

**EXPLANATORY MEMORANDUM TO  
THE TERRORISM ACT 2000 (REMEDIAL) ORDER 2011  
2011 No. 631**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The purpose of this Order is to make immediate but temporary provision in relation to counter-terrorism stop and search powers pending the coming into force of similar (permanent) provision in the Protection of Freedoms Bill. The purpose of the Order is to provide that the Terrorism Act 2000 (“the 2000 Act”) is to have effect as if:

- i. sections 44-47 of the Terrorism Act 2000 (“the 2000 Act”) which were found to be incompatible with a Convention right by the European Court of Human Rights in *Gillan and Quinton v United Kingdom* (Application no. 4158/05) were repealed; and
- ii. these provisions were replaced with new counter-terrorism stop and search powers, exercisable without reasonable suspicion, which are compatible with Convention rights.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This order comes into force the day after it is laid. The Secretary of State considers that the need for the police to be able to use the powers to be introduced by the order (that is, powers, available in limited circumstances where an authorisation is in place for a particular place and time, to stop and search vehicles and individuals without reasonable suspicion for counter-terrorism purposes) is urgent. She considers that the ability of the police to protect the public from acts of terrorism will be compromised if the commencement of the order were to be delayed to allow more time between laying and commencement.

4. **Legislative Context**

4.1 Sections 44 to 46 of the 2000 Act (referred to colloquially as “section 44”) enable a police constable to stop and search pedestrians or vehicles within an authorised area for the purposes of searching for articles of a kind which could be used in connection with terrorism, whether or not the constable suspects such articles are present. The power can only be used in a place where and during a time when an authorisation is in place. An authorisation may be made by a senior police officer where he or she considers it “expedient for the prevention of acts of terrorism”. An authorisation must be confirmed by the Secretary of State if it is to last more than 48 hours.

4.2 Section 47 of the 2000 Act makes it an offence for a person to fail to stop when required to do so by an officer in exercise of the power conferred by an authorisation under section 44, or to wilfully obstruct a constable exercising that power.

4.3 The use of these powers in relation to individuals and, in so far as they allow searches without suspicion, in relation to vehicles, was suspended by the Secretary of State for the Home Department in her statement to Parliament to this effect on 8 July 2010. She made this statement in response to the European Court of Human Rights' judgment in *Gillan and Quinton* becoming final on 28 June 2010. But sections 44 to 47 of the 2000 Act remain in force.

4.4 This Order provides that the 2000 Act is to have effect as if sections 44 to 47 were repealed, and as if new sections 47A, 47B and 47C and a new Schedule 6B were inserted into that Act. It also makes consequential amendments to other enactments.

4.5 New section 47A of and Schedule 6B to the 2000 Act introduce replacement stop and search provisions. An authorisation for the use of the new stop and search powers can only be given under section 47A where the person giving it reasonably suspects an act of terrorism will take place and considers the powers are necessary to prevent such an act. An authorisation can last for no longer and cover no greater an area than is necessary to prevent such an act. This represents a significantly higher threshold for giving an authorisation than the "expediency" test under section 44 of the 2000 Act.

4.6 An authorisation in place under section 47A(2) confers powers on a constable in uniform to search a vehicle, its driver, passengers and anything in or on the vehicle for evidence that the vehicle is being used for the purposes of terrorism or that any of the individuals are terrorists within the meaning of section 40(1)(b) of the 2000 Act (that is, that they are or have been concerned in the commission, preparation or instigation of acts of terrorism). An authorisation in place under section 47A(3) confers powers on a constable in uniform to stop and search a pedestrian or anything carried by the pedestrian for evidence that they are a terrorist within the meaning of section 40(1)(b) of the 2000 Act. The powers may be exercised whether or not the constable has reasonable suspicion that there is such evidence. Anything discovered during the course of a search which the constable reasonably suspects may constitute such evidence may be seized and retained.

4.7 Schedule 1 to the Order provides that the 2000 Act is to be read as if a new Schedule 6B is inserted, which makes supplementary provision about the authorisation process and the stop and search powers. The Secretary of State must be informed of any authorisation given and must confirm any authorisation specified to last more than 48 hours if it is to last beyond that period. The main changes from the way in which powers under sections 44-46 were authorised and used are:

- i. An authorisation may only be given when a senior officer reasonably suspects that an act of terrorism will take place;
- ii. An authorisation may only be given where the senior officer considers that it is necessary to prevent such an act;

- iii. An authorisation may last for a period no longer than the senior officer considers necessary and for a maximum of 14 days (as opposed to a 28 day maximum under section 46(2) of the 2000 Act);
- iv. An authorisation may cover an area or place no greater than the senior officer considers necessary;
- v. The Secretary of State may substitute an earlier date or time for the expiry of an authorisation when confirming an authorisation;
- vi. The Secretary of State may substitute the area or place authorised for a more restricted area or place when confirming an authorisation;
- vii. A senior police officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
- viii. An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist (within the meaning of section 40(1)(b) of the 2000 Act) or that the vehicle concerned is being used for the purposes of terrorism;
- ix. Officers (in both authorising and using the powers) must have regard to a statutory Code of Practice which further constrains the use of those powers.

4.8 Article 4 of the Order provides that the 2000 Act is to have effect as if new sections 47B and 47C were inserted into the 2000 Act. Section 47B requires the Secretary of State to issue a Code of Practice in relation to the power to make an authorisation under sections 47A(2) and (3), the exercise of the powers conferred by such an authorisation and section 47A(6) (the power of seizure), and any other matters in connection with those powers as the Secretary of State considers appropriate. New section 47C makes provision about the effect of the Code of Practice, in particular that constables must have regard to it and that it is admissible in legal proceedings.

4.9 As a result of this instrument, the non-textual amendments to the Terrorism Act 2000 summarised above will come into effect on 18 March.

4.10 Article 6 of the Order makes a sunset provision. It provides that if an Act passed in the same Session as that in which the Order is made repeals sections 44 to 47 of the 2000 Act, the non-textual amendments to the 2000 Act (and to other enactments) made by the Order cease to have effect on the coming into force of such provision. The Protection of Freedoms Bill contains clauses to repeal sections 44 to 47 of the 2000 Act and to introduce new stop and search provisions (including those similar to the provisions in the Order). The intention is that the provisions in the Order will cease to have effect on the coming into force of the provisions in the Protection of Freedoms Bill – after those provisions have received full Parliamentary scrutiny.

## **5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

## 6. European Convention on Human Rights

6.1 The Secretary of State, Theresa May, has made the following statement regarding Human Rights:

*“In my view the provisions of the Terrorism Act 2000 (Remedial) Order 2011 are compatible with the Convention rights”.*

## 7. Policy background

- *What is being done and why*

7.1 On 28 June 2010, the European Court of Human Rights (ECtHR) made final its decision in the case *Gillan and Quinton* which found sections 44-46 of the Terrorism Act 2000 to be in breach of Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR) because they were not “in accordance with the law”. The ECtHR found the powers in those provisions were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. In a statement to Parliament on 8 July 2010, the Home Secretary announced that the police were no longer to make authorisations under section 44 for stop and search powers to be used without reasonable suspicion. She did this in order to take immediate steps to address the ECtHR’s judgment, whilst the issue was considered as part of the government’s review of various counter-terrorism and security powers.

7.2 The Home Secretary’s action represented an administrative measure to ensure the use of the powers no longer breached individuals’ Article 8 rights. However, the guidelines she gave on 8 July 2010 do not implement the *Gillan and Quinton* judgment, which can only be done by changes to the primary legislation. The government’s review of counter-terrorism and security powers published on 26 January 2011 concluded that a power to stop and search individuals and vehicles without reasonable suspicion in tightly circumscribed circumstances is operationally necessary.

7.3 The review concluded that sections 44 to 47 of the 2000 Act should be repealed. The review also took into account the fact that there may be circumstances in which stop and search powers requiring reasonable suspicion, or other measures such as high visibility policing, are insufficient to counter the threat of a terrorist attack. The police may, for example, become aware of an intended terrorist attack on a particular site or transport network, but have no (or incomplete) information about the identity or characteristics of those planning to conduct it. It would be difficult and probably impossible in such circumstances to reach the threshold required to conduct a stop and search under section 43 of the 2000 Act (power to search an individual on reasonable suspicion that the person is a terrorist). And yet it would be vital to have a power of stop and search available to address the potential terrorist threat in such circumstances. The review therefore concluded that it was necessary to introduce a replacement stop and search power, which is exercisable without reasonable suspicion, but which is available only in circumscribed circumstances. It was announced that the repeal of section 44 and the introduction of the replacement power would be contained in the Protection of Freedoms Bill.

7.4 The review also recommended that consideration should be given to whether the replacement provisions could be implemented more quickly than could be achieved by primary legislation (i.e. the Protection of Freedoms Bill), to fill the operational gap left by the non-availability of any powers exercisable without reasonable suspicion. In her opening speech at second reading of the Protection of Freedoms Bill, the Home Secretary announced that the outstanding action needed to implement the *Gillan and Quinton* judgment and the current threat environment which demands that ECHR-compatible counter-terrorism stop and search powers exercisable without reasonable suspicion are available as soon as possible, meant that there was an operational gap. She announced that she intended to address this by making this remedial order under section 10 of the Human Rights Act 1998, using the urgency procedure.

7.5 The Home Secretary considered whether it would be more appropriate, rather than making this remedial order, to provide revised guidelines on the use of the existing section 44 powers (replacing the guidelines in her statement to Parliament on 8 July 2010). However, it was considered that attempting to operate existing powers under sections 44 to 46 of the 2000 Act in a more restricted way than provided for by the legislation would be unsatisfactory, including for the following reasons:

- i. it would not provide the legal certainty and clarity of legislative amendment;
- ii. the full range of changes considered necessary to make the existing powers Convention-compatible could not be achieved without legislative amendment; and
- iii. further (non-statutory) guidelines would still not implement the ECtHR's judgment.

7.6 The powers introduced by the Order are a much more circumscribed replacement for the provisions in sections 44-46 of the 2000 Act. The threshold for giving an authorisation is significantly higher than under the provisions of the order and there are additional restrictions and safeguards as outlined in paragraph 4.7. This fulfils the recommendations of the review of the powers, which stated that:

- i. *The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered "necessary", (rather than the current requirement of merely "expedient") to prevent the act of terrorism.*
- ii. *The period of authorisation should be reduced from the current maximum of 28 days to 14 days.*
- iii. *It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent the suspected act of terrorism.*

- iv. *The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism.*
- v. *The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present).*
- vi. *Robust statutory guidance on the use of the powers should be developed to ensure that the scope for misinterpretation or misuse of the powers is minimised.*

7.7 Taking all of these factors into account, there are compelling reasons for changing the primary legislation using this remedial order in order to ensure the legislation is compatible with Convention rights. It is also necessary to use the urgency procedure provided in paragraphs 2(b) and 4 of Schedule 2 to the Human Rights Act 1998 in order to have a coherent framework of legislation in place as soon as possible, which is compatible with ECHR, and which provides the powers required by police in order to protect the public from acts of terrorism. If this Order were to be made other than via the urgency procedure, it is unlikely that these powers would be available to the police before approximately September 2011. The Home Secretary considers that this is unsustainable given the urgent need for these powers to be available to the police now.

## **8. Consultation outcome**

8.1 There is no requirement to consult on this instrument. However, a wide consultation took place as part of the review of counter-terrorism and security powers, the results of which can be found at:

<http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/sum-responses-to-cons?view=Binary>

8.2 There is also a statutory requirement to consult on the Code of Practice associated with the powers in the Protection of Freedoms Bill and this will take place before those provisions are brought into force.

## **9. Guidance**

9.1 A Code of Practice on the use of the powers brought into force by this order is being issued simultaneously, as required by the non-textual amendments made to the 2000 Act by article 4 of the Order. This Code has been consulted on, so far as practicable, with relevant stakeholders, including the Association of Chief Police Officers, the Association of Chief Police Officers in Scotland, the National Police Improvement Agency, the Metropolitan Police Service, British Transport Police and the Lord Advocate. There are two Codes of Practice, one for Great Britain and one for Northern Ireland.

9.2 The Code of Practice will govern the way in which the powers are authorised and used. It includes guidance on:

- i. the test for giving an authorisation,
- ii. the need to consider whether other powers are more appropriate,
- iii. the geographical and temporal extent of an authorisation,
- iv. information to be provided to the Secretary of State in support of an authorisation,
- v. the fact that continual renewal of authorisations on the basis of a similar intelligence case cannot be justified,
- vi. briefing and tasking for officers using the powers,
- vii. avoiding discrimination,
- viii. the general conduct of stop and searches,
- ix. the monitoring and review of the use of the powers,
- x. community engagement.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is likely to be negligible, although there will be some impact on the work of the police.

10.3 An Equality Impact Assessment has been prepared separately and published alongside this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 Provisions to repeal sections 44-47 of the Terrorism Act 2000 and to replace them with provisions very similar to those in this Order are contained in the Protection of Freedoms Bill. Parliament will therefore have the opportunity to review the use of the provisions in this Order to inform its scrutiny of the provisions of the Protection of Freedoms Bill.

12.2 The Code of Practice published alongside the Order will include provisions requiring the monitoring of the use of the powers and the collation and reporting of statistics for publication.

12.3 The powers in the Order are subject to a sunset clause and will cease to have effect on the coming into force of the relevant provisions of the Protection of Freedoms Bill.

## **13. Contact**

13.1 Ben Hale at the Home Office (Tel: 020 7035 6821 or e-mail: [ben.hale@homeoffice.x.gsi.gov.uk](mailto:ben.hale@homeoffice.x.gsi.gov.uk)) can answer any queries regarding this instrument.



**HOME OFFICE  
FULL EQUALITY IMPACT ASSESSMENT**

Directorate	Office for Security and Counter-Terrorism
Unit	Pursue Policy and Strategy Unit
Date	March 2011

<b>Name of Policy/Guidance/Operational activity</b>
Introduction of stop and search powers to replace sections 44-47 of the Terrorism Act 2000 pending the coming into force of the provisions on stop and search in the Protection of Freedoms Bill.

<b>What are the aims, objectives &amp; projected outcomes?</b>
<p>The policy objectives are to repeal sections 44 to 47 of the Terrorism Act 2000 which have been found by the European Court of Human Rights to be incompatible with a Convention right (<i>Gillan and Quinton v United Kingdom</i>) and to introduce new counter-terrorism stop and search powers which are necessary, proportionate and effective and have sufficient safeguards to prevent misuse of the power. The terrorism stop and search powers must be lawful (including compliance with the <i>Gillan</i> ECtHR judgment) whilst also ensuring that the police have the necessary powers to protect the public from the risk of terrorism.</p> <p>The intended effects are (a) to implement the <i>Gillan</i> judgment, (b) to ensure that the police are able to protect the public effectively from the threat of terrorism; (c) to make these powers available to the police as soon as possible because of the urgent operational need for them; (d) to ensure the powers are lawful (including in compliance with the ECtHR judgment); and (e) to ensure that civil liberties are protected, including through robust safeguards in the legislation and the statutory code of practice.</p> <p>The aim of the remedial order is to effectively and swiftly implement the recommendations contained in the review of counter-terrorism and security powers, announced by the Home Secretary on January 26<sup>th</sup> 2011. The order will be temporary however, and will be superseded by the similar provisions in the Protection of Freedoms Bill, to ensure that Parliament has the opportunity to carry out the usual scrutiny of proposed changes to primary legislation.</p>

**1 SCOPE OF THE EIA**

<b>1.1 Scope of the EIA work</b>
The Equality Impact Assessment has been developed by the terrorism legislation team in the Office for Security and Counter-Terrorism in the Home Office. It relates to the review of Section 44 powers and the provisions of the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631) which repeal and replace Section 44.



1.2 Will there be a procurement exercise?

No.

2 COLLECTING DATA

2.1 Relevant quantitative and qualitative data

Race

**Quantitative data**

- The Home Office statistical bulletin published on 28 October 2010 covers the operation of police counter-terrorism powers in Great Britain during 2009/10. This records that of the 101,248 stops and searches carried out under section 44 of the Terrorism Act 2000 during the period, 59% were against people who defined themselves as white, 17% against people who defined themselves as of Asian or Asian British origin and 10% against people who defined themselves as of black or black British origin. These percentages are in line with section 44 stops and searches in earlier years. (In 2008/09, of those stopped and searched under section 44 in Great Britain the majority defined themselves as White (61%)). A further 15% defined themselves as being Asian or Asian British, 10% Black or Black British and 4% self-classified as being Chinese or other.
- These statistics reflect the way that section 44 was used before the Home Secretary's statement in July 2010. This statement announced that the use of section 44 without any suspicion was to cease and that the stop and search powers in Part V of the Terrorism Act 2000 were only to be used on the basis of reasonable suspicion on an interim basis whilst powers were considered as part of a wider review of counter-terrorism and security powers. More recent statistics were published on 24 February 2011 for the quarter July to September 2010, which show an almost complete cessation of the use of the powers since the Home Secretary's statement.
- Northern Ireland Statistics and Research Branch Northern Ireland Statistics on the Operation of the Terrorism Act 2000: Annual Statistics Research and Statistical Bulletin. The published statistics show that the vast majority of individuals stopped and searched under Section 44 in Northern Ireland are white (for example, between 1 January 2010 and 31 March 2010, nearly 99% of individuals stopped and search under these powers were white).

	<p><b>Qualitative Data</b></p> <ul style="list-style-type: none"> <li>• There is a perception in Asian communities that section 44 stop and search powers have been used disproportionately against people of Asian origin.</li> <li>• Previous reports by the independent reviewer of terrorism legislation (Lord Carlile of Berriew QC).</li> <li>• Reports by civil liberty organisations (such as Liberty and Amnesty) and academics on the use of section 44. These reflect concerns about the necessity and proportionality of Section 44 powers.</li> <li>• Parliamentary committee reports, in particular by the Joint Committee on Human Rights.</li> <li>• Whilst such polling is self-selecting (i.e. it does not reflect a random cross section of the population and therefore does not necessarily indicate the public's view), on the 'Your Freedom' website set up by the Deputy Prime Minister, repealing section 44 was in the top six most popular ideas on the civil liberties section.</li> <li>• Dstl report entitled '<i>What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?</i>' was published in March 2010.</li> <li>• Significant consultation with internal and external stakeholders (see below).</li> </ul>
<p><b>Religion/ belief &amp; non belief</b></p>	<p><b>Quantitative data</b></p> <ul style="list-style-type: none"> <li>• No statistics are available on the religious or other beliefs on those stopped and searched under section 44, as this data is not requested of or collected from individuals subject to stop and search.</li> </ul> <p><b>Qualitative data</b></p> <ul style="list-style-type: none"> <li>• Muslim communities have expressed concerns that Muslims generally (rather than individual suspects) are being targeted by counter-terrorism laws.</li> <li>• It is likely that there is a perception in Northern Ireland that counter-terrorism powers are used disproportionately against Catholic people. Most searches in Northern Ireland take place in areas where there are high levels of terrorist activity. It is a fact that republican terrorists (who represent the most significant current risk in Northern Ireland) have tended to come from the Catholic community almost</li> </ul>

	exclusively (albeit a very small minority of the population). It is therefore understandable that a Catholic person may feel more likely to be searched than a Protestant person.
<b>Disability</b>	No issues arise from the change to the legislation in relation to disability.
<b>Gender</b>	Data on the gender of individuals stopped and searched under Section 44 by the police is not collected in Great Britain. It has been in Northern Ireland for some quarters (for example, between 1 Jan 2010 to 31 March 2010, 92% of those stopped and search under Section 44 were male. The difference in Great Britain is likely to be much less stark given the power was used, before July 2010, at a much greater volume and in a less targeted way. It is likely that the majority of those stopped and searched would be male on the basis that the majority of those arrested under counter-terrorism legislation are male. The proposed changes to the power to stop and search individuals and vehicles without suspicion contained in the remedial order are not assessed to have an impact on the proportion of men/women searched.
<b>Gender Identity</b>	No issues arise from the change to the legislation in relation to gender identity.
<b>Sexual Orientation</b>	No issues arise from the change to the legislation in relation to sexual orientation.
<b>Age</b>	No issues arise from the change to the legislation in relation to age.
<b>Welfare of Children [UKBA ONLY]</b>	N/A
<b>Socio-economic</b>	The replacement of the powers in section 44 of the Terrorism Act 2000 with the provisions in the remedial order is not assessed to have a socio-economic impact.

## Human Rights

The replacement of the powers in section 44 of the Terrorism Act 2000 with the provisions in the remedial order responds to the European Court of Human Rights' judgment in the case of *Gillan and Quinton* (as well as reflecting the Government's concerns about the power). The new stop and search powers in the remedial order are considered to be in compliance with our domestic and international human rights obligations, including in the light of the European Court judgment. See also the ECHR Memorandum for the Protection of Freedoms Bill (as the replacement powers provided for in that Bill are identical to those in the remedial order).

### 2.2 What are the overall trends/patterns in this data?

The overall pattern in this data (which reflects the position prior to the Home Secretary's guidelines on 8 July 2010) are that:

- (a) The use of Section 44 had been declining (over 250,000 in 08/09 before falling to just over 100,000 in 09/10).
- (b) Whilst the number of individuals from ethnic minorities stopped and searched under this legislation had fallen, the proportion of those stopped and searched who are from ethnic minorities remained broadly the same and is still disproportionately high in Great Britain.
- (c) There was significant regional variation in the use of the power. Between April 2009 and March 2010, 79% of the Section 44 stops and searches in Great Britain were carried out by the Metropolitan Police Service. 17% were made by British Transport Police. This principally reflects the different levels of threat in the UK (in particular, London and the transport network face a particularly high threat of terrorism).

The replacement of the powers in section 44 of the Terrorism Act 2000 with the provisions in the remedial order should have a positive equality impact as the total volume of terrorism stop and searches conducted without reasonable suspicion should fall considerably (from the pre-July 2010 position) and the police will only be able to use the power in a much more limited and proportionate way.

### 2.3 Please list the specific equality issues and data gaps that may need to be addressed through consultation and/or further research?

Due to the significant concerns about the use of Section 44 and its impact on ethnic minorities and civil liberties more generally, there is a significant amount of qualitative information about stakeholders' views. In respect of quantitative data, the statistics for the police's use of stop and search powers provides a good data base (the Home Office and Northern Ireland Office produce regular statistical bulletins). Looking ahead, it will be important to maintain the monitoring of use and data collecting / reporting requirements on the police. This is reflected in the Code of Practice issued under the provisions introduced by the remedial order, which requires chief officers to

monitor the use of the powers, including identifying and addressing any potentially discriminatory trends, and requires the compilation and publication of statistics on the use of the powers. The Home Office will publish data on the use of the new powers on a quarterly basis.

The fact that the powers introduced by the remedial order will replace section 44 with a significantly circumscribed stop and search regime means that the volume of stops and searches using the new powers is likely to be substantially lower than the use of section 44 prior to the Home Secretary's guidelines on 8 July 2010. There is evidence that where such powers are used in a much more focused way, the proportion of individuals affected from particular groups can increase, even though the volumes will be much smaller. The use of the powers will be closely monitored to ensure the powers are used proportionately in response to available intelligence.

### 3 INVOLVING AND CONSULTING STAKEHOLDERS

#### 3.1 Internal consultation and Involvement: e.g. with Other Government Departments, Staff (including support groups), Agencies & NDPBs

The review of counter-terrorism and security powers which lead to the formulation of the provisions in the remedial order was led by the Home Office and involved significant internal and external consultation and involvement. Stakeholders across Government (including within the Home Office and other Government Departments such as the Ministry of Justice) were engaged and consulted. Similarly stakeholders across the security and intelligence agencies were consulted. The key method for this engagement and consultation was the establishment of a Section 44 working group that comprised representatives of:

- Office for Security and Counter Terrorism, Home Office
- Crime and Policing Group, Home Office
- Olympics Security Directorate, Home Office
- Home Office Legal Advisors Branch
- Ministry of Justice
- National Policing Improvement Agency
- Security Service
- Association of Chief Police Officers
- Metropolitan Police Service
- Northern Ireland Office
- Police Service of Northern Ireland
- British Transport Police

In addition, the Crown Prosecution Service, Attorney General's Office and counterparts in the Devolved Administrations were consulted. The former statutory Independent Reviewer of terrorism legislation, Lord Carlile, was also consulted and the independent reviewer of the review of counter terrorism and security measures, Lord MacDonald, provided oversight of the review.

#### 3.2 External consultation and involvement: strand specific organisations e.g. charities, local community groups, third sector

As part of the review of counter-terrorism and security powers, the Home Office consulted a wide range of external organisations including civil liberty and human rights organisations, community groups, local councils, organisations representing the legal profession, victims support groups and organisations which had a special interest in particular aspects of the review (such as photography organisations). The Home Office also consulted key individuals with an interest in counter-terrorism and security powers.

The Home Office sought to ensure that different external stakeholder and community groups had access to the consultation by making different groups

and the public in general aware of the review (in particular the Parliamentary statement by the Home Secretary announcing the review resulted in significant media coverage of the review) and by providing a variety of avenues for external groups / individuals to provide their views.

Consultation meetings on the review were held in Manchester, Birmingham, Edinburgh, London and Belfast. These meetings involved police, community representatives (the Research, Information and Communications Unit (RICU) based in the Home Office provided advice on local faith and community groups that were likely to have an interest) and local authorities. The Home Office also provided an e-mail and postal address for members of the public and organisations to contribute to the review. As a result of the consultation, the Home Office has received over 50 written contributions to the review.

Independent oversight of the review was provided by Lord Macdonald of River Glaven QC who also met interested organisations and individuals. Lord Macdonald concluded that the review's conclusions achieve the sensitive balance between the need for stop and search powers to be conducted without reasonable suspicion, and the decision in *Gillan*.

As part of their contribution to the review, the Equality and Human Rights Commission included interim findings from research they had undertaken (by Tufyal Choudhury from the University of Durham) into the impact of counter-terrorism measures on Muslim communities. This suggested that:

- The impact of counter-terrorism law and policies are experienced and felt more acutely and directly amongst Muslims than non-Muslims. Non-Muslims were less likely to have direct or indirect experiences of any measures and were generally more supportive of the measures that were being taken as necessary.
- Amongst Muslims concern focused on those measures that it was felt were targeted against or applied to Muslims as a group or community compared to measures that were seen as targeted against individual suspects. In relation to the measures covered by the review, this concern was focused on the use of section 44 stop and search powers.
- Most Muslims had direct experience of being stopped and searched, had close friends or family who had been stopped and searched or had witnessed stops in their local area. This covered all stop and search powers (including non-terrorism powers and ports and border powers), not just section 44 powers.

The Your Freedom website provided the public with an opportunity to suggest changes in laws and Government policies. Repealing section 44 was in the top six most popular ideas on the civil liberties section. Whilst such polling is self-selecting (i.e. it does not reflect a random cross section of the population and therefore does not necessarily indicate the public's view), the fact that repealing section 44 was in the top six most popular ideas on the civil liberties section shows that it is a significant civil liberty concern.

The fact that people of South Asian origin were more likely to be stopped under section 44 was made by a number of contributors to the review (*‘Many young Muslim men in particular feel that they are stopped and searched simply because they fit a general stereotype held by the police’* – Liberty).

The Equality and Human Rights Commission raised concerns about the use of racial profiling and the adverse impact this could have on race relations to the extent that it was considering enforcement action against particular police forces under the race equality duty. At least one contribution to review argued that even if use of the power was limited, it may not entirely address the possibility of ethnic profiling when deciding who should be stopped.

The Home Office has provided feedback to participants who engaged in the review, and will continue to do so, by:

- (a) Publishing the findings from the review
- (b) Publishing a summary of the consultation
- (c) Continuing to engage with internal and external stakeholders in the development and implementation of the policy (see Action Plan).



## 4 ASSESSING IMPACT

### 4.1 Assessment of the impact

The review of counter-terrorism and security powers was welcomed by everyone who contributed to the review. The replacement of section 44 powers with a severely circumscribed regime was seen as a positive move which would have a favourable impact on Muslim and Asian community perceptions that the powers had been used disproportionately against them.

The results of this Equality Impact Assessment suggests that:

- (a) Replacing section 44 and replacing it with the powers set out in the remedial order should have a positive equality impact (in relation to race and human rights) by significantly reducing the total volume of stops and searches conducted without reasonable suspicion and limiting officers' discretion in the use of the power when available. The total number of individuals whose human rights (in particular Article 8) are engaged will reduce.
- (b) The replacement of Section 44 is likely to promote good community relations as it was a widely discredited power, especially amongst Asian communities.
- (c) The curtailment of, and increased safeguards in, the new powers will mean that the power may only be used in far more limited circumstances and will be proportionate.

The introduction of a statutory Code of Practice will ensure best practice is followed and lead to greater transparency about how the powers are to be authorised and used. The Code of Practice will govern the way in which the powers are authorised and used. It will include guidance on:

- a) the threshold for an authorisation
- b) the geographical and temporal extent of an authorisation
- c) information to be provided to the Secretary of State in support of an authorisation, clarification that continual renewal of authorisations on the basis of a similar intelligence case cannot be justified
- d) briefing and tasking for officers using the powers
- e) avoiding discrimination
- f) the general conduct of stop and searches
- g) community engagement

The concerns expressed about the disproportionate and/or unnecessary use of Section 44 has been the key driver (alongside the need to implement the European Court of Human Rights judgment) in making the proposed changes to the legislation.

The powers in the remedial order are considered to be compatible with our domestic and international human rights obligations, including in the light of the *Gillan and Quinton* judgment.

The order will also be temporary and will sunset on the coming into force of the relevant provisions of the Protection of Freedoms Bill, to ensure that Parliament has the opportunity to scrutinise the powers as part of the normal legislative process.

Further safeguards will be implemented. We will:

- (a) Issue a robust statutory Code of Practice at the same time as the order comes into force and keep it under review.
- (b) Increase the level of scrutiny provided by the Home Office in considering authorisations.
- (c) Continue to keep the powers under review once they come into force and publish statistics on a quarterly basis.

## 5 REPORT, ACTION PLANNING AND SIGN OFF

### 5.1 Sign-off

Date of completion of EIA	10 March 2011
Compiled by	Ben Hale, OSCT Pursue Policy and Strategy Unit
SCS sign-off	Peter Hill, OSCT PPSU
<b><i>I have read the Equality Impact Assessment and I am satisfied that all available evidence has been accurately assessed for its impact on equality strands. Mitigations, where appropriate, have been identified and actioned accordingly.</i></b>	
Date of publication of EIA Report	17 March 2011
Review date	TBC

### 5.2 Publication and Review

## Equality Impact Assessment Report

### TITLE

Introduction of stop and search powers to replace sections 44-47 of the Terrorism Act 2000 pending the coming into force of the stop and search provisions in the Protection of Freedoms Bill.

### BACKGROUND

On 28 June 2010, the European Court of Human Rights (ECtHR) made final its decision in the case *Gillan and Quinton v United Kingdom* which found sections 44 to 46 of the Terrorism Act 2000 to be in breach of Article 8 (the right to privacy and family life) of the European Convention on Human Rights (ECHR) because they are not “in accordance with the law”. The ECtHR found the legislation was too broadly expressed and the safeguards in place were not sufficient. The Home Secretary took immediate steps to bring the use of the powers into line with the judgment whilst the issue was considered by the government’s review of various counter-terrorism powers and measures.

The policy objectives of the review in relation to stop and search were to ensure that the powers were necessary, proportionate and effective and that there are sufficient safeguards to prevent their misuse and that the powers would be ECHR-compatible in the light of the *Gillan* judgment. The terrorism stop and search powers must be lawful (including compliance with the ECtHR judgment) whilst also ensuring that the police have the necessary powers to protect the public from the threat of terrorism. The review also looked at whether the powers should be repealed and not replaced.

The remedial order constructs a new terrorism stop and search regime to replace the provisions of sections 44-47 of the Terrorism Act 2000. The order replaces the previous threshold for making an authorisation of “expedient” for the prevention of acts of terrorism, to where the senior officer making the authorisation “reasonably suspects that an act of terrorism will take place” and considers that the powers are necessary to prevent such an act. The provisions also specify that the geographic and temporal extent of an authorisation can be no greater or longer than is considered necessary for that purpose. The grounds for the exercise of the powers is to search for evidence that a person is a terrorist (as defined by section 40(1)(b) of the 2000 Act) or for evidence that a vehicle is being used for the purposes of terrorism (rather than the grounds under section 45 of the 2000 Act, which was to search for articles of a kind which could be used in connection with terrorism). An officer may conduct a search whether or not he reasonably suspects the presence of such evidence.

The intended effects are:

- (a) to implement the *Gillan* judgment,
- (b) to ensure that the police are able to protect the public effectively from the threat of terrorism;
- (c) to make these powers available to the police as soon as possible because of the urgent operational need for them;

- (d) to ensure the powers are lawful (including in compliance with the ECtHR judgment); and
- (e) to ensure that civil liberties are protected, including through robust safeguards in the legislation and the statutory code of practice.

The remedial order effectively implements the recommendations contained in the review of counter-terrorism and security powers. It implements those recommendations as swiftly as possible in light of the urgent operational need to have ECHR-compatible powers of this nature on the statute book. The substantive powers introduced by this Order will cease to have effect on the coming into force of the relevant provisions in the Protection of Freedoms Bill (after those provisions have received the full Parliamentary scrutiny that accompanies the passing of primary legislation).

### **SCOPING THE EIA**

The Equality Impact Assessment has been developed by the terrorism legislation team in the Office for Security and Counter-Terrorism in the Home Office. It relates to the review of Section 44 powers and the provisions of the Terrorism Act 2000 (Remedial) Order 2011 which repeal and replace Section 44.

### **COLLECTING DATA**

The Home Office review of Section 44 (as part of the wider review of counter-terrorism and security powers) had a wide range of quantitative and qualitative data to consider. This included:

- The Home Office statistical bulletin published on 28 October 2010 covers the operation of police counter-terrorism powers in Great Britain during 2009/10. This records that of the 101,248 stops and searches carried out under section 44 of the Terrorism Act 2000 during the period, 59% were against people who defined themselves as white, 17% against people who defined themselves as of Asian or Asian British origin and 10% against people who defined themselves as of black or black British origin. These percentages are in line with section 44 stops and searches in earlier years. (In 2008/09, of those stopped and searched under section 44 in Great Britain the majority defined themselves as White (61%)). These statistics reflect the way that section 44 was used before the Home Secretary's statement in July 2010. This statement announced that the use of section 44 without any suspicion was to cease and that the stop and search powers in Part V of the Terrorism Act 2000 were only to be used on the basis of reasonable suspicion on an interim basis whilst the review considered the power.
- Northern Ireland Statistics and Research Branch Northern Ireland Statistics on the Operation of the Terrorism Act 2000: Annual Statistics Research and Statistical Bulletin
- Previous reports by the independent reviewer of terrorism legislation (Lord Carlile of Berriew QC).

- Reports by civil liberty organisations (such as Liberty and Amnesty) and academics on the use of section 44. These reflect concerns about the necessity and proportionality of Section 44 powers.
- Parliamentary committee reports, in particular by the Joint Committee on Human Rights.
- Whilst such polling is self-selecting (i.e. it does not reflect a random cross section of the population and therefore does not necessarily indicate the public's view), on the 'Your Freedom' website set up by the Deputy Prime Minister, repealing section 44 was in the top six most popular ideas on the civil liberties section.
- Dstl report entitled '*What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?*' was published in March 2010.
- Significant consultation with internal and external stakeholders (see below).

## **INVOLVING AND CONSULTING STAKEHOLDERS**

The review which led to the recommendations to be implemented by the remedial order (and subsequently by the Protection of Freedoms Bill), was conducted by the Home Office with the full involvement of other government departments, the police, prosecutors and the intelligence and security agencies.

The terms of reference for the review, published by the Home Secretary in July 2010, made it clear that the review should consider a wide range of views, including those of civil liberty organisations and community groups. To meet this commitment, the Home Office wrote to key organisations including civil liberty and human rights organisations, organisations and those representing the legal profession to make them aware of the review and offering to provide further advice on how they could contribute. The Home Office met with a number of these organisations, including the main human rights organisations to discuss the review.

Consultation meetings were also held in Edinburgh, Belfast, Manchester, Birmingham and London. Over 190 organisations were invited to the consultation meetings. This included community groups (including representatives of all the major religions and beliefs), local police forces, probation and prosecutors, local councils, academics, youth organisations, equality groups and representatives of the legal profession.

A dedicated Home Office e-mail and postal address was also provided for those who wanted further information on the review or who wanted to submit contributions to the review.

The Home Office sought to ensure that different external stakeholder and community groups had access to the consultation by making different groups and the public in general aware of the review (in particular the Parliamentary statement by the Home Secretary announcing the review resulted in significant media coverage of the review) and by providing a variety of avenues for external groups / individuals to provide their views.

Independent oversight of the review was provided by Lord Macdonald of River Glaven QC who also met interested organisations and individuals.

The Home Office provided feedback to participants who engaged in the review by:

- (d) Publishing the findings from the review
- (e) Publishing a list of those who contributed to the review and summary of the contributions received
- (f) Continuing to engage with internal and external stakeholders in the development and implementation of the policy (see Action Plan).

The views expressed as part of the review consultation and which helped to inform the review's recommendations, have been carried forward into the drafting of the provisions of the remedial order.

## **ASSESSING IMPACT**

There has been significant public, NGO and parliamentary concern over the breadth of section 44 and its alleged misuse by the police. The former independent reviewer of terrorism legislation, Lord Carlile, has repeatedly highlighted inconsistencies in the use of section 44 across police forces and concluded that the power was overused and that the authorised areas were too large and not directly related to threat intelligence (although forces – particularly the Metropolitan Police Service – made significant changes to reduce the geographic extent of their authorisations and their use of the powers in 2009 and early 2010 until the Home Secretary's guidelines in July 2010).

Critics often note that there is no evidence of a single individual being convicted with a terrorist offence after being stopped and searched under section 44 or even being arrested on terrorism grounds in Great Britain. While it may be the case that a high visibility section 44 operation around for instance, an Underground station, made it a less attractive target for terrorists, the lack of an outcome of that kind in Great Britain from those types of operation is a stark statistic. In addition, the increase in use (from around 42,000 in 06/07 to just over 250,000 in 08/09 before falling to just over 100,000 in 09/10)<sup>1</sup> led to accusations of abuse and concern that there were effective constraints on the police's use of the powers.

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<sup>1</sup> Home Office Statistical Bulletin, '*Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches*'.

The perception of disproportionate use of the section 44 powers against people from Asian Communities may adversely impact on *Prevent* work by fuelling the perception that the police employ racial profiling techniques and that terrorism legislation is not being applied equally across all sections of society. The Home Office statistical bulletin published on 28 October 2010 covers the operation of police counter-terrorism powers in Great Britain during 2009/10. This records that of the 101,248 stops and searches carried out under section 44 of the Terrorism Act 2000 during the period, 59% were against people who defined themselves as white, 17% against people who defined themselves as of Asian or Asian British origin and 10% against people who defined themselves as of black or black British origin.<sup>2</sup>

Conversely, operations which were based on entirely random stops and searches attracted criticism that the powers were not being used in an “intelligence-led” way, and that individuals from a wide variety of backgrounds were stopped and searched in an attempt to “even out” the figures. Lord Carlile has also criticised the use of the powers against individuals who he said were clearly not suspected terrorists. This has created confusion about the way in which the powers were meant to be applied. Attempts to address this have been made in a number of guidance documents, including the Police and Criminal Evidence (PACE) Codes of Practice, and comprehensive, dedicated terrorism stop and search guidance issued by the National Policing Improvement Agency (NPIA)<sup>3</sup>.

The production of a dedicated statutory Code of Practice to accompany the new powers seeks to address any potential confusion around how the new powers are to be used. It provides guidance on:

- a) the threshold for an authorisation
- b) the geographical and temporal extent of an authorisation
- c) information to be provided to the Secretary of State in support of an authorisation, clarification that continual renewal of authorisations on the basis of a similar intelligence case cannot be justified
- d) briefing and tasking for officers using the powers
- e) avoiding discrimination
- f) the general conduct of stop and searches
- g) community engagement

It also requires authorising officers to consider whether the powers should be used on the basis of “objective factors” (i.e. indicators that will officers help

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<sup>2</sup> Statistics on Race and the Criminal Justice System 2007/08, Ministry of Justice, 2009

<sup>3</sup> Practice Advice on Stop & Search in Relation to Terrorism, NPIA, 2008.

select individuals or vehicles to be stopped and searched but which would not meet a threshold of reasonable suspicion) or, where intelligence provides insufficient information about the potential perpetrators of an attack, whether the powers should be used on a “random” basis, and to set out how the powers will be so used, as part of an authorisation.

The increasing use of section 44 powers since their implementation and criticism of the consistency, effectiveness and proportionality of their use contributed to a sense, that counter-terrorism powers were being misused. During the “42 days” pre-charge detention debates during the passage of the Counter-Terrorism Act 2008, a commitment was made to review the impact of all counter-terrorism legislation on our communities. The report ‘*What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?*’ was published in March 2010.<sup>4</sup> This considered existing research on public perceptions and found that:

- Although it was acknowledged that stop and searches conducted without reasonable suspicion are a necessary procedure to ensure public safety<sup>5</sup> there are perceptions that the process is discriminatory, based on stereotypes and racial profiling.<sup>6</sup>

- Most objections to section 44 stem from acknowledgements of disproportionality in the demographics of those subject to search procedures. (See ETHNOS Research).

- However, there is also evidence that shows acceptance of the need for measures to take account of the intelligence about the demographics of potential terrorists. An opinion poll, carried out by ICM Research for the BBC in April 2004, indicated 69 per cent of the respondents, representative of the UK population, supported police powers to stop and search anyone at anytime. It appears that the contention with section 44 was not necessarily linked to the measure itself, but with the way it was implemented.<sup>7</sup>

Concerns voiced in the evidence assessed by the rapid evidence assessment of existing research suggested two key perceptions towards the implementation of section 44 that fuelled negative perceptions:

- (a) Lack of justification by the authorities, or valid logic as to why the procedures are carried out. (See CML Market Research footnote)

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<sup>4</sup> The Dstl report entitled ‘What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?’ was published in March 2010. It is available at <http://rds.homeoffice.gov.uk/rds/pdfs10/occ88.pdf>

<sup>5</sup> ETHNOS Research & Consultancy for Communities and Local Government. *The Drivers of Black and Asian people’s perceptions of racial discrimination by Public Services*. 2008

<sup>6</sup> El-Wafi, L. (2006). *British Arab Muslims and the ‘War on Terror’: Perceptions of Citizenship, Identity and Human Rights*. Unpublished manuscript. [http://www.naba.org.uk/content/articles/2006/BrArabs/61010\\_BrArMus\\_AIWafiL.pdf](http://www.naba.org.uk/content/articles/2006/BrArabs/61010_BrArMus_AIWafiL.pdf). 19 Nov 2009.

<sup>7</sup> CML Market Research for Communications Strategy and Insight Unit; Home Office. Communications Directorate, UK 2008



- (b) The manner in which searches are conducted: disrespectful; intimidating; impolite; brusque; and rude. (See CML Market Research footnote)

As part of their contribution to the review, the Equality and Human Rights Commission included interim findings from research they had undertaken (by Tufyal Choudhury from the University of Durham) into the impact of counter-terrorism measures on Muslim communities. This suggested that:

- The impact of counter-terrorism law and policies are experienced and felt more acutely and directly amongst Muslims than non-Muslims. Non-Muslims were less likely to have direct or indirect experiences of any measures and were generally more supportive of the measures that were being taken as necessary.
- Amongst Muslims concern focused on those measures that it was felt were targeted against or applied to Muslims as a group or community compared to measures that were seen as targeted against individual suspects. In relation to the measures covered by the review, this concern was focused on the use of section 44 stop and search powers.
- Most Muslims had direct experience of being stopped and searched, had close friends or family who had been stopped and searched or had witnessed stops in their local area. This covered all stop and search powers (including non-terrorism powers and ports and border powers), not just section 44 powers.

The review of counter-terrorism and security powers was welcomed by everyone who contributed to the review. The possibility of repealing the section 44 powers or severely limiting their usage was seen as a positive move which would have a favourable impact on Muslim and Asian community perceptions that the powers had been used disproportionately against them. The fact that people of South Asian origin are more likely to be stopped under section 44 was noted by a number of contributors to the review (*'Many young Muslim men in particular feel that they are stopped and searched simply because they fit a general stereotype held by the police'* – Liberty).

The Equality and Human Rights Commission raised concerns about the use of racial profiling and the adverse impact this could have on race relations to the extent that it was considering enforcement action against particular police forces under the race equality duty. At least one contribution to review argued that even if use of the power was limited, it may not entirely address the possibility of ethnic profiling when deciding who should be stopped.

The fact that the powers introduced by the remedial order will replace section 44 with a significantly circumscribed stop and search regime means that the volume of stops and searches using the new powers is likely to be substantially lower. There is evidence that where such powers are used in a much more focused way, the proportion of individuals affected from particular groups can increase, even though the volumes will be much smaller. The use of the powers will be closely monitored to ensure the powers are used proportionately

in response to available intelligence. In general however, the reduction in the overall volume of stops and searches will represent a significant reduction in the potential infringement of the rights of all sections of the community.

The repeal of section 44 and replacement with the provisions contained in the remedial order responds to the ECtHR judgment in the case of *Gillan and Quinton* and reflects the Government's concerns about the power. The proposed new powers are considered to be compatible with our domestic and international human rights obligations, including in the light of the European judgment.

## **ACTION PLAN**

Repealing section 44 and replacing it with the provisions of the remedial order should have a positive equality impact by:

- (a) Significantly reducing the total volume of stops and searches conducted without reasonable suspicion. The total number of individuals whose human rights (in particular, in relation to Article 8) are engaged will reduce.
- (d) The repeal of section 44 is likely to promote good community relations as it was a widely discredited power, especially amongst Asian communities.
- (e) The curtailment of, and increased safeguards in, the new powers will mean that the power is available in far more limited circumstances and is proportionate.

The concerns expressed about the disproportionate and/or unnecessary use of section 44 has been the key driver (alongside the need to implement the ECtHR judgment) in making the proposed changes to the legislation.

The replacement of Section 44 with the new powers contained in the remedial order is considered to be in compliance with our domestic and international human rights obligations, including in the light of the *Gillan and Quinton* judgment.

Further safeguards will be introduced. We will:

- (d) Issue a robust statutory Code of Practice at the same time as the order comes into force and keep it under review.
- (e) Increase the level of scrutiny provided by the Home Office in considering authorisations.
- (f) Continue to keep the powers under review once they come into force and publish statistics on a quarterly basis.

An action plan is attached. The Home Office and the police will continue to assess the equality impact of the new powers and consult with internal and external stakeholders to inform that assessment. The independent reviewer of terrorism legislation will have an important role in continuing to report on the

operation of terrorism powers – including the new terrorism stop and search powers contained in the remedial order.

## ANNEX B - Action Plan for use with Home Office Equality Impact Assessments

### Terrorism stop and search powers

ACTION / ACTIVITY	OWNER AND INTERESTED STAKEHOLDERS	DEPENDENCIES / RISKS / CONSTRAINTS	COMPLETION DATE	PROGRESS UPDATE
<p>Ensure that the police continue to collect and report data of their usage of terrorism stop and search powers, including the new proposed powers to be conducted without reasonable suspicion contained in the remedial order</p>	<p>Home Office (owner) Parliament Northern Ireland Office Scottish Government Independent Reviewer of Terrorism legislation National Policing Improvement Agency Association of Chief Police Officers Association of Police Officers in Scotland Individual Police Forces</p>	<p>The Government is committed to reducing the bureaucratic burden on the police. There may, therefore, be pressure to reduce the reporting requirements on the police.</p>	<p>The statutory Code of Practice will include a requirement for the police to collect and report data on their usage of terrorism stop and search powers.</p> <p>The Code will also require the police to monitor the use of the power.</p> <p>The ability to collect data will be in place before the powers are exercised</p>	<p>Monitoring will be provided by the Terrorism legislation team in the Home Office.</p>
<p>Publish a statutory Code of Practice governing the authorisation and use of the new powers</p>	<p>Home Office (owner) Parliament Northern Ireland Office Scottish Government Independent Reviewer of Terrorism legislation</p>	<p>The Code will need to be kept under review to ensure police forces can and do comply with its provisions, but also that it does not create unjustifiable burdens on the police which</p>	<p>Code to be issued and laid before Parliament at the same time the remedial order comes into force</p>	<p>The Code of Practice will be published at the same time as the remedial order</p>

	<p>National Policing Improvement Agency  Association of Chief Police Officers  Individual Police Forces  Civil liberty organisations  Faith organisations</p>	<p>disproportionately diminish the usefulness of the powers.</p>		
<p>Continue to engage with internal and external stakeholders in the development and implementation of the new terrorism stop and search powers.</p>	<p>Home Office (owner)  Parliament  Northern Ireland Office  Scottish Government  Independent Reviewer of Terrorism legislation  National Policing Improvement Agency  Association of Chief Police Officers  Individual Police Forces  Crown Prosecution Service  Civil liberty organisations  Victims groups  Faith organisations  Local authorities  Academics</p>	<p>The passage of the Protection of Freedoms Bill, which will include the new stop and search terrorism powers (to be placed on the statute book on a permanent basis), should provide significant opportunity to engage with internal and external stakeholders. This will include consultation on the draft Statutory Code of Practice accompanying the provisions in the Bill (which will be wider than the Code accompanying the remedial order as the Bill introduces new stop and search powers exercisable on reasonable suspicion as well as powers identical to the ones in the remedial order, which will also be covered in that Code).</p> <p>The risk to this action is the</p>	<p>Ongoing.</p>	<p>The Protection of Freedoms Bill, containing similar provisions to the remedial order, was introduced to Parliament on 11 February. A Code of Practice will be introduced for committee stage.</p>

		capacity of the Home Office team responsible for the new powers to engage with the broad range of stakeholders. We will seek to mitigate this by seeking to consult in a resource-efficient manner (i.e. consult stakeholders at the same time on any changes to the Codes of Practice required during the passage of the Protection of Freedoms Bill).		
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## **Required information: Terrorism Act 2000 (Remedial) Order 2011 (S.I. 2011/631)**

### Introduction

1. This document sets out the 'required information' which is defined in paragraph 5 of Schedule 2 to the Human Rights Act 1998 (HRA) as follows:

*“(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and*

*(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.”*

### Incompatibility

2. The Terrorism Act 2000 (Remedial) Order 2011, made under section 10 of the HRA (“the remedial order”) removes the incompatibility of sections 44 to 46 of the Terrorism Act 2000 (“the 2000 Act”) with Article 8 rights. The European Court of Human Rights (“ECtHR”) found in its judgment in the case of *Gillan & Quinton v United Kingdom* (Application no. 4158/05) that the stop and search powers in sections 44 to 46 of the Terrorism Act 2000 violated Article 8. These provisions allow the police to stop and search vehicles or individuals for counter-terrorism purposes, without reasonable suspicion, in an area and for a period specified in an authorisation given by a senior police officer.

3. The ECtHR found that the powers in these provisions are “*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not therefore ‘in accordance with the law’ and it follows that there has been a violation of article 8 of the Convention*” (paragraph 87)<sup>1</sup>. This judgment became final on 28 June 2010 when a panel of five judges refused the UK’s request for the case to be referred to the Grand Chamber of the ECtHR.

4. The ECtHR’s reasoning was as follows:

a) The statutory test for giving an authorisation is one of “expediency”. There is no requirement that the stop and search power be considered “necessary”. The consequence was that there was therefore no requirement of any assessment of the proportionality of the measure: (paragraph 80).

b) The Secretary of State has no power to alter the geographical coverage of an authorisation and although she has a power of confirmation, this had never been exercised to refuse an authorisation or to substitute an earlier time of expiry: (paragraph 80).<sup>2</sup>

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<sup>1</sup> The full judgment is available at [www.echr.coe.int/ECHR/homepage\\_EN](http://www.echr.coe.int/ECHR/homepage_EN)

<sup>2</sup> This was not factually correct in relation to the exercise of the Secretary of State’s power.

c) Although the exercise of these powers was subject to judicial review, “*the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are ultra vires or an abuse of power*”: (paragraph 80).

d) The temporal (a maximum of 28 days) and geographical (area of police force) restrictions on authorisations provide no real check because:

(i) authorisations could be and had been continuously renewed;

(ii) some forces (such as the Metropolitan Police Service) covered large and densely populated areas: (paragraph 81).

e) The Code of Practice “*governs essentially the mode*” in which the powers are carried out “*rather than providing any restriction on the officer’s decision to stop and search*”: (paragraph 83).

f) There is nothing in the Code or the legislation providing any real check on the officer’s discretion in exercising the stop and search powers. The “*sole proviso*” is that the search must be for the purpose of looking for articles which could be used in connection with terrorism. But that was “*a very wide category which could cover many articles commonly carried by people in the streets*”: (paragraph 83).

g) There is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer and the risk that it could be misused – including in a discriminatory way: (paragraph 84).

#### Reason for proceeding under Section 10 of the Human Rights Act 1998 and making an order in those terms

5. After the *Gillan* judgment became final on 28 June 2010, the Home Secretary wanted to immediately stop the ongoing and widespread use of the section 44 powers so as to urgently give effect to the *Gillan* judgment. The Home Secretary therefore made a statement in the House of Commons on 8 July 2010, (repeated by the Minister of State for Security and Counter-Terrorism, Baroness Neville-Jones, in the Lords<sup>3</sup>) setting out how the powers in sections 44 to 46 of the 2000 Act were to be operated pending the review of those provisions within the government’s wider review of counter-terrorism measures and legislative amendment. In short, she said that:

a) Terrorism-related stops and searches of individuals are to be conducted under section 43 of the 2000 Act (on the basis of reasonable suspicion that the individual is a terrorist). Section 44 is no longer to be used for the searching of individuals.

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<sup>3</sup> The Home Secretary’s statement is at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100708/debtext/100708-0001.htm#10070875001177>, and the Minister for Security and Counter Terrorism’s is at <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100708-0002.htm#10070878000285>



- b) In view of the fact that there is currently no terrorism-related power to stop and search vehicles on the basis of reasonable suspicion, section 44 may continue to be used for the purpose of searching vehicles. So authorisations may continue to be given under section 44(1) of the 2000 Act, but these authorisations are to be made (and will only be confirmed by the Secretary of State) on the basis that they are "necessary" for the prevention of acts of terrorism (rather than merely "expedient" as expressed in section 44(3) of the 2000 Act).
- c) Any stops and searches conducted under an authorisation under section 44(1) of the 2000 Act must be carried out on the basis that the officer reasonably suspects the presence of articles of a kind which could be used in connection with terrorism in the vehicle.

6. The Home Secretary has, therefore, already put an end, administratively, to the possibility of these powers being used in a manner which is incompatible with Convention rights. However, sections 44 to 47 of the 2000 Act remain on the statute book and the Home Secretary's guidelines on 8 July 2010 represented only an interim position (as expressed at the time) and do not represent an implementation of the *Gillan* judgment which must be carried out by amending the primary legislation. In the Parliamentary debate that followed the statements, Baroness Neville-Jones said that, in relation to the interim guidance:

*"What we have, in effect, are non-statutory guidelines, and the law remains in place. It is not to be ruled out that, should a contingency of an extreme kind arise-and I emphasise "extreme kind"-the Home Secretary would regard it as both right and within her powers to alter the guidelines. It is very important - I come back to this - that we do not put the police in the position of acting illegally."*<sup>4</sup>

7. By suspending use of the powers without suspicion, the Home Secretary acted in a way which gave unequivocal effect to the judgment as quickly as possible. This however, leaves the police unable to use counter-terrorism stop and search powers exercisable without reasonable suspicion even to the extent that such powers are compatible with Convention rights.

8. During the counter-terrorism and security powers review, a need was identified for a counter-terrorism stop and search power that could be exercised without reasonable suspicion in tightly circumscribed circumstances. These circumstances were where the police reasonably suspect that an act of terrorism will take place and that stops and searches (of individuals or vehicles) are necessary to prevent such an act - but where the intelligence available is insufficient for such stops and searches to be conducted on the basis of reasonable suspicion. This is set out in the chapter on section 44 in the published findings from the Government's review of counter-terrorism and security powers<sup>5</sup>.

9. As noted above, the position under the Home Secretary's current guidelines

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<sup>4</sup> Column 384, Hansard

<sup>5</sup> The review is available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/>

does not envisage the use of the existing powers (exercisable without reasonable suspicion) in any circumstances<sup>6</sup>. There is currently, therefore, an operational gap in police counter-terrorism powers. The review recommended that this gap be addressed by making provision in the Protection of Freedoms Bill. However, the review also stated:

*“19. Given the Government will need to legislate to replace the existing section 44 powers, the review recommends that consideration is given to whether the replacement provisions can be implemented more quickly than would be possible through the Freedom Bill to fill the potential operational gap.”<sup>7</sup>*

10. It is generally desirable for amendments to primary legislation to be made by way of a Bill. The Government has taken steps to do this through the Protection of Freedoms Bill which was introduced on 11 February and received its second reading on 1 March 2011. This Bill includes provisions to repeal sections 44 to 47 of the 2000 Act and to replace them with a new stop and search power which is far more circumscribed and which is compatible with Convention rights. These provisions are unlikely, however, to come into force until early 2012 when the Protection of Freedoms Bill is currently expected to receive Royal Assent. As an alternative, the Secretary of State has considered whether to use a short fast-track Bill to amend the 2000 Act. There is, however, no available space in the current legislative programme for such a Bill.

11. The Government also considered, as an alternative to using a remedial order, whether the Home Secretary’s interim guidance of 8 July 2010 could be revised to allow the police to use the counter-terrorism stop and search powers in sections 44 to 46 of the 2000 Act again (without reasonable suspicion) but in only circumscribed circumstances. This could have provided the police with a stop and search power to fill the operational gap quickly. However, it was considered that attempting to operate existing powers under sections 44 to 46 of the 2000 Act in a more restricted way than provided for by the legislation would be unsatisfactory, including for the following reasons:

- a) it would not provide the legal certainty and clarity of legislative amendment;
- b) the full range of changes considered necessary to make the existing powers Convention-compatible could not be achieved without legislative amendment; and
- c) further (non-statutory) guidelines would still not implement the ECtHR’s judgment.

12. In summary, there is a need to amend the legislative powers of stop and search in sections 44 to 46 of the 2000 Act to prevent unlawful interference with individuals’ rights. Although the Home Secretary suspended the practical use of the powers in sections 44 to 46 without reasonable suspicion, these provisions remain in force and it remains necessary to remove this incompatibility. The counter-terrorism review identified an urgent need, for national security reasons, to provide an ECHR-

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<sup>6</sup> An officer must have reasonable suspicion to exercise the powers under an authorisation given under section 44(1) of the 2000 Act.

<sup>7</sup> See page 19 of the review.

compatible replacement for these powers. There is a lack of alternative suitable legislative vehicles for revising the counter-terrorism stop and search powers quickly enough for operational requirements (in particular, the Protection of Freedoms Bill is not expected to receive Royal Assent until early 2012 and there is no space in the legislative programme for a stand-alone fast-track bill). The non-legislative alternative is unsuitable. In view of this, the Home Secretary considers that there are compelling reasons for proceeding under section 10 of the HRA to make a remedial order to make such amendments she considers necessary to remove the incompatibility identified in *Gillan*.

### The replacement provisions

13. The order provides that the 2000 Act is to be given effect to as if sections 44 to 47 are repealed and new provisions relating to stop and search are inserted. The Explanatory Memorandum to the Terrorism Act 2000 (Remedial) Order 2011<sup>8</sup> provides a detailed explanation of the provisions. But in short, the new section 47A of, and Schedule 6B to, the 2000 Act introduce a limited power for a senior officer to give an authorisation for the use of the new stop and search power to search vehicles or individuals without reasonable suspicion for counter-terrorism purposes. The new powers are compatible with Convention rights, addressing as they do, the criticisms made in the *Gillan* judgment and conferring only an appropriately constrained discretion on both authorising officers and officers exercising the powers and containing effective legal safeguards. In particular:

- i. An authorisation may only be given when a senior officer reasonably suspects that an act of terrorism will take place and the senior officer considers that it is necessary to prevent such an act (this is considerably higher than the “expediency” test in section 44);
- ii. An authorisation may last for a period no longer than the senior officer considers necessary and for a maximum of 14 days (as opposed to a 28 day maximum under section 46(2) of the 2000 Act);
- iii. An authorisation may cover an area or place no greater than the senior officer considers necessary;
- iv. The Secretary of State may substitute an earlier date or time for the expiry of an authorisation when confirming an authorisation;
- v. The Secretary of State may substitute the area or place authorised for a more restricted area or place when confirming an authorisation;
- vi. A senior police officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
- vii. An officer exercising the stop and search powers may only do so for the purpose of searching for evidence that the person concerned is a terrorist (within the meaning of section 40(1)(b) of the 2000 Act) or that the vehicle concerned is being used for the purposes of terrorism (as opposed to the purpose under

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<sup>8</sup> This will be available on the Home Office website.

- section 45(1) of searching for articles of a kind which could be used in connection with terrorism);
- viii. Officers (in both authorising and using the powers) must have regard to a statutory Code of Practice which further constrains the use of those powers.

14. Article 6 of the remedial order makes a sunset provision so that the order will cease to have effect on the coming into force of the provisions in the Protection of Freedoms Bill. By this point, Parliament will have had the opportunity to fully scrutinise the provisions in the Protection of Freedoms Bill to similar effect to those contained in this order.

#### Reason for using the urgency procedure

15. Paragraph 2(b) of Schedule 2 to the HRA provides that the usual procedure for making a remedial order (approval by a resolution of each House after 60 days of a draft being laid, following the additional procedure set out in paragraph 3 which itself lasts more than 60 days<sup>9</sup>), does not apply if *'it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order'* without that procedure being followed.

16. The Home Secretary, on the basis of advice from the police and in the light of the Government's review of counter-terrorism powers, considers that, for national security reasons, it is necessary, now, for there to be available to the police a limited form of counter-terrorism stop and search powers, exercisable without reasonable suspicion. She considers that there is currently a gap in police powers and that this cannot be sustained until the procedure provided for under paragraph 2(a) and 3 of Schedule 2 to the HRA for making a remedial order could be completed. As the powers in sections 44 to 46 cannot be used (without reasonable suspicion) compatibly with Convention rights, the Home Secretary considers that the situation can most appropriately be dealt with by making provision to remove the incompatibility and making such provision urgently. The experience of the police since the suspension of the section 44 powers has indicated that there is a clear operational gap in responding to specific threat scenarios which cannot be met by other, existing powers. The current international terrorism threat level is assessed by the Joint Terrorism Analysis Centre as 'Severe' meaning a threat is considered highly likely. Whilst it is not possible to provide the intelligence supporting the assessment without damaging national security, the seriousness of the current threat is reflected in the Prime Minister's New Year measure that the terrorism threat is "*as serious today as it ever has been*".<sup>10</sup> This remains the case.

17. The Home Secretary considers that having such an ECHR-compatible counter-terrorism stop and search power on the statute book now is in the interests of national security and it therefore appears to her that, because of the urgency of the

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<sup>9</sup> The calculation of 'days' for this purpose does not include any time during which Parliament is dissolved or prorogued, or both Houses are adjourned for more than four days.

<sup>10</sup> <http://www.number10.gov.uk/news/speeches-and-transcripts/2010/12/new-year-podcast-58413>

matter, she must make the remedial order under the procedure prescribed in paragraph 2(b) of the Schedule to the HRA.

**17 March 2011**