a doctor or hospital treatment if necessary**.
- IX. **Interrogation must be closely monitored, recorded electronically**, and not carried out in an oppressive, coercive way, or with undue influence.¹¹
- X. **At the point at which there is sufficient evidence to charge the detainee with a criminal offence, they must be charged and brought before a court**, or charged and bailed to appear at a court at a point in the future.¹²
- XI. **If there is insufficient evidence to bring a criminal charge, the detainee must be released**. However, on release, they may be bailed to reappear at the police station at a time in the future, pending police investigations.¹³

⁸ PACE sections 36 and 37, PACE Code C parts 2 to 17.

⁹ PACE section 34, PACE Code C part 15.

¹⁰ PACE section 34, PACE Code C part 15.

¹¹ PACE Code C parts 8 and 9.

¹² PACE section 37, PACE Code C part 16.

¹³ PACE sections 37 and 47.

THE FOUR PILLARS OF PACE CONCERNED WITH THE PREVENTION OF ENFORCED DISAPPEARANCES

There are four particular pillars of PACE that underpin its protection of detainees. These are:

1. the keeping of a close and detailed record of the period of detention,
2. the right not to be held incommunicado,
3. the right to consult with a legal representative, and
4. the limitation on the time for which a person may be held in detention before being charged with an offence.

These pillars provide for the protection of detainees from short-term enforced disappearance. Each of these is elaborated below.

Pillar 1: Record of detention

Sections 36 and 37 of PACE (to be read with PACE Code C Part 2) provide that Custody officers keep a custody record showing full details of the detainee's detention, including times of arrest and of being brought to the police station. The law requires that a full record exists of the period of detention, including times, events, and treatment during detention. This means that all that occurs whilst in detention is known and that this can be scrutinised both during and after detention.

The detainee's legal representative must be permitted access to the custody record as soon as practicable after they have attended the police station on the detainee's behalf.¹⁴ Furthermore, a copy of the custody record may be obtained by the detainee and their legal representatives after release.¹⁵ This record will, *inter alia*, show whether the detainee has been informed of their rights on first being detained, namely: their right to legal representation, to have someone informed of their arrest, their right to consult the PACE

¹⁴ PACE Code C paragraph 2.4.

¹⁵ PACE Code C paragraph 2.4A.

Codes of practice, their right to have interpretation or translation, and their right to be told why they have been arrested and detained.¹⁶

Pillar 2: Right not to be held incommunicado

The detainee has a right to inform a person known to them - that person being someone who is likely to take an interest in the detainee's welfare. The detainee has the right to inform them of their whereabouts whilst in detention (PACE section 56, and PACE Code C part 5). As such, this acts as a means of preventing the fear or threat of disappearance, as a detainee can exercise their right to inform a close relative or friend of their arrest and detention, and thus not be held incommunicado. This is a separate right to also having the right to consult a legal representative, which is elaborated below.

Pillar 3: Right to consult with a legal representative

In addition to the right not to be held incommunicado, a detainee has the right to consult a legal representative privately at any time during their detention (PACE section 58). Detainees must be informed by police officers that they may consult or communicate with a legal representative in person, in writing, or by telephone whilst they are detained (PACE Code C, part 6). They must be informed that such consultation and advice will be free. Code C contains detailed provisions that guard against police officers obstructing or obscuring the detainee's access to information about these rights.

Pillar 4: Limitation of time for which a detainee may be held before charge

PACE and its Code C provide for a structured framework of time limits for the detention of detainees. This includes scrutinised processes that govern extension of time limits up to a maximum. A detainee may be held in detention for a maximum period of twenty-four hours (PACE section 41), which may be extended with the sanction of a senior police officer for up to thirty-six hours (PACE section 42). That is the maximum period that a detainee may be held

¹⁶ PACE Code C paragraph 3.1.

before charge, unless those holding the detainee make a successful application to a court to extend detention.

The maximum period of detention which may be granted by the court (before charge) is ninety-six hours (PACE sections 43 and 44). Otherwise, the detainee must be charged or released.¹⁷ This means that the time for which a detainee may be detained by authorities before being charged is limited by law. Once charged, the detainee can request bail before the court. If denied bail, they have the repeated right to seek it.

SUMMARY

The PACE Act and PACE Code C provide, *inter alia*, protections that require that a detainee's detention and place of police custody is recorded and known about by those who are concerned for their welfare (such as loved ones). The detainee has the right to have their custody records and conditions in detention scrutinised by an independent legal representative, who has the right to be at the place of detention. The intervention of a court is required if the police wish to extend the duration of custody prior to charge. The courts are also subject to legal constraints as to how long they can extend detention.

It is our submission that this framework can provide a model, in principle and in practice, for a system of regulation designed to prevent short-term enforced disappearances. We respectfully make this input to the Committee and the Working Group, with the hope that our contribution may be of assistance.

¹⁷ PACE section 37.