



## **Submission to the UK Home Office's Public Review of Schedule 7 of the Terrorism Act 2000**

### **ABOUT STOPWATCH**

StopWatch is a coalition of legal experts, academics, citizens and civil liberties campaigners. We aim to address any excessive or disproportionate use of stop and search powers, promote best practice and ensure fair, effective policing for all.

Members of StopWatch include: Coalition for Racial Justice; Engage; Equanomics UK; Howard League for Penal Reform; Independent Academic Research Studies (IARS); Just for Kids law; Mannheim Centre for Criminology, London School of Economics; Muslim Safety Forum; NACRO; Newham Monitoring Group; Not Another Drop; Open Society Justice Initiative; Release; Runnymede Trust; School of Law, Kings College London.

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## INTRODUCTION

In September 2012, the Home Office launched a public review into the operation of Schedule 7 of the Terrorism Act 2000. StopWatch welcomes the public review, the first in its eleven year history, which takes place against a backdrop of concerns about the law and practice of Schedule 7.

The review set out seven potential changes, which include:

1. Reducing the maximum legal period of examination.
2. Requiring a supervising officer to review, at regular intervals, whether the examination or detention needs to be continued.
3. Requiring examining officers to be trained and accredited to use Schedule 7 powers.
4. Giving individuals examined at ports the same rights to publically funded legal advice as those transferred to police stations.
5. Amending the basis for undertaking strip searches to require suspicion and a supervising officer's authority.
6. Repealing the power to take intimate DNA samples from persons detained during a Schedule 7 examination.

StopWatch welcomes the above reforms proposed by the Home Office, however, we feel that these proposals do not go far enough to bring the law in compliance with international Human Rights. We believe that the Home Office can go much further in introducing greater reforms without it negatively impacting upon national security, as outlined in our response.

Our submission is split into a number of sections. First we provide a summary of our recommendations for ease of reference. Then an outline of the powers afforded to officers under Schedule 7 is presented before we then provide an overview of the significant background activities that have taken place in the last two years. Finally, a more detailed discussion on each of the above Home Office proposals takes place before closing with an additional set of recommendations.

**Schedule 8 represents a fundamental flaw in the system which treats people detained under Schedule 7 and not suspected of any crimes the same way as suspected terrorists arrested under Section 41 of the same Act. We call upon the Home Office to rectify this flaw by adopting the recommendations outlined in our submission which has been designed to address this issue.**

StopWatch would like to thank David Anderson QC for his intervention on Schedule 7 and for, twice, calling for a review of the power. We have no doubt that this was pivotal to bringing about this much needed review and we have the utmost confidence in him as the independent reviewer of counter-terrorism powers.

## **SUMMARY AND RECOMMENDATIONS**

For ease of reference, the recommendations made by StopWatch are summarised as follows:

### **Home Office Proposals**

- 1.6. StopWatch welcomes the proposal to lower the legal maximum period of examination. We recommend that any combination of an examination and/or detention should not last longer than a combined total of an hour. At the one hour mark, the person should either be released or arrested and provided with all the rights associated with an arrest.
- 2.3. StopWatch welcomes the proposal to require a supervising officer to review at regular intervals whether or not the examination or detention needs to be continued. However, given our proposal to reduce the maximum legal examination/detention period to 1 hour, the supervising officer should make a decision within the first 30 minutes and, then again upon the hour, to release the individual or arrest them under suspicion of being involved in terrorism or for any other offence discovered.
- 3.4. Officer training to use Schedule 7 should be developed in consultation with a range of legal, academic and equality and community groups and subject to independent and public evaluation.
- 4.4. People detained at ports should be entitled to consult with a legal representative in line with the rights given to those detained at a police station, even if this is via telephone.
- 4.5. Port officers should partner with local legal practices which can be called upon to provide advice to individuals detained under Schedule 7 in order to reduce the time spent waiting for legal representatives to arrive.
- 4.6. StopWatch does not, however, support the proposal to increase the maximum legal examination/detention period in order to wait for the lawyer to arrive. In this case, legal advice should be provided to the individual on the phone and more creative solutions found.
- 5.4. StopWatch welcomes the proposal to increase the threshold of suspicion to ensure that strip-searches only take place with reasonable suspicion to believe that an individual is hiding an item useful for terrorism.
- 5.5. StopWatch also calls for the proper recording of these encounters which should be collated centrally and published in the quarterly and annual Home Office statistical bulletins on arrests and outcomes on the use of counter-terrorism powers.
- 6.9. The power to take non-intimate biometric data should be repealed along with the current proposal by the Home Office remove the power to take intimate biometrics.

- 6.10. A public statement should be made confirming the destruction of both the physical samples and database records of biometric data taken from innocent people at ports, in line with the requirements of the Protection of Freedoms Act 2012, so as to reassure those concerned.

## **Further proposals**

### **7. Revising the law**

- 7.7. StopWatch strongly recommends the introduction of a minimum threshold of suspicion upon which individuals can be stopped based upon objective facts, information, and/or intelligence, so as to minimize the risk of arbitrary and/or discriminatory application of stop and search powers. This, along with the redaction of the taking of any biometric data and our other recommendations, will help bring the power in line with the Gillian case and European Convention on Human Rights.
- 7.8. Schedule 7 should be governed under the Police and Criminal Evidence Act 1984, the regulatory framework for other stop and search powers.

## **Professional Practice and External Oversight**

### **8. Revising the Codes of practice**

- 8.5. The Home Office code of practice should be amended to reflect all of the recommendations made in this submission by StopWatch.
- 8.6. The NPIA Practice Advice to examining officers should also be amended to reflect the recommendations made in this submission by StopWatch and should continue to be in effect under the NPIA's successor organisation, the national College of Policing.
- 8.7. Both the Home Office's code of practice and the NPIA practice advice should be amended to ensure that people examined or detained under Schedule 7 are given the necessary support in rearranging any transport missed.

### **9. Data Transparency**

- 9.1. Schedule 7 data should always be included in each Home Office quarterly statistical bulletin on the use of counter terrorism powers as a way of ensuring transparency and increasing community confidence in policing.
- 9.2. Data on the number of arrests and successful convictions arising from Schedule 7 powers should also be published to show that it is necessary and effective.

### **10. External Regulation**

- 10.8. The Home Office should support the HMIC review of stop and search powers and, in particular, their inspection into the use of Schedule 7 at ports and borders.
- 10.9. Statistics on the number of complaints made against each police force and their outcomes should be published to increase community confidence in ports policing and in regulatory bodies such as the IPCC.
- 10.10. The Home Office and police forces should support and fully comply with the IPCC during Schedule 7 investigations. This includes sharing any information requested by the IPCC in order for it to fulfil its functions as the regulatory body of police practice.
- 10.11. Information should be provided to all people examined/detained on how to complain should they desire to do so later.

## BACKGROUND

### What is Schedule 7?

**Schedule 7** of the Terrorism Act 2000 provides stop and search powers at ports and borders where 'examining officers' are able to stop, question and/or detain people for up to 9 hours, *without the need for any reasonable suspicion*, to ascertain whether or not they are likely to be engaged in acts of terrorism. 'Examining officers' include counter-terrorism police officers and immigration and customs staff, all of whom do not currently require to be trained to use it.

Schedule 7 is the widest ranging stop power in the UK<sup>1</sup> which places an obligation upon people examined or detained under it to cooperate with the full extent of the powers applied against them. Under this power, people can be questioned about a number of personal, social and political views; undergo a thorough search of their body, luggage, and any associated vehicles in the port; undergo a strip-search; and have their property confiscated for up to seven days or have money that they carry seized. People may have their DNA and fingerprint samples taken even though they are not suspected of being involved in acts of terrorism or any other crime and they must, upon request, hand over any identification documents or information in their possession including their mobile phones or other electronic equipment from which data can be taken without informed consent. The whole process can lead to people missing their flight, ferry, train or any other transport without the right to compensation or assistance in rearranging missed journeys.

These wide-ranging powers conferred upon examining officers can be applied at different times of a stop which can therefore result in the following three types of encounters:

1. A process of '**initial screening questions**', similar to a stop-and-accounts, take place in the first instance. Here, people are stopped and asked to identify themselves and account for their presence in the port as well as to inform the examining officer of where they are heading to. This is designed to be a quick encounter and no data is held on the number of people undergoing initial screening questions.
2. Officers may then decide to examine the person further by asking them additional questions or wish to search them, their belonging and any associated vehicle(s) in the port; this is known as an '**examination**'. Once the encounter reaches an hour mark, a TACT1 form is issued to the person which informs them of what powers officers have and of the person's obligations to comply. A TACT1 form may be issued at any time if the officers intend to keep them for longer than an hour or to detain them.

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1 The full extent of Schedule 7 powers can be viewed by following the link below: <http://www.legislation.gov.uk/ukpga/2000/11/schedule/7>

There is no obligation for police forces to record the number of examinations lasting below the first hour although statistics gathered by four police forces show that 3934 (63%) of people were examined for up to 15 minutes, 1544 (25%) of people were examined for up to 30 minutes and the remaining 791 (13%) were examined for up to an hour<sup>2</sup>.

3. Finally, the officer may wish to escalate the examination at any time of the encounter to a '**detention**' whereby the person being examined is taken away from public view and to a room within the port which is used to hold people under arrest of suspected terrorism or other serious crimes. Detentions take place without requiring reasonable suspicion and a TACT2 form is issued to the person informing them of their detention, the powers of the police and their obligations to cooperate. It is here that the taking of their biometric information and a strip-search may take place in addition to a thorough search and questioning of the person.

Reasonable force may be used to effect examinations and detentions and failures to comply with either of the above encounters under Schedule 7, including the obstruction of a search or refusing to cooperate with the taking of DNA and fingerprint samples, is an offence punishable by up to three months of imprisonment and a fine.

### **Current Practice and Concerns**

In recent years, there has been growing concern about the legislation and the operation of Schedule 7 powers. Whilst the coalition government conducted a comprehensive review of all other counter-terrorism powers, it was unclear whether Schedule 7 would have also undergone a similar process. Meanwhile, politicians such as David Lammy MP<sup>3</sup>, Lord Nazir Ahmed and Humza Yousaf MSP and civic groups like StopWatch<sup>4</sup> had a long history of raising concerns on this power which remained unanswered. David Anderson QC, the Independent Reviewer of Counter-Terrorism powers, twice called for a public review of Schedule 7<sup>5</sup> and the United Nation's Human Rights Committee also expressed grave concerns over the use of counter-terrorism measures in the UK, with particular concerns over what they felt to be religious and ethnic profiling<sup>6</sup>, leading them to call upon the government to conduct a review of such powers.

In 2011/12, **63,902** people were stopped under this power. Examinations lasting for under an hour accounted for **61,662** of encounters during this period and **2,240** were

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2 Home Office (2012a) *Review of the Operation of Schedule 7: A Public Consultation*. London: Home Office. September 2012.

3 See: [http://www.davidlammy.co.uk/Statement\\_on\\_Schedule\\_7\\_of\\_the\\_Terrorism\\_Act\\_2000](http://www.davidlammy.co.uk/Statement_on_Schedule_7_of_the_Terrorism_Act_2000)

4 The Guardian (2011). *Time for an Independent Review of the Terrorism Act's Schedule 7*. 26 May 2011. <<http://www.guardian.co.uk/commentisfree/libertycentral/2011/may/26/terrorism-act-schedule-7>>

5 Anderson, D (2011) *Report on the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*. London: The Stationary Office. 18 July 2011.

[http://terrorismlegislationreviewer.independent.gov.uk/publications/Terrorism\\_Act\\_2000\\_and\\_2006-annual\\_independent\\_review2010.pdf](http://terrorismlegislationreviewer.independent.gov.uk/publications/Terrorism_Act_2000_and_2006-annual_independent_review2010.pdf)

6 See: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights24May2012am.aspx>

examined for over an hour<sup>7</sup>. Since Schedule 7 came into effect in February 2001, there has been a steady increase in its use particularly between the years 2004 and 2010 where it more than doubled. The figures for 2011/12 represent a **3%** reduction in examinations (both under the hour and over the hour), together with a larger reduction of detentions and the taking of biometric samples. This follows a much larger decrease of **23%** in the overall number of Schedule 7 examinations for the 2010/11 period.

The rate of people detained after a Schedule 7 stop remains very low at 1.1 per cent. There are no figures available on the number of Schedule 7 stops that result in arrests, convictions or biometric samples taken in 2011/12.

However, Black and minority ethnic groups make up the majority of those subject to Schedule 7 stops even though they account for a small minority (approximately 11 per cent) of the national population. Asians accounted for 28% of overall Schedule 7 stops (and 5% of the national population), Blacks accounted for 8% of stops (and 3% of the population) and people from other ethnic groups (including Chinese and 'mixed backgrounds') accounted for 21% of stops (but only 3% of the population). The targeting of Black and minority ethnic groups continues to be even more marked when we consider the most intensive Schedule 7 encounters. Of those stops which lasted over an hour, 36% were of Asians, 14% were of Blacks and 27% were of 'other' ethnic groups. Fewer than 12% of stops were of white<sup>8</sup>. It is during these latter encounters that the most intrusive searches and questioning takes places along with the taking of people's biometric information.

One of the few studies to explore the impact of Schedule 7 on Muslim communities is the report produced in June 2011 for the Equality and Human Rights Commission (EHRC) by researchers from Durham University<sup>9</sup>. The EHRC found that Schedule 7 was *having "the single most negative impact on Muslim"* communities within the four cities in the UK which were under study. They reported that

*"[f]or some Muslims, these stops have become a routine part of their travel experience" and that "—this power is silently eroding Muslim communities' trust and confidence in policing."*

Most of the Muslims participating in their focus groups were said to feel: that they were being targeted because of their religious faith and being asked questions that were being used to build up profiles of them and to gather information in general about the communities that they lived in. Negative experiences included repeated stops of the same individuals; the stress caused to the person stopped and to those travelling with them, as they worry about missing flights or losing baggage; the seizure of mobile phones and credit cards; and intrusive and maladroit questions about religious beliefs and community activities. The report concluded that such is the impact of Schedule 7, that there should be a review of the power and it also confirmed anecdotal evidence that people were either deterred from travelling abroad

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7 Home Office (2012b) *Statistical Bulletin HOSB11/12: The Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches*. 13 September 2012. London: The Stationary Office.

8 Ibid. There are no publicly available figures on the numbers of arrests coming out of these examinations or detentions for direct terrorism or terrorism-related offences.

9 Choudhury, T. & Fenwick, H. (2011) *The Impact of Counter-Terrorism Measures on Muslim Communities*. London: The Equalities and Human Rights Commission.

or were travelling great distances across the UK to board at other ports where they felt that they would be less likely to be subjected to a Schedule 7 examination or detention<sup>10</sup>.

## HOME OFFICE PROPOSALS

The Home Office has identified a number of potential changes to the Schedule 7 powers. StopWatch comments on each of these below and also proposes additional reforms later in the proceeding section of this response.

### 1. Reducing the maximum legal period of examination.

- 1.1. Currently the law allows for people to be detained for up to a maximum of 9 hours. This power may only be used at ports and border areas across the United Kingdom and against people believed to be travelling through the port<sup>11</sup>. The Home Office Code of Practice makes it clear that no combination of examination and detention can exceed the 9 hour maximum time period.
- 1.2. The *Gillan and Quinton v. the United Kingdom*, decision noted that stops and searches under section 44 that lasted up to 30 minutes amounted to a deprivation of liberty<sup>12</sup>—that is a significantly shorter time period than the 9 hours currently allowed under Schedule 7.
- 1.3. Between April 2009 and March 2012, only 3% of recorded Schedule 7 encounters continued for over one hour<sup>13</sup>. This indicates that a lowering of the legal maximum period of examination and detention to an hour can take place more easily than previously thought. This reduction would also help limit the inconveniences placed upon individuals examined but not suspected of being involved in terrorism, as well as helping to reduce the likelihood of a person missing their transport.
- 1.4. The Home Office is consulting on what the maximum period of time an examination should last before it then becomes a detention. It is consulting on whether this should be one hour, three hours, six hours, left flexible for officers to base it on specific circumstances or another set period
- 1.5. StopWatch does not believe that any combination of an examination and/or detention should last beyond a maximum total of one hour. Figures quoted in paragraph 1.3. indicate that it is feasible to cap the total period to an hour after which a person should be released or detained further but under an arrest.

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10 Also see: Scottish TV (STV) *Ethnic minority representatives invited to airport security open day*. 1 June 2011.

<http://news.stv.tv/scotland/west-central/253622-ethnic-minority-representatives-invited-to-airport-security-open-day/>

11 Examining Officers under the Terrorism Act 2000: Code of Practice Issued pursuant to paragraph 6(1) of Schedule 14 of the Terrorism Act 2000. Home Office 30<sup>th</sup> June 2009.

12 ECtHR, *Gillan and Quinton v. the United Kingdom*, Application no. 4158/05, judgment of January 12, 2010,

13 Home Office (2012a)

- 1.6. StopWatch welcomes the proposal to lower the legal maximum period of examination. We recommend that any combination of an examination and/or detention should not last longer than a combined total of an hour. At the one hour mark, the person should either be released or arrested and provided with all the rights associated with an arrest.**
- 2. Requiring a supervising officer to review at regular intervals whether the examination or detention needs to be continued.**

  - 2.1. The Home Office is proposing to introduce greater supervision into a Schedule 7 examination or detention whereby a supervising officer takes a decision every hour as to whether the detention should continue or cease.
  - 2.2. This move has already been supported by Assistant Chief Constable Marcus Beale, who leads the counter-terrorism portfolio for West Midlands Police<sup>14</sup>.
  - 2.3. StopWatch welcomes the proposal to require a supervising officer to review at regular intervals whether or not the examination or detention needs to be continued. However, given our proposal to reduce the maximum legal examination/detention period to 1 hour, the supervising officer should make a decision within the first 30 minutes and, then again upon the hour, to release the individual or arrest them under suspicion of being involved in terrorism or for any other offence discovered.**
- 3. Requiring examining officers to be trained and accredited to use Schedule 7 powers.**

  - 3.1. Currently, a wide array of ports and border staff are empowered to use Schedule 7 including police constables, immigration and customs officers or anyone authorised by them. There does not appear to be any mandatory training for all of these 'examining officers' to undergo before applying the power. According to David Anderson QC, this may explain the fluctuations in the use of Schedule 7 across ports which *"[s]eem to be the consequence, at least in part, of different emphases during officer training [and] they point up the need for a clear and consistent policy on when examination ends and detention begins"*.<sup>15</sup>
  - 3.2. In his review of officer training for ports in 2010, Anderson also pointed to how ports-specific training in the Behavioural Assessment Screening System (BASS) had been offered since that year and that it was anticipated that by the end of 2011, 95% of all ports counter-terrorism officers, and a

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14 Police Oracle (2012) 'CT: Strong Support For Supervision Changes'. 7<sup>th</sup> November 2012. See: [http://www.policeoracle.com/news/CT-Strong-Support-For-Supervision-Changes\\_57702.html](http://www.policeoracle.com/news/CT-Strong-Support-For-Supervision-Changes_57702.html)

15 Anderson, D (2012) *The Terrorism Acts in 2011: Report on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*. London: The Stationary Office. June 2012. p.103

proportion of airport dedicated uniformed police, would have been BASS trained<sup>16</sup>.

- 3.3. StopWatch is yet to see a comprehensive evaluation of BASS training, or indeed Passenger Assessment Screening System (PASS), it's sister programme. Until then, we reserve our judgement on the effectiveness of such an approach.
  - 3.4. **Officer training to use Schedule 7 should be developed in consultation with a range of legal, academic and equality and community groups and subject to independent and public evaluation.**
4. **Giving individuals examined at ports the same rights to publically funded legal advice as those transferred to police stations.**
    - 4.1. A person detained under Schedule 7 and served a TACT2 form is informed of their entitlement to legal advice from a lawyer. Although this right may be requested by the person examined or detained, it may be delayed with the authorisation of someone from the rank of superintendent<sup>17</sup>.
    - 4.2. The Home Office proposes to confer upon individuals detained at ports the same rights to legal advice as those detained at police stations. It is also considering whether or not to increase the maximum legal period of time a person is detained to allow legal representatives to arrive at the port.
    - 4.3. StopWatch strongly supports the strengthening of the right to legal advice for those detained and their right to legal advice before an examination/detention commences. We do not, however, share the same views expressed by some ports officers that waiting for a legal representative would take too long, particularly since more creative systems can be easily developed. This includes: enabling detainees to gain legal advice over a telephone or requiring ports officers to partner with local legal practices who could arrive much sooner than those based at more geographically distant locations. We believe that this would also help reduce the excessive use of Schedule 7 powers such as unnecessary or maladroit questioning and the taking of people's biometric information. It would also provide a degree of protection for police officers by ensuring that they do not exceed their powers and always adopt best practice.
    - 4.4. **People detained at ports should be entitled to consult with a legal representative in line with the rights given to those detained at a police station, even if this is via telephone.**
    - 4.5. **Port officers should partner with local legal practices which can be called upon to provide advice to individuals detained under Schedule 7 in order to reduce the time spent waiting for legal representatives to arrive.**

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16 Anderson (2011).

17 Home Office (2009) *Code of Practice to Examining Officers under Schedule 7 of the Terrorism Act 2000*. Issued Pursuant to Paragraph 6(1) of Schedule 14 to the Terrorism Act 2000. London: The Stationary Office.

- 4.6. StopWatch does not, however, support the proposal to increase the maximum legal examination/detention period in order to wait for the lawyer to arrive. In this case, legal advice should be provided to the individual on the phone and more creative solutions found.**
- 5. Amending the basis for undertaking strip searches to require suspicion and a supervising officer's authority.**
- 5.1. The Home Office proposes to increase the criteria for which a decision to conduct strip-searches of individuals is made. This includes introducing reasonable suspicion to believe that the person is concealing an item useful for terrorism and to require the authority of a supervising officer.
- 5.2. The Home Office Code of Practice for examining officers under Schedule 7 already informs officers that there must be reasonable suspicion that such an item is being concealed in order to carry out a strip-search. In addition, the now defunct National Police Improvement Agency (NPIA) also produced practice advice which went much further in outlining how such a search should be conducted and recorded<sup>18</sup>.
- 5.3. Figures on the number of strip-searches that have been conducted in previous years remains unknown although the Home Office consultation document states that this is extremely rare.
- 5.4. StopWatch welcomes the proposal to increase the threshold of suspicion to ensure that strip-searches only take place with reasonable suspicion to believe that an individual is hiding an item useful for terrorism.**
- 5.5. StopWatch also calls for the proper recording of these encounters which should be collated centrally and published in the quarterly and annual Home Office statistical bulletins on arrests and outcomes on the use of counter-terrorism powers.**
- 6. Repealing the power to take intimate DNA samples from persons detained during a Schedule 7 examination.**
- 6.1. People detained under Schedule 7 can have biometric data taken from them under Schedule 8 of the same Terrorism Act 2000. This includes samples of their fingerprints taken as well as both intimate DNA samples (e.g. blood, semen and pubic hair) and non-intimate (e.g. mouth swabs). This information is held on the same database as convicted terrorists<sup>19</sup> and, until

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18 Home Office (2009) p.16-17; NPIA (2009) *Practice Advice on Schedule 7 of the Terrorism Act 2000*. London: National Police Improvement Agency. p.35-38

19 MPA (2011) *Protecting the Innocent: The London Experience of DNA and the National DNA Database*. Report by the MPA Civil Liberties Panel. London: The Metropolitan Police Authority. June 2011.

recently, was held indefinitely regardless of the outcome of a Schedule 7 examination or detention.

- 6.2. Biometric information was taken from people on **769** occasions between April 2010 and March 2011, and on **592** occasions between April 2011 and March 2012. National data does not break these figures down into sub-categories to identify what proportion relate to intimate biometric data and what proportion relate to non-intimate samples.
- 6.3. The Home Office is proposing to retract the taking of intimate DNA samples from people detained under Schedule 7 which is welcomed by StopWatch, however, we believe that it can go much further.
- 6.4. The Protection of Freedoms Act 2012 reduced the retention period of non-intimate DNA & Fingerprint profiles of people examined or detained under Schedule 7 from indefinitely to six months. Whilst this reduction was a considerable move towards a more proportionate use of the power, the retention of biometric data from people not suspected of any crime still fails to strike the right balance in treating innocent people proportionately and fairly. Their data is not only stored on the national DNA database but also on the counter-terrorism database which is specifically dedicated to storing data on convicted terrorists.
- 6.5. In fact, compared to the other aspects of this power, nothing has caused greater discontent amongst people who have been examined or detained under Schedule 7. Not only has this made people feel criminalised but it has significantly undermined faith in counter-terrorism.<sup>20,21</sup> The police have sufficient powers to take a person's biodata upon arrest of an individual and therefore there is no compelling reason why this policy should continue.
- 6.6. StopWatch is aware of the practice in some ports whereby biometric data is taken from individuals *before* any search or questioning takes place (e.g. Gatwick Airport). This is of huge concern since it demonstrates a blanket biometrics retention regime, regardless of the result of a detention, and a blatant disregard for fairness by adopting a policy which takes this data from people as a matter of routine, or *standard procedure* rather than based on any evidence or intelligence arising from the encounter.
- 6.7. Furthermore, no information has been published on the number of people arrested or convicted as a result of a match on the DNA or fingerprint databases after having been taken under a Schedule 7 examination or detention. It is therefore hard to understand why officers insist on taking biometric data from people not suspected of terrorism, particularly in light of the resultant feelings of criminalisation felt by people who have been through such a process.

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20 Verkaik, R. (2010) *They asked me where Bin Laden was, then they took my DNA!*. The Independent Newspaper. 21 Sept 2010.  
<http://www.independent.co.uk/news/uk/home-news/they-asked-me-where-bin-laden-was-then-they-took-my-dna-2084743.html>

21 MPA (2011).

- 6.8. Finally, despite the changes highlighted above by the Protection of Freedoms Act 2012, there has been no public announcement that the biometric data taken from people previously examined or detained under Schedule 7, and held for over the six month retention period, has been destroyed. An announcement should be made by the Home Secretary to reassure individuals affected and concerned and to instil greater confidence in the National DNA Database.
- 6.9. **The power to take non-intimate biometric data should be repealed along with the current proposal by the Home Office remove the power to take intimate biometrics.**
- 6.10. **A public statement should be made confirming the destruction of both the physical samples and database records of biometric data taken from innocent people at ports, in line with the requirements of the Protection of Freedoms Act 2012, so as to reassure those concerned.**

## FURTHER PROPOSALS

In addition to the reforms proposed by the Home Office, StopWatch also wishes to see greater changes to the law and practice of Schedule 7 powers. These are discussed below.

### 7. Revising the law

- 7.1. The proposals to amend the current legislation do not go far enough to meet European Convention of Human Rights standards.
- 7.2. A 2010 European Court of Human Rights (ECtHR) judgment concerning these provisions, in the case of *Gillan and Quinton v. the United Kingdom*, held that Section 44 of the Terrorism Act 2000 to be “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.”<sup>22</sup> Finding a violation of the right to respect for private life under Article 8 of the *European Convention on Human Rights* (ECHR), the Court also noted the clear risk of arbitrariness in the granting of such broad discretion to police officers. It highlighted the risks of discriminatory use of such powers, given that the available statistics demonstrated that Black and Asian people were disproportionately affected by the powers.<sup>23</sup> The *Gillan* decision also noted that stop and search under Section 44 amounted to a deprivation of liberty within the meaning of Article 5 § 1.<sup>24</sup>
- 7.3. We content that Schedule 7 confers powers which are not sufficiently circumscribed nor subject to adequate legal safeguards against abuse and do not meet the standards set in *Gillan*. The onus should be on the Home Office and police forces to justify those powers as *necessary* in the interests

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22 ECtHR, *Gillan and Quinton v. the United Kingdom*, Application no. 4158/05, judgment of January 12, 2010, at 87

23 *Gillan and Quinton v. the United Kingdom*, at 85.

24 *Gillan and Quinton v. the United Kingdom*, at 57.

of national security, *proportionate* in their application and *effective*. As yet, this case has not been made.

- 7.4. On *necessity* and *effectiveness*, there is a severe limitation in the current data published on the outcome of the power. However, previous data shows that between 1st January 2004 and 30th September 2009<sup>25</sup>, there were:
- **10,400** examinations under Schedule 7
  - **1,110** detentions
  - **99** arrests (17 charged under direct terrorism offences and 31 under other terror-related offences)
  - **43** convictions<sup>26</sup>

This illustrates an extremely low rate of convictions as a portion of those examined and then detained, especially considering that the figure provided for convictions includes successful charges for multiple offences. In fact, Anderson asserted that:

*It is fair to say that the majority of examinations which have led to convictions were intelligence-led rather than based simply on risk factors, intuition or the "copper's nose". Indeed, despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind.<sup>27</sup>*

This demonstrates how, despite Schedule 7 being an investigative power requiring no suspicion, in practice, the successful outcomes were the result of some degree of suspicion linked to prior intelligence which led to the decision to examine or detain a person in the first instance. Indeed, the police have other stop powers upon which they can rely to question and search individuals at ports, not least under Section 43 of the Terrorism Act which requires reasonable suspicion and Section 47A which requires no suspicion for use during periods where a terrorist attack is anticipated.

Therefore, Schedule 7 legislation and practice, as it currently stands, fails to meet both tests on *necessity* and on *effectiveness*. Introducing a minimum level of suspicion to examine/detain people based on objective facts and intelligence will be nothing out of the ordinary and would bring the legislation and code of practice in line with successful practice at ports and ECHR standards.

- 7.5. On *proportionality*, we have already made the arguments above which demonstrate that, as the law and practice currently stand, Schedule 7 also fails the test on proportionality. This is due to the feelings of criminalisation of people not suspected of any crimes owing to: the length of detention; inconveniences placed upon them; the failure to treat them differently to suspected terrorists, for example by taking their biometric information or the lack of a right to remain silent- a right given to actual terrorist suspects but

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25 <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2992.pdf>

26 This does not equate to the number of individuals conviction because this figure also represents multi-convictions of individuals found guilty of more than one offence

27 Anderson (2012) p.111

not examinees or detainees under Schedule 7; and, as the statistics point to, the fact that people from ethnic minority backgrounds are more likely to be subject to the more extreme elements of the power such as being examined longer than an hour or being detained.

- 7.6. The current reforms proposed by the Home Office, whilst welcomed, do nothing to tighten the law to meet ECHR standards or comply with *Gillian*. This is extremely concerning particularly in light of Schedule 7 being governed outside the Police and Criminal Evidence Act (PACE) 1984, the regulatory framework for other stop and search powers.
- 7.7. **StopWatch strongly recommends the introduction of a minimum threshold of suspicion upon which individuals can be stopped based upon objective facts, information, and/or intelligence, so as to minimize the risk of arbitrary and/or discriminatory application of stop and search powers. This, along with the retraction of the taking of any biometric data and our other recommendations, will help bring the power in line with the *Gillian* case and ECHR standards.**
- 7.8. **Schedule 7 should be governed under PACE, the regulatory framework for other stop and search powers.**

## **PROFESSIONAL PRACTICE AND EXTERNAL OVERSIGHT**

### **8. Revising the Codes of practice**

- 8.1. Under Schedule 14 of the Terrorism Act 2000, the UK Home Office must issue a code of practice for the use of Schedule 7 by officers upon whom this power is conferred<sup>28</sup>.
- 8.2. The National Police Improvement Agency (NPIA) produced additional practice advice to examining officers on behalf of the Association of Chief Police Officers (ACPO)<sup>29</sup>. This went further than the Home Office in providing officers with the necessary clarification on how Schedule 7 powers should be applied and it attempted to ensure a greater degree of standardised treatment of examinees/detainees across the UK.
- 8.3. Our submission thus far has touched upon a number of aspects relating to both the Home Office's code of practice and the NPIA's practice advice. However, neither provide any guidance nor duty upon officers to help people examined or detained under Schedule 7 rearrange any transport missed as a result of the encounter.
- 8.4. We believe that officers have a duty of care over those they examine or detain which also extends to minimising the 'knock-on effects' that can often arise from an encounter; this includes helping people to rearrange any transport missed. This would not only minimise the inconveniences placed

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28 Home Office (2009)

29 See: NPIA (2009).

upon people, but it would also go a long way to restoring faith in counter-terrorism and policing as a whole.

- 8.5. The Home Office code of practice should be amended to reflect all of the recommendations made in this submission by StopWatch.**
- 8.6. The NPIA Practice Advice to examining officers should also be amended to reflect the recommendations made in this submission by StopWatch and should continue to be in effect under the NPIA's successor organisation, the national College of Policing.**
- 8.7. Both the Home Office's code of practice and the NPIA practice advice should be amended to ensure that people examined or detained under Schedule 7 are given the necessary support in rearranging any transport missed.**

## **9. Data Transparency**

- 9.1. The Home Office only started to regularly publish annual data on Schedule 7 in October 2011 for that month's quarterly statistical bulletin on terrorism powers and outcomes<sup>30</sup>. This was at a time when a growing number of Parliamentarians, community groups and various organisations expressed concerns over the use of the power.
- 9.2. StopWatch notes that the number of arrests and convictions arising from Schedule 7 were not included in the most recent statistical bulletin<sup>31</sup> and we feel that this data should always be included. Such data will provide partners and communities with an idea of the utility of the power and we believe that it is in the interest of ports and border policing to publish this data to support its justification that this power is both necessary and effective.
- 9.3. The only data regularly published by the Home Office on arrests and convictions arising from an examination or detention relate to the failure to comply with such encounters which, since September 2011, totalled **23** occasions. Failures to comply do *not* mean that the individual has been found to be guilty of supporting or being involved in terrorism.
- 9.4. The only other data released was in response to a question in the House of Lords by Lord Nazir Ahmed which has already been included in paragraph 7.4 above. The fact that retrospective data was released to answer this question demonstrates the possibility that this data is in fact being recorded but is neither being shared amongst other policing agencies nor disclosed to the public.
- 9.5. Schedule 7 data should always be included in each Home Office quarterly statistical bulletin on the use of counter terrorism powers as**

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30 Home Office (2011) *Statistical Bulletin HOSB15/11: The Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches*. London: The Stationary Office. October 2011.

31 Home Office (2012b).

**a way of ensuring transparency and increasing community confidence in policing.**

- 9.6. Data on the number of arrests and successful convictions arising from Schedule 7 powers should also be published to show that it is necessary and effective.**

## **10. External Regulation**

- 10.1. StopWatch welcomes the greater interest into the operation of Schedule 7 shown by policing bodies like the Association of Chief Police Officers (ACPO), senior officers in the Metropolitan Police Service and the Independent Police Complaints Commission (IPCC), all of whom have a key role to play in identifying best practice and addressing any excessive application of the power.
- 10.2. Her Majesty's Inspectorate of Constabulary (HMIC) has recently initiated a review of the use of stop and search powers by police forces with the aim of determining *"how effectively and fairly the Police Service is using the power to stop and search in the fight against crime"* and to identify *"how the powers can be used in a way that builds the public's trust in the police, supporting the legitimacy of the Service rather than eroding it"*<sup>82</sup>. Having made a submission to the HMIC's consultation for their business plan and priorities from the year 2013 for such an inspection, StopWatch welcomes this initiative by the HMIC. We recommend that the HMIC also inspects the way that forces are using Schedule 7 powers in the same way that they are inspecting other stop powers.
- 10.3. Furthermore, the IPCC have lowered their threshold for a referral to be made in relation to Schedule 7 such that it makes it easier for members of the public to complain about their experiences. All Schedule 7 complaints are currently automatically forwarded onto the IPCC to investigate. This is a welcomed move towards promoting confidence in the complaints process by removing the duty of the police force responsible for the stop from handling that process.
- 10.4. Thus far, 23 cases have been referred to the IPCC from members of the public. This figure should not be taken as a reflection of frustrations with Schedule 7 by people and communities across the UK. It is widely known that the people most affected by state powers are less likely to complain and have greater mistrust in complaints processes. In fact, our own work has revealed that many people feel too scared to make a complaint in light of the wide-ranging nature of this power and particularly where attempts were made to recruit these individuals as informants.
- 10.5. Ports officers should be mindful of the impact that stop and accounts or stop and searches which occur outside of ports can have on individuals examined or detained under Schedule 7. Ports policing should not be divorced from the everyday reality of people living in areas where stops are

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32 See: <http://www.hmic.gov.uk/inspections/stop-and-search/>

a regular feature of their lives which would undoubtedly shape their interaction with ports officers. Conversely, ports officers should be mindful of the impact that their behaviour will have on people's perceptions of the police force as a whole and how their experience of policing at ports could shape their levels of trust in police officers back in their local communities.

- 10.6. StopWatch is aware of the difficulties that the IPCC have had in accessing the information necessary to ensure that it can investigate Schedule 7 complaints properly. We find it unacceptable that some police forces and ports officers have not been as forthcoming as they could be in providing the IPCC with the necessary information for their investigations.
- 10.7. StopWatch understands the underlying concerns about sharing sensitive information with the public which may arise from an IPCC investigation particularly where this risks revealing sources of intelligence; however, we find it hard to understand the mistrust shown by the relevant police forces in sharing the necessary information with the IPCC Commissioners, some of whom have been vetted to the highest levels of security clearance.
- 10.8. The Home Office should support the HMIC review of stop and search powers and, in particular, their inspection into the use of Schedule 7 at ports and borders.**
- 10.9. Statistics on the number of complaints made against each police force and their outcomes should be published to increase community confidence in ports policing and in regulatory bodies such as the IPCC.**
- 10.10. The Home Office and police forces should support and fully comply with the IPCC during Schedule 7 investigations. This includes sharing any information requested by the IPCC in order for it to fulfil its functions as the regulatory body of police practice.**
- 10.11. Information should be provided to all people examined/detained on how to complain should they desire to do so later.**