

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL BILL 29**HOUSE OF LORDS REPORT****PART 1 – Border Functions
(in particular, clauses 23, 25, 28 & 30)****Key concerns:**

Part 1 would allow for extensive new powers to be transferred to immigration officers. Immigration officers already exercise significant policing and police-like powers, and several of these powers are also exercised by private contractors of the UK Border Agency. The need for guidance, oversight and independent scrutiny of the exercise of these powers is urgent.

This briefing specifically addresses the following clauses, setting out proposed amendments and highlighting questions left over from Committee stage:

- Clause 23, Investigations and detention: England and Wales and Northern Ireland
- Clause 25, Short-term holding facilities
- Clause 28, Inspections by the Chief Inspector of the UK Border Agency
- Clause 30, Complaints and misconduct

Each of these matters is addressed under distinct heading below.

Clause 23, Investigations and detention: England and Wales and Northern IrelandProposed Amendment:

Page 17, line 27 leave out 'may' and insert 'must'

Purpose:

To change the power to apply the PACE Codes to the acts of customs and immigration officials to a duty.

Proposed Amendment:

Page 17, line 33, omit 'or'

Page 17, line 34, at end, insert "or,

(e) the provision of services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function within subsections (a) to (d)."

Purpose:

To ensure that immigration officers and private contractors exercising policing or police-like immigration functions are subject to the PACE Codes.

Briefing:

These amendments were moved by the Lord Avebury at Committee stage [then numbered **30** and **31**]. The Baroness Hanham and the Earl of Sandwich also spoke in support of them.

ILPA's Committee stage briefing on these amendments ("Part 1 Clause 22 ILPA briefing re Police and Criminal Evidence Act (PACE) powers") remains available on our website.

In his response at Committee stage, the Minister asserted that the first of these amendments (to require the adoption of PACE Codes) was unnecessary. He said this was because:

"...we will make an order under Clause 22 [now clause 23] to replace the Immigration (PACE Codes of Practice) Direction 2000 and the Immigration (PACE Codes of Practice No. 2 and Amendment) Direction 2000, made under Section 145 of the Immigration and Asylum Act 1999. In doing so, we will also seek to bring together in one place the PACE powers and safeguards to be applied in relation to the UK border force and its immigration functions. We believe that the approach in Clause 22 [now 23] is the right one, mirroring as it does the construction of similar enabling provisions within PACE itself..."¹

This might be considered a reasonable response if not for the fact that the power to apply provisions of PACE to the exercise by immigration officers of powers to arrest, question, search, take fingerprints, enter and search premises, and seize property was provided a decade ago by section 145 of the Immigration and Asylum Act 1999. During the passage of that legislation, the Lord Williams of Mostyn on behalf of the Government made clear that adoption of PACE Codes was necessary². In the event, however, very little has been done since the commencement of section 145.

In the intervening period, immigration officers' powers have continued to grow. Yet, the Government's attention to what the Lord Williams had said was necessary in 1999 has not revealed any sense of urgency. During the passage of the UK Borders Bill in 2007, the Lord Bassam of Brighton on behalf of the Government then referred to an ongoing review of PACE and the need to consider this before taking further steps to adopt PACE Codes in this area³. Three years earlier, during the passage of the Asylum and Immigration (Treatment of Claimants, etc.) Bill in 2003-04, Beverley Hughes MP, then Immigration Minister, had said this same matter was under review⁴. In the meantime nothing has been done.

¹ *Hansard*, HL 25 Feb 2009 : Columns 266-267 *per* the Lord West of Spithead

² *Hansard*, HL Report 28 July 1993 : Columns 1592-3

³ *Hansard*, HL 9 Oct 2007 : Column 171

⁴ *Hansard*, HC Standing Committee B Thursday 15 January 2004 (afternoon) Column Number: 211

Elsewhere in the debates on the Borders, Citizenship and Immigration Bill, the Lord West of Spithead has referred to “*jam tomorrow*”⁵. However, on this issue, the Government has effectively been promising jam for ten years and has failed to deliver. What the Minister now offers is not more jam, of which there has been little to date, but more promise of jam. Parliament is entitled to consider that it has received more than enough of that by now, and to demand that the Government delivers on these promises now by imposing a duty upon, rather than continuing to afford a mere power to, the Secretary of State to apply PACE Codes.

As regards the second of these amendments (to extend PACE Codes to private contractors), the Minister said:

*“There is an important distinction between the nature of the services provided by contractors and the exercise by immigration officers and designated customs officials of their functions and powers related to criminal investigations. Contractors are not charged with the duty of investigating offences, nor do they have the legislative responsibility of custody officers.”*⁶

He also referred to police forces contracting out services relating to custody and escort functions, where PACE Codes were not extended to the contractor and responsibility remained with the custody officer.⁷

More generally, the Minister stated that:

*“Most people detained by immigration officers are held in connection with administrative immigration processes rather than as part of any criminal investigation, and it would not be appropriate to apply the provisions of PACE or PACE Northern Ireland to those administrative processes or to any persons detained in connection with them, nor is it intended that any order made in due course under Clause 22 of the Bill should alter that position.”*⁸

Whereas PACE Codes deal with policing powers, it is important to recall the reason for their adoption. This was explained in our briefing for Committee stage:

“The Police and Crime Evidence Act 1984 was introduced in the aftermath of the civil disorder of the early 1980s and the recommendations of the Scarman Report. The Act was intended to protect both police officers and those being dealt with by the police, by putting in place codes of practice governing the proper exercise of police powers, particularly in sensitive areas such as stop and search, arrest, detention and questioning. Immigration officers now exercise similarly sensitive powers in relation to potentially vulnerable persons and for their own protection as well as the person who is subject to their powers, these activities should be governed by the PACE Codes of Practice.”

The key point is that PACE Codes are designed to protect the police and the public in the exercise of sensitive and potentially intrusive powers. The guidance these Codes contain is designed to ensure that powers are exercised fairly, responsibly and without discrimination, and for the police and the public to have confidence in the exercise of policing powers. As has been detailed, immigration officers exercise several policing powers. However, administrative powers in relation to detention and

⁵ Hansard, HC 10 Mar 2009 : Column 1148 (in relation to the promise of improvement of the records and statistics maintained in respect of children and detention)

⁶ Hansard, HL 25 Feb 2009 : Column 267

⁷ Hansard, HL 25 Feb 2009 : Column 268

⁸ Hansard, HL 25 Feb 2009 : Column 267

escorting are no less sensitive and intrusive; and the exercise of such powers has raised serious concerns. The need for that part of the PACE Codes which provides guidance and standards in relation to fair, responsible and non-discriminatory exercise of power is as acute in relation to these administrative powers as in relation to the policing powers which immigration officers exercise.

Clause 25, Short-term holding facilities

This clause was introduced by the Government at Committee stage. The Lord West explained the purpose of this clause as follows:

“The amendments will provide the [UK Border] agency and Her Majesty’s Revenue and Customs with the flexibility in the future to use short-term holding facilities to detain persons other than those who are detained under the administrative provisions of the immigration legislation.

”The new clause achieves that by amending the definition of a short-term holding facility in Section 147 of the Immigration and Asylum Act 1999... As a result of the amendment, the definition of a short-term holding facility will be,

‘a place used for the detention of detained persons for a period of not more than seven days or for such other period as may be prescribed whether or not it is also used for the detention of other persons for any period’.

“I should stress that these amendments do not impact in any way on the treatment of administrative immigration detainees. The treatment of such persons will continue to be governed by existing arrangements, and the period for which their detention in a short-term holding facilities is permitted will be unaffected.”⁹

This explanation raises more questions than it answers.

Firstly, the Minister explains that places that are now designated as short-term holding facilities will or may in future be used to detain persons under customs and revenue investigation powers. The Amendment would on its face allow the police to use such facilities, including in relation to crime and counter-terrorism powers. The mixing of persons detained under these various powers in facilities designed to hold immigration detainees raises questions as to the suitability of holding such persons together.

Secondly, the amendment and the Minister’s response indicates that the length of time someone, who is held under powers other than immigration detention powers, may be longer than seven days. But these facilities are not designed to hold people for such periods of time.

Thirdly, the amendment, albeit the Minister made no allusion to this in his explanation, goes further than allowing current short-term holding facilities to be used for other purposes beyond immigration detention. It also re-designates other places in which people are held under immigration detention powers for periods of seven days or less. This would include police cells. It could include prisons – e.g. where a person is retained in the prison under immigration powers on the completion of

⁹ Hansard, HL 25 Feb 2009 : Column 287

sentence pending transfer to an immigration removal centre. It may include holding cells at courts and tribunals

The situation of police cells was raised in debate. The Minister's response was:

*"That is a very good question, and I will try to resolve exactly what would be the status. On that basis, I would be grateful if the amendment were accepted."*¹⁰

This matter remains outstanding. It is no small matter. Section 157 of the Immigration and Asylum Act 1999 allows for rules and regulations, which apply to Immigration Removal Centres (detention centres) to be applied to short-term holding facilities. There is also provision for the establishment of an Independent Monitoring Board in respect of each such facility. Where a person is detained in a facility (e.g. a police cell) where responsibility for the person's welfare is provided by guidance and duties upon the authorities there (e.g. the police custody sergeant), will these guidance and duties be displaced by the rules and regulations under section 157 in respect of those held under immigration detention powers? In respect of those held under powers other than immigration detention powers, will the rules and regulations under section 157 apply? Finally, will the Independent Monitoring Boards be able to provide adequate supervision of the welfare of detainees, held under a range of powers and for a range of reasons, in such a wide and increased range of facilities, including police cells.

Clause 28, Inspections by the Chief Inspector of the UK Border Agency

At Committee stage, the Baroness Hanham pressed the Minister to confirm that the Chief Inspector would be provided with increased resources, personnel and financial, commensurate with the increased remit to be provided to him under the Bill. The Lord West said:

*"So far as I am aware, the extra resources to enable him to carry out that [new] function have been made available. If I am wrong, I will get back in writing."*¹¹

Confirmation is still required.

Clause 30, Complaints and misconduct

Proposed Amendment:

Page 23, line 26, at end insert –

"(2B) Regulations made under subsection (1) or (2A) may make provision conferring functions on the Independent Police Complaints Commission in respect of the exercise of immigration functions, customs functions and the provision of services pursuant to arrangements relating to the discharge of those functions whether in the UK or overseas."

Purpose:

¹⁰ *Hansard*, HL 25 Feb 2009 : Column 290

¹¹ *Hansard*, HL 25 Feb 2009 : Column 292

To ensure that complaints can be made to the IPCC about the conduct not only of customs officials but also of immigration officials both within and outside the UK. While the amendment does not propose a duty on the Secretary of State to make regulations conferring functions on the IPCC it provides an opportunity to debate the point and also to seek to understand the division between the IPCC and the Prisons and Probations Ombuds.

Briefing:

ILPA briefed to a different amendment [number **37**] at Committee stage. Our briefing (“Part 1 Clause 28 ILPA briefing re complaints and misconduct, IPCC jurisdiction”) remains available on our website. The difference between this amendment and that previously pursued recognizes the change made by the Government amendment [number **38**] at that stage, which enabled the remit of the IPCC to be extended to include private contractors of the UK Border Agency.

In responding to the amendment pursued at Committee stage, the Lord West stated that there was no need to provide power for independent investigation of misconduct by officials at overseas posts because enforcement powers were not exercised at those posts. As regards juxtaposed controls, the Minister said:

“The Government are considering whether an independent oversight system can be put in place for matters arising at the juxtaposed controls...”¹²

As regards escorting those who are being removed or deported from the UK, he added:

“...the IPCC jurisdiction does not cover detention in the escorting of prisoners on probation outbound from the UK. An individual being escorted for deportation... is really for the Prisons and Probation Ombudsman. There probably is something here that needs a little more looking into. My Box tells me that this is a Prisons and Probation Ombudsman issue but I will look into it a little more because it looks like something could fall between the cracks and I want to look at it.”¹³

The importance of provision for independent investigation of complaints of misconduct by immigration officers and private contractors at juxtaposed controls and in the course of escorted removals, particularly in respect of the latter, has been highlighted by the *Outsourcing Abuse* dossier¹⁴, which is currently subject to investigation by Dame Nuala O’Loan and which has been referred to by peers at Second Reading¹⁵ and Committee¹⁶ stages.

Further information is therefore needed as to how the Government proposes to ensure that misconduct overseas by officials or contractors at juxtaposed controls or during escorted removals will be made subject to independent investigation. This is distinct from the question of the division of responsibility for investigation of misconduct within the UK as between the IPCC and the Ombuds, which is itself an

¹² *Hansard*, HL 25 Feb 2009 : Column 295

¹³ *Hansard*, HL 25 Feb 2009 : Column 297

¹⁴ Report produced by Birnberg Pierce and Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns available at:

<http://www.medicaljustice.org.uk/images/stories/reports/outsourcing%20abuse.pdf>

¹⁵ *Hansard*, HL 11 Feb 2009 : Column 1151-52 (*per* the Earl of Sandwich), Column 1181 (*per* the Lord Ramsbotham) and Column 1194 (*per* the Lord Hylton)

¹⁶ *Hansard*, HL 25 Feb 2009 : Column 294 (*per* the Lord Avebury)

important matter and one that could be addressed by the Government placing the latter on a statutory footing. Further clarification is also called for on this question.

At Committee stage, the distinct situations in Northern Ireland and Scotland, to which the remit of the IPCC does not extend, were raised by the Baroness Miller of Chilthorne Damer. In respect of the former, the Minister said:

“We are proposing that, through the immigration simplification Bill, the police ombudsman would have oversight of serious complaints, incidents and conduct matters in relation to the exercise of specified enforcement functions by all border force staff and contractors...”¹⁷

As regards Scotland, he said:

“...I will write to the noble Baroness about that.”¹⁸

It is understood that there has been correspondence between the Home Office and the Scottish Government regarding proposals to extend the remit of the Police Complaints Commissioner for Scotland to match the extended remit to be granted to the IPCC. The Government might usefully be pressed to inform the House as to the detail and progress of these proposals.

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¹⁷ *Hansard*, HL 25 Feb 2009 : Column 300

¹⁸ *Hansard*, HL 25 Feb 2009 : Column 301