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28 March 2012

Dear Sir/Madam,

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

As you may know, 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.

Thank you for inviting us to comment on the draft Northern Ireland Code of Practice for the exercise of Stop and Search powers under the Terrorism Act 2000.

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Our position on terrorism legislation generally is that we feel that these threats can and should be dealt with under the normal criminal law, and this is the case with these powers under the Terrorism Act 2000 as well.

However, as these powers exist, we make comments below on the strengths and weaknesses of the Code of Practice.

A Code of Practice

We note that this is a Code of Practice specific to Northern Ireland, even though the legislation applies in England, Scotland and Wales. We do not see why there needs to be a different regime in Northern Ireland, and believe that this separate treatment entrenches difference in a way that impedes the normalisation that is so desirable for Northern Ireland.

We think that a Code of Practice is only of limited value, as it is only guidance. For it to be a strong and enforceable set of rules we believe that it should be placed within the statute to which it applies. Otherwise we fear that despite good intentions it will be disregarded at the times when it is most important. There is also a clear risk that those who fail to adhere to the Code would not be held accountable, and that it would be relatively meaningless as a result.

Further, we are not clear how these powers and this Code would fit with similar powers under s. 21 and s. 24 of the Justice and Security (Northern Ireland) Act 2007.

The adequacy of the tests

We believe it is an improvement that stops and searches under s. 43 and s.43A of the Act now require reasonable suspicion on the part of a constable for the action to be legal, we remain concerned that under 47A no such reasonable suspicion is required. This makes irrational and disproportionate decision making more likely.

In particular in the Code of Practice we notice that at 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 hallmarks of a human rights compliant system.

Similarly we are concerned at 7.12 at the recommendation that a senior police officer should make "an assessment in the round about what is the most appropriate operational response". Again this seems much too vague. There

should be clear criteria against which facts can be measured so that a proportionate and rational response is ensured.

The potential under 7.14 for the powers under s. 47A to apply to the whole of Northern Ireland for 14 days is a serious problem, amounting on the face of it to an ability for a single senior police officer to declare something approaching a type of emergency rule throughout the whole region on (as we have seen) a vague and subjective basis. We note that under 7.16 the Secretary of State would have to be informed of this, and would have the power to cancel it, but the fact remains that this seems a disproportionately huge power for the police to 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.

While we note the attempted safeguard at 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 quickly becoming permanent in their use, rather than an expedient temporary response.

We strongly agree with 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 diminish liberty, and it is essential that such dangers are identified and guarded against.

Data, discrimination, and scrutiny

We believe that high quality data must be gathered by officers conducting any stop and search, 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 wherever possible (e.g. gender, race/ethnicity, disability, age, and religion). [**CS do you think this is alright or likely to be perceived as discriminatory in itself? This is normally a request of equalities groups as it enables tracking of who is being stopped disproportionately, but I'm not sure if it's regarded differently in NI. For example the Runnymede Trust was able to do a bunch of research showing disproportionate stops of BME men because this data was collected during searches, and in NI you would think that it would be important to track which religions were being stopped, but I was wondering if a police officer demanding to know a person's religion might cause more trouble?]

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 as methods to attempt to prevent this, we notice 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 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 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 13.1 it is said that oversight will be provided by the Northern Ireland Policing Board. The Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, currently Robert Whalley, should have key oversight of the implementation of these powers, and his views on this should feature prominently in his general reports. 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 it. We believe that such information and associated decision making powers should go to the Minister for Justice in Northern Ireland.

Yours sincerely,

Christopher Stanley
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