

28 June 2024

Police Federation Open Letter

We are writing in response to a letter received from the NPCC Custody Lead regarding Operation Safeguard, Early dawn and Brinker, specifically Section 46 PACE, and to reaffirm PFEW's position.

The Police and Criminal Evidence Act 1984 was introduced as a framework to strike the balance between police powers and freedoms of the public. The role of a Custody Officer is critical to ensure the safe detention of individuals in custody, the efficiency and effectiveness of investigations, evidential thresholds, charge, bail or remanding of individuals, along with the safe release of individuals from police custody.

S.46 PACE stipulates where a person is charged with an offence and after being charged is kept in police detention, he shall be brought before a magistrate's court in accordance with the provisions of this section. S.46 places a dual responsibility on the Police Service to get the detainee to the court and for His Majesty's Court Services to provide hearing capacity for the detainee. PFEW has learned/evidence that due to the increased pressures on the criminal justice system, detainees are being kept in police custody facilities unlawfully.

We have now received advice which has identified and highlighted significant risks for officers in relation to criminal, civil and misconduct processes, should officers act outside of the law.

Operation Early Dawn appears to be directed at one of the consequences of the acute pressures on the criminal justice system, namely what the police should do if presented with an inability to bring a charged and detained person before the court within the mandated period. The suggestion appears to be that presented with a situation where the charged and detained person cannot be brought before the court for whatever reason, the custody officer (or other decision-maker in the police, possibly purporting to order the statutory custody officer to do so) should continue to detain such a person rather than releasing them. An unlawful detention has certain legal consequences and implications.

1. The continued detention would straightforwardly be unlawful and amount to false imprisonment. Both the police force and individual decision-makers within any such police force – in fact, the designated custody officer under PACE – would be liable in civil proceedings to damages.
2. It would be misconceived to contend that the use of force to detain in such circumstances would be justified under section 3 of the Criminal Law Act 1967.
3. Any such custody officer would potentially commit any one or more of a number of criminal offences in authorising detention knowing it was unlawful: if no physical force is used, then the custody officer may commit the indictable-only common law offence of false imprisonment; if force is used there may be a form of assault; more widely the officer (and/or those directing them or party to the decision) may commit the indictable-only common law offence of misconduct in public office.

We note that NPCC believes that the risk for policing is ‘receding’, and that further use of live links will alleviate the problem. We have been advised that the use of live links (Sections 51 – 56 of the Criminal Justice Act 2003 (under Part 8,) for hearings arising in the context of section 46 PACE 1984 is either wrong or at least questionable. Those ‘eligible criminal proceedings’ to which the revised section 51 relates do not appear to include first appearances following charge.

Further, and as to this being achieved by Live Link, even if such a hearing qualifies as a ‘preliminary hearing’ under these and associated legislative provisions, under sub-section(4), ‘The court may not give a direction under this section unless—(a) the court is satisfied that it is in the interests of justice for the person to whom the direction relates to take part in the proceedings in accordance with the direction through the live audio link or live video link, (b) the parties to the proceedings have been given the opportunity to make representations, and (c) if so required by section 52(9), the relevant youth offending team has been given the opportunity to make representations.’ Whilst the provisions plainly apply to defendants – the original section 51 expressly excluded them – it is difficult to see how the parties to proceedings can make representations in advance of any such determination other than in person. It is also difficult to see how this could be achieved in practice by way of another Live Link hearing, or otherwise.

PFEW appreciates that these are difficult issues to resolve but can only be made worse by pressurising police officers into potentially breaking the law themselves. That would do nothing to restore the trust, confidence, and reputation of policing at a time when these are under severe strain. As it stands, we have no alternative but to make this letter public, so that officers can make informed decisions and protect themselves from investigation and future litigation for simply doing their job.

We note that the NPCC specifically mentions the following –

Whilst these arrangements reduce the risk of policing being put into the position of having to consider the unlawful detention or release a dangerous prisoner as far as is possible and that risk is now low, until legislation is changed a residual risk remains. In any such scenario our obligations under Article 2 ECHR would also have to be considered, where the police have a duty to act where they knew or ought to have known of a real and immediate risk to life. Under Article 3, police have a similar duty in respect of serious harm. Prolonged activation of Op Safeguard and the implementation of OED and Operation Brinker could result in a failure by the state to comply with its

obligations under ECHR. I am therefore in contact with IOPC to seek some reassurance given the potentially exceptional circumstances that could arise.

At a meeting held on Friday 28 June 2024 with the NPCC lead and other relevant parties we were given assurance from the NPCC that there would be no expectation for officers to act unlawfully. It is disappointing that the letter now received makes mention of articles 2 and 3 of the ECHR. These provisions were not mentioned or even discussed during the meeting. PFEW will be seeking further legal advice in respect of these specific matters that have been subsequently raised.

PFEW advise all police officers to act lawfully and remind officers that they cannot be lawfully ordered to work outside of the legislation. If officers have any concerns over the decisions they are making, they can contact their local Federation branch who are aware of this letter.

We are committed to working with the NPCC and others in order to seek solutions and look forward to discussing these matters further and at the earliest opportunity.

Kind regards,

Police Federation of England and Wales