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28th March 2012

Dear Sir/Madam,

RE: CODE OF PRACTICE FOR EXERCISE OF STOP AND SEARCH UNDER THE TERRORISM ACT 2000 (PUBLIC CONSULTATION)

British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available free of charge to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.

We welcome the opportunity to comment on the draft Northern Ireland Code of Practice regarding the exercise of stop and search powers under the Terrorism Act 2000 as part of the implementation of ECtHR judgment in *Gillan and Quinton v UK*.

Our position remains that legal provisions in relation to the prevention of acts related to terrorism can and should be dealt by the statutory scheme provided by domestic criminal law in accordance with compliance with the European

Convention of Human Rights and international human rights law norms, and this is the case with this proposed Code of Practice under the powers of the Terrorism Act 2000.

However, as current laws exist, we make comments below on the proposed Code of Practice for the authorisation and exercise of stop and search powers

A Code of Practice

We note that this is a Code of Practice specific to Northern Ireland, even though the legislation applies in England and Wales. We do not see why there needs to be a different regime in Northern Ireland, and believe that this separate treatment entrenches differences in a way that impedes the normalisation that is so desirable for Northern Ireland. This perpetuation is not helpful in developing civil society after the conflict in Northern Ireland.

Further, we consider a Code of Practice is of limited value as it is only guidance. For it to be a strong and enforceable set of rules we consider that it should be placed within the statute to which it applies as a Schedule. Otherwise we fear that despite the expressed good intentions of the Consultation the Code will be disregarded at the times when it is imperative to be adhered to. There is also a clear risk that those who fail to adhere to the Code would not be held accountable, and that its effect would be meaningless as a result.

Further, we are not clear how these powers and this Code would fit with similar powers under the prevailing powers of section 21 and section 24 of the Justice and Security (Northern Ireland) Act 2007 (JSA 2007) which have so far failed to have been repealed in Northern Ireland despite the ECtHR judgment.

The adequacy of the tests

We consider it an improvement that stop and searches under sections 43 and sections 43A of the 2000 Act require reasonable suspicion on the part of an officer for the action to be legal, we remain concerned that under 47A no such reasonable suspicion is required. This makes disproportionate and subjective decision making more probable. Specifically regarding section 21 of the JSA 2007, our experience is that this power has been used disproportionately and often unjustifiably. The Northern Ireland provision is currently subject to litigation in the High Court in Belfast.

In particular in this proposed Code of Practice we notice that at paragraph 6.4 it reads: "suspicion that a person is a terrorist may arise from the person's behaviour at or near a location which has been identified as a potential target for terrorists". This is allows too much scope for subjectivity and vagueness, which

are inimical to the proportionate, fair and accountable decision making which would be the standards of a human rights compliant system.

Similarly, we are concerned at paragraph 7.12 at the recommendation that an authorising police officer (rank of ACC or above) should make "an assessment in the round about what is the most appropriate operational response". This is too vague; there should be clear criteria against which facts can be measured so that a proportionate and rational response is ensured, not simply the colloquial of assumption of an operational assessment 'in the round'.

The potential under paragraph 7.14 for the powers under section 47A to apply to the whole of Northern Ireland for 14 days is a serious problem, amounting *prima facie* to an ability for a single senior police officer to declare something approaching a type of emergency rule throughout the whole region (as we have noted) on a vague and subjective operational needs basis. We note that under paragraph 7.16, the Secretary of State would have to be informed of this, and would have the power to cancel such an authorisation, but the fact remains that this seems a disproportionately extensive power for the police to be given and wield. This is particularly the case as it amounts to the suspension of key aspects of normal policing with a consequent likely loss of individual liberties, and does not require reasonable suspicion in order to be applied by constables on the ground. In addition, this provision restricts the potential success of a judicial challenge brought against the Secretary of State, in relation to the area which s/he has authorised the powers to cover. There is no provision in the proposed Code of Practice as to what form of legal challenge would be available to the decision of the Secretary of State if he or she upholds the authorisation.

While we note the attempted safeguard at paragraph 7.28 – "an authorisation renewed continuously without justification is not permitted under these provisions" – we are not convinced that this is an adequate protection against these powers swiftly becoming entrenched in their use, rather than as an expedient temporary response without recourse to judicial challenge.

We agree at paragraph 7.8 that "an authorisation should not be given on the basis that the use of the powers provides public reassurance or that the powers are a useful deterrent or intelligence-gathering tool". Misuse of these powers has the potential to seriously erode individual liberty, and it is essential that these potential dangers are identified and guarded against.

Data, discrimination, and scrutiny

We believe that high quality data must be gathered by officers enforcing any stop and search powers, and that this data should be made widely available so

that the public can keep the use of the powers under effective scrutiny. We also believe that as disproportionate and discriminatory use of these powers against particular communities remains a serious threat, that the data gathered should include equalities data assessment wherever possible.

This is linked to the need to ensure that the powers are not used in a discriminatory way against particular groups. While some measures are described in the Code of Practice as methods to attempt to prevent this, we note that there appears to be, for example, insufficient protection for women who may need to keep their heads or faces covered in the presence of men (see paragraphs 9.12 and 9.13, where it is noted that for example "a person's hair may be searched in public" and that a search "should preferably be made by an officer of the same sex as the person searched, though this is not a requirement of the legislation"). Where this is dealt with at point 4 of the Notes for guidance, it is insufficient protection against discrimination and consequent distress to say "some people customarily cover their heads or faces for religious reasons. Where there may be religious sensitivities about ordering the removal of such an item, the officer should permit the item to be removed out of public view. Where practicable, the item should be removed in the presence of an officer of the same sex as the person and out of sight of anyone of the opposite sex". This last should be guaranteed, not optional.

At paragraph 10.2 it is noted that "in all cases the officer must ask for the name, address and date of birth of the person searched, but there is no obligation on a person to provide these details, unless they are obliged to provide it under other relevant legislation and no power of detention if the person is unwilling to do so". The Code should say that the officer in this situation should proactively make clear to the person stopped that they are under no obligation to provide this information.

At paragraph 13.1 it is stated that oversight will be provided by the Northern Ireland Policing Board. The Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, should have the key oversight of the implementation of these powers as they reflect the existing powers in Northern Ireland section 21 of JSA 2007, and his or her views on this should feature prominently in the general reports of the Independent Reviewer. This is justified by the similar issues raised by stop and search under both pieces of legislation – it would seem irrational to have independent oversight for one regime and not for another, very similar, one.

Devolution matters

Given the devolution of law and justice matters to the Northern Ireland Assembly, it seems inappropriate that the Code at 7.16-18 indicates that the Secretary of

State would be notified of any authorisation made under s. 47A and would then have the power to cancel the authorisation. We consider that such information and associated decision making powers should go to the Minister for Justice in Northern Ireland.

Yours faithfully,

Christopher Stanley

Christopher Stanley
Research and Casework Manager