



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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**Terrorism Act 2000  
(Remedial) Order 2011:  
Stop and Search  
without Reasonable  
Suspicion**

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**Fourteenth Report of Session 2010–  
12**





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# **Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion**

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**Fourteenth Report of Session 2010–  
12**

*Report, together with formal minutes and  
written evidence*

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The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee is: Mike Hennessy (Commons Clerk), Rob Whiteway (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Claudia Rock (Committee Assistant), Greta Piacquadio (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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### Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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## Summary

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The Terrorism Act 2000 (Remedial) Order 2011, an urgent remedial order concerning exceptional counter-terrorism powers to stop and search without reasonable suspicion, was made by the Home Secretary on 17 March 2011 and came into force on 18 March 2011. The purpose of the Order is to remove the incompatibility of the current statutory powers to stop and search without reasonable suspicion (in sections 44 to 46 of the Terrorism Act 2000) with the right to respect for private life in Article 8 of the European Convention on Human Rights (“ECHR”). The European Court of Human Rights, in the case *Gillan and Quinton v UK*, found that those powers violated the right to respect for private life because the powers were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.

As required by Standing Orders, we are reporting to each House our recommendations as to whether the Order should be approved in the form in which it was originally laid before Parliament; whether it should be replaced by a new Order modifying its provisions; or whether it should not be approved. We are also reporting as to whether or not the Government is justified in having recourse to the urgent procedure (under which the Order comes into force immediately, before any opportunity for parliamentary scrutiny).

The Home Secretary is required to make a statement to both Houses, 60 days after the Order is made, which must set out any changes the Minister considers it appropriate to make to the original Order. Although not required to do so by Standing Orders, we have decided to report in time for the Home Secretary to take account of this Report in her statement.

We accept the necessity of introducing a replacement stop and search power which is exercisable without reasonable suspicion but only available in tightly circumscribed circumstances. We agree with the Government that there are compelling reasons for using the remedial order procedure to introduce the replacement power to stop and search without reasonable suspicion. We note that proceeding by way of a remedial order, rather than the announcement of administrative guidance, provides much greater opportunity for parliamentary scrutiny of the detail of the replacement power. However, we recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the existence of an operational gap in the absence of a power to stop and search without reasonable suspicion since that power was suspended. In the absence of detailed scrutiny of such evidence, it is difficult for us and Parliament to reach a view as to the appropriateness of proceeding by urgent remedial order, rather than by the normal procedure. If such evidence is provided to the satisfaction of both Houses, we are satisfied that although this is an unusual exercise of the power to make an urgent remedial order, it is appropriate and justifiable to do so in the circumstances.

We also recommend that the Order be replaced with a new Order modifying the provisions of the original Order in the ways specified in this Report, because the Order in its current form does not go far enough to remove the incompatibility identified by the European Court of Human Rights in *Gillan* and therefore risks giving rise to further breaches of Convention rights. We recommend, in particular, that the Order should be modified so as to require the officer authorising stop and search without reasonable suspicion to have a reasonable basis for his or her belief as to the necessity of the authorisation and to provide an

explanation of those reasons. The Order should also prevent the renewal of authorisations other than on the basis of new or additional information or a fresh assessment of the original intelligence that the threat remains immediate and credible. The Order should be modified to require prior judicial authorisation of the availability of the power to stop and search without reasonable suspicion; and require authorisations to be publicly notified once they have expired, so far as consistent with the protection of intelligence sources.

We also recommend that, in view of concerns about the racially discriminatory exercise of the previous power, the Code of Practice should be strengthened and the role of the independent reviewer bolstered in relation to this exceptional counter-terrorism power in order to enhance political accountability for its exercise.



# 1 Introduction

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## The purpose and effect of the Order

1. The Terrorism Act 2000 (Remedial) Order 2011, an urgent remedial order concerning exceptional counter-terrorism powers to stop and search without reasonable suspicion, was made by the Home Secretary on 17 March 2011 and came into force on 18 March 2011.<sup>1</sup>

2. The purpose of the Order is to remove the incompatibility of the current statutory powers to stop and search without reasonable suspicion (in sections 44 to 46 of the Terrorism Act 2000) with the right to respect for private life in Article 8 of the European Convention on Human Rights (“ECHR”). The current powers 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. The European Court of Human Rights, in a case called *Gillan and Quinton v UK*, found that those powers violated the right to respect for private life because the powers are “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.”<sup>2</sup>

3. A concise but informative explanation of the incompatibility that the Remedial Order is intended to remove, and of the Government’s reasons for doing so by way of an urgent remedial order, is contained in the “Required Information” document provided by the Government.<sup>3</sup> In short, the effect of the order is to bring into force with immediate effect the Government’s response to the judgment of the European Court of Human Rights in *Gillan*, which is contained in the Protection of Freedoms Bill currently before Parliament. The Government initially responded to that judgment by the Home Secretary announcing administrative guidance as to how the powers should henceforth be operated by the police so as to avoid incompatibility with the ECHR. That guidance effectively suspended the use of the power to stop and search without reasonable suspicion. The Government’s justification for now proceeding by way of urgent remedial order is that there is an urgent need for a more tightly circumscribed replacement power and that without such a power being made immediately available there will be a significant gap in the powers available to counter terrorism.

## Parliamentary scrutiny of urgent remedial orders

4. A remedial order is a fast-track method for removing incompatibilities with Convention Rights which emerge from the judgments of courts, including the European Court of Human Rights.<sup>4</sup> The normal procedure for making a remedial order is for a draft of the Order to be laid before both Houses and approved by affirmative resolution of each House after the end of a 60-day period, during which we are required by our Standing Orders to

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1 SI 2011 No. 631.

2 *Gillan and Quinton v UK* (Application no. 4158/05). The judgment became final on 28 June 2010 when the UK’s request for the case to be referred to the Grand Chamber was refused.

3 <http://www.homeoffice.gov.uk/>. The content of the information which the Government is required to provide with a Remedial Order is prescribed in para. 5 of Schedule 2 to the Human Rights Act 1998.

4 Remedial Orders are provided for in the Human Rights Act 1998, ss. 4, 10 and Schedule 2.

report on the draft. The recent Remedial Order concerning the certificate of approval scheme for marriages of people subject to immigration control, on which we reported earlier this Session, was a remedial order made under the normal procedure.<sup>5</sup>

5. However, remedial orders may also be made by the urgent procedure, if it appears to the Minister that, because of the urgency of the matter, it is necessary to make a remedial order without a draft being first approved by each House.<sup>6</sup> In such cases, the Minister may make the Order, which comes into force immediately. The Minister must lay the Order before Parliament after it is made, accompanied by “the required information”, which must include an explanation of the incompatibility which the Order seeks to remove, a statement of the reasons for proceeding by way of remedial order, and for making an Order in those terms.<sup>7</sup> The Terrorism Act 2000 (Remedial) Order 2011 is a remedial order made under this urgent procedure.

6. An urgent procedure remedial order comes into force immediately but lapses after 120 days unless it has been approved by affirmative resolution of each House.<sup>8</sup> After 60 days the Minister must lay before each House a statement containing a summary of any representations which have been made about the Order and details of any changes the Minister considers it appropriate to make to the Order. The Home Secretary must therefore make a statement to both Houses after **Monday 13 June 2011** and the Order will cease to have effect if it has not been approved by a resolution of each House before **Friday 21 October 2011**.

7. During the 120-day period, we are required by our terms of reference under our Standing Orders to consider whether the special attention of each House should be drawn to the Order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (“JCSI”),<sup>9</sup> and to report to each House our recommendation as to whether the Order:

- should be approved in the form in which it was originally laid before Parliament;
- should be replaced by a new Order modifying its provisions; or
- should not be approved.<sup>10</sup>

8. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are:<sup>11</sup>

- that it imposes a charge on the public revenues or requires payments to be made to a public authority;

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5 See Ninth Report of Session 2010–11, *Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report*, HL 111/HC 859.

6 HRA 1998, Schedule 2, para 2(b).

7 HRA Schedule 2, para 4(1).

8 HRA Schedule 2, para 4(4).

9 S.O. No. 152B(2)(c) of the House of Commons.

10 S.O. No. 152B(4) of the House of Commons.

11 S.O. No. 151(B) of the House of Commons.

- that there appears to have been unjustifiable delay in the publication or laying of the Order before Parliament;
- that there appears to have been unjustifiable delay in notifying the Speaker or Lord Chancellor where the Order has come into effect before being laid;
- that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- that for any special reason its form or purport calls for elucidation;
- that its drafting appears to be defective;
- or on any other ground which does not impinge on its merits or the policy behind it.

9. We can draw the attention of each House to the Order on any of these grounds and may also report to each House on “any matter arising” from our consideration of the Order.<sup>12</sup>

10. Although we are not required to report during the first 60 days of the making of an urgent remedial order, we have done so in time for our Report to be taken into account by the Home Secretary in the statement that she is required to make to both Houses, which must include a statement about any changes the Minister considers it appropriate to make to the original Order. Given that in our view changes should be made to the Order, for the reasons set out in this Report, it is clearly desirable that our views are available to the Minister at the end of the 60-day period so that she can respond accordingly in the statement to both Houses.

## Our consideration of the Order

11. Our predecessor Committee published *Guidance for Departments on Responding to Court Judgments on Human Rights*, including guidance as to when a remedial order should be used and when the urgent remedial order procedure, rather than the normal remedial order procedure, should be used.<sup>13</sup> We have adopted that Guidance and have used it to inform our scrutiny of the Order.

12. On 8 February 2011 we asked Baroness Neville-Jones, the then Minister for Security and Counter-Terrorism at the Home Office, whether the Government intended to make a legislative change to the counter-terrorism stop and search powers by way of a remedial order.<sup>14</sup> She replied that the Government would make a decision on that very shortly. On 1 March 2011 the Home Secretary informed the House of Commons in her opening speech in the Second Reading of the Protection of Freedoms Bill that the Government had decided to address the operational gap in the police’s counter-terrorism stop and search powers by way of a remedial order made using the urgent procedure under the Human Rights Act.

<sup>12</sup> S.O. No. 152B(4) of the House of Commons.

<sup>13</sup> Fifteenth Report of 2009–10, *Enhancing Parliament’s role in relation to human rights judgments*, HL 85/HC 455, Annex paras 22–24.

<sup>14</sup> <http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/uc797-i/uc79701.htm>

On 2 March 2011 Baroness Neville-Jones wrote to us to explain the Government's reasons for using the urgent procedure.<sup>15</sup>

13. On 6 April 2011 we issued a call for evidence on the urgent Remedial Order, inviting submissions by 3 May 2011 on any aspect of the Order, and in particular on the following issues:

- What evidence is there of the existence of a clear operational gap in counter-terrorism powers which requires the immediate availability of a replacement power to stop and search without reasonable suspicion?
- Is the replacement power to stop and search without reasonable suspicion sufficiently tightly circumscribed? In particular:
  - Should there be a requirement that the authorizing officer have a “reasonable belief” as to the necessity of the three matters specified in new s. 43B(1)(b)(i)-(iii) Terrorism Act 2000?
  - Should the geographical area or place to which an authorization applies be more specifically defined?
  - Should the duration of an authorization be more strictly defined?
  - Should the legislation expressly prevent the giving of a new authorization other than on the basis of new or additional information?
- Is the replacement power to stop and search without reasonable suspicion subject to sufficient legal safeguards against possible abuse? In particular:
  - Should there be prior judicial (as opposed to executive) authorization of the availability of the power to stop and search without reasonable suspicion, with an urgent procedure for police authorization subject to judicial authorization within 48 hours?
  - Should there be a requirement that authorizations be publicly notified?
  - Does the Code of Practice contain any safeguards which ought to be on the face of the legislation?
  - Should the Code of Practice contain any additional safeguards?

14. Submissions have been received from:

- The Equality and Human Rights Commission (“EHRC”)
- The Northern Ireland Human Rights Commission (“NIHRC”)
- The Independent Police Complaints Commission (“IPCC”)
- JUSTICE

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<sup>15</sup> Letter from the Rt Hon Baroness Neville-Jones, 2 March 2011, Ev 33–34.

- Human Rights Watch
- Liberty
- The Shadow Minister for Immigration and Counter-Terrorism, Gerry Sutcliffe MP

15. We are grateful to all those who responded to our call for evidence. All submissions received in response to our call for evidence have been published on our website.<sup>16</sup>

16. We also wrote to the Commissioner of the Metropolitan Police and the Association of Chief Police Officers (“ACPO”) on 6 April inviting them to provide any evidence in support of the Home Secretary’s statement that “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.”<sup>17</sup> The first part of a response from the Metropolitan Police was received on 13 May.<sup>18</sup> A “Confidential Annexe”, containing details of the operational gap which is said to exist, was also promised. This Confidential Annexe was received on 27 May. The Metropolitan Police has asked that this Annexe not be published in any form. No separate response has been received from ACPO, who forwarded our letter to Assistant Commissioner Yates of the Metropolitan Police who is also the ACPO Lead on Terrorism. The Home Secretary was also invited to respond to the call for evidence in our letter concerning the Protection of Freedoms Bill. A response was received on 19 May.<sup>19</sup>

17. In our scrutiny of the Order we have been acutely aware of the potentially racially discriminatory impact of wide powers to stop and search without reasonable suspicion, as the history of s. 44 demonstrates. This concern was expressed by the European Court of Human Rights in *Gillan* and was also a theme in a number of the representations we received. The disproportionate use of the s. 44 power against members of ethnic minorities is well documented. The EHRC told us that it is shortly to publish research on the impact of counter-terrorism measures on Muslim communities which suggests that for many Muslims the experience of being stopped and searched without reasonable suspicion contributes to a sense of alienation and fuels perceptions of racial and religious discrimination.<sup>20</sup> This history of the s. 44 power makes it particularly important, in our view, that the necessity for any replacement power is cogently demonstrated by the Government, and that any such power is very narrowly defined and subject to robust legal safeguards in order to minimise the risk of such discriminatory use in future.

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16 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/remedial-orders/terrorism-act-2000/>

17 Ev 37

18 Letter from Assistant Commissioner Yates, 13 May 2011, Ev 37–40.

19 Letter from James Brokenshire MP, 19 May 2011, Ev 40–43.

20 T. Choudhury, *The impact of counter-terrorism measures on Muslim communities* (EHRC, 2011, forthcoming).

## 2 Is the Order Necessary?

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### Introduction

18. The Government argues that a replacement power to stop and search individuals and vehicles without reasonable suspicion is operationally necessary; that there are compelling reasons for introducing such a replacement power by remedial order because the alternative ways of making the necessary change, by further administrative guidance or primary legislation, are unsuitable; and that the use of the urgent procedure is justified because of the need for the power to be available to the police immediately.

19. Three questions therefore arise about whether the Remedial Order is necessary:

- (1) Is a counter-terrorism power to stop and search without reasonable suspicion necessary?
- (2) If so, is it necessary to introduce such a power by remedial order rather than by further administrative guidance or primary legislation?
- (3) If so, is it necessary to use the urgent remedial order procedure rather than the normal procedure?

20. We consider each of these questions in turn.

### **(1) Is a power to stop and search without suspicion necessary?**

#### *The Home Secretary's suspension of the power*

21. The Government first responded to the *Gillan* judgment by the Home Secretary announcing to the House of Commons in July 2010 new non-statutory guidance for the police, setting out how the existing powers were to be operated in order to avoid further breaches of Convention rights.<sup>21</sup> The Home Secretary announced that the test for authorising the availability of powers to stop and search without suspicion would henceforth be whether such powers were “necessary” for the prevention of terrorism, rather than merely “expedient”. Most importantly, the Home Secretary introduced a new suspicion threshold: officers would only be able to stop and search individuals and vehicles where they have “reasonable suspicion”. These were expressed to be interim guidelines, to last until the completion of the Government’s review of counter-terrorism and security powers.

22. The effect of the Home Secretary’s non-statutory guidance was therefore to suspend the exercise of counter-terrorism stop and search powers without reasonable suspicion, pending the completion of the Government’s Review of Counter-Terrorism and Security Powers.

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21 Home Secretary’s statement to the House of Commons, HC Deb 8 July 2010 col. 540.

23. As we made clear in a letter to the Home Secretary concerning the *Gillan* judgment, we welcome the Government's swift and constructive response to the Court's judgment.<sup>22</sup> Providing in interim administrative guidance about the use of a power which has been found to be in breach of the ECHR, pending amendment of the power by legislation, is a commendable approach to the implementation of European Court of Human Rights judgments. It helps to give swift effect to those judgments and so prevent repetitive violations which are responsible for much of the backlog before the European Court. The Home Secretary's interim guidelines to the police have undoubtedly prevented further breaches of individuals' right to respect for their private life pending Parliament's consideration of a longer term solution.

24. This introduction of what were, in effect, interim general measures constitutes a significant step by the UK towards implementing the Interlaken Declaration and Action Plan,<sup>23</sup> which calls on states to commit themselves to ensuring that the necessary measures are taken at national level to prevent further similar violations, as well as ensuring that Parliaments are more closely involved in decisions about implementation of Court judgments. We look forward to this sensible and pragmatic approach to interim measures being taken by the Government in other cases, where appropriate.

### *The review of counter-terrorism and security powers*

25. The Home Secretary's suspension of the counter-terrorism power to stop and search without reasonable suspicion suggests that, in July 2010, the Home Secretary was of the view that such a power was not necessary. However, the suspension of the power was only ever intended to be an interim measure, pending the completion of the Government's review of counter-terrorism and security powers.

26. That review reported in January 2011.<sup>24</sup> It took evidence on the question of whether a power to stop and search without suspicion is necessary.<sup>25</sup> It noted that opponents of the power questioned its necessity in light of the fact that hundreds of thousands of stop and searches under the power had not led to any convictions or even any arrests for terrorism offences in Great Britain.<sup>26</sup> The review acknowledges that this fact is "clearly relevant" to whether the power continues to be necessary. But it also notes that supporters of the power believe that it has been useful "because of its deterrent and disruptive effect on terrorists and because it can be used flexibly in a variety of counter-terrorism operations and situations."

27. The report records that in the course of the review, the police and others argued that there will continue to be circumstances where there is an urgent operational need for a stop and search power which does not require reasonable (or any) suspicion.<sup>27</sup>

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22 Letter from the Chair to the Home Secretary dated 9 September 2010, <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/human-rights-judgments/gillan-and-quinton-v-united-kingdom/>

23 See Fifteenth Report of Session 2009-10, *Enhancing Parliament's role in relation to human rights judgments*, HL 85/HC 455, paras 5-12.

24 *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004 (January 2011).

25 *Review*, pp 15-19.

26 *Review*, p 16, para 4(b) and p 17 para 9.

27 *Review*, p 16, para 5.

“For instance, the police may become aware of an intended attack on a particular site or transport network, but have no description of a suspect and no specific information which could allow individual officers to form a reasonable suspicion that particular individuals were terrorists and needed to be searched.”

In such circumstances, the power of the police to stop and search a person whom they reasonably suspect is a terrorist, under s. 43 Terrorism Act 2000, could not be used. The Summary of Responses to the Consultation records that there was “a general acceptance” that a power to stop and search without suspicion could be necessary in limited circumstances, for example where there was intelligence that a terrorist attack was likely.<sup>28</sup>

28. The review considered whether the power to stop and search without reasonable suspicion in s. 44 should be repealed without replacement, but found the scenario of concern to the police (above) to be not only credible but “arguably inevitable”.<sup>29</sup> It concluded that the other related powers available to the police would not sufficiently address the gap left by repealing the power to stop and search without suspicion, and that the absence of any form of “no suspicion” terrorism stop and search power would lead to an increase in the levels of risk. The review therefore decided that a power to stop and search individuals and vehicles without reasonable suspicion in exceptional circumstances is “operationally justified.”<sup>30</sup>

29. The review’s conclusion was endorsed by Lord Macdonald in his report overseeing the process of the review.<sup>31</sup> He said that the review had uncovered a significant and understandable concern that blanket abolition of without suspicion searches might compromise public safety to an unacceptable degree.

“If, for example, the police received credible intelligence of a plot to car bomb Parliament Square, it would seem proportionate and reasonable to allow the police to carry out random ‘without suspicion’ searches of cars in that location for a limited period.”

30. The review’s conclusion that a power to stop and search without reasonable suspicion continues to be necessary is relied on by the Government in both the Required Information<sup>32</sup> and the Explanatory Memorandum accompanying the Remedial Order.<sup>33</sup> The review identified the need for such a power to be available in the exceptional circumstances envisaged in the police’s hypothetical scenario in which they have intelligence about a planned terrorist attack on a particular site or transport network but insufficient information to conduct a stop and search of anyone on the basis of reasonable suspicion.

**31. We accept the necessity of introducing a replacement stop and search power which is exercisable without reasonable suspicion but only available in tightly circumscribed**

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28 *Review of Counter-Terrorism and Security Powers: Summary of Responses to the Consultation*, Cm 8005, p 8.

29 *Review*, p 17, para 9.

30 *Review*, p 18, para 15.

31 *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC*, Cm 8003, pp 4–5.

32 *Required Information*, para 8.

33 *Explanatory Memorandum*, paras 7.2–7.3.



circumstances. In our view the case for having such a narrowly defined and exceptional power has been made out in the review of counter-terrorism and security powers. The necessity, in our view, is for a power to conduct random stop and searches of people and vehicles in the exceptional circumstances where credible intelligence is received about an imminent threat to a specific location but that intelligence is not sufficiently specific to give rise to reasonable suspicion about the identity of the person or vehicle.

## (2) Is it necessary to proceed by way of remedial order?

32. The review of counter-terrorism powers recommended that the power to stop and search without reasonable suspicion in s. 44 of the Terrorism Act 2000 should be repealed and replaced with a new power, but that consideration should be given to whether the replacement provisions can be implemented more quickly than would be possible through the Protection of Freedoms Bill in order to “fill the potential operational gap.”

33. Provisions in the Protection of Freedoms Bill, currently before Parliament, are designed to fill this operational gap by providing a replacement power to stop and search without reasonable suspicion which is more narrowly defined and subject to more legal safeguards than the current power.<sup>34</sup> However, the Government says that the urgent need to fill the operational gap in the interests of national security makes it necessary to bring those provisions into force immediately, and that is why it has made the urgent Remedial Order.

34. The Government explains its justification for proceeding by way of a remedial order, rather than further administrative guidance or primary legislation, in the “Required Information” published with the Order:

“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

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<sup>34</sup> Protection of Freedoms Bill, clauses 58 and 60 and Schedule 5 (repealing sections 44–47 Terrorism Act 2000 and inserting a new section 43B and Schedule 6B to the Terrorism Act 2000 providing for the replacement power).

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-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*."

**35. We agree with the Government that there are compelling reasons for using the remedial order procedure to introduce the replacement power to stop and search without reasonable suspicion. We accept that awaiting the enactment of the Protection of Freedoms Bill would ensure that the operational gap continues for another year, until that Bill receives Royal Assent. We also accept that the Government's reasons for proceeding by way of a remedial order rather than altering the administrative guidance that has already been given about the current law. We would add to those reasons the additional consideration that a remedial order provides much greater opportunity for parliamentary scrutiny of the detail of the replacement power than the mere announcement of new administrative guidance.**

### **(3) Is it necessary to use the the urgent procedure?**

36. The Government's reason for proceeding by way of an urgent procedure remedial order (as opposed to a normal procedure remedial order) is also explained in the Required Information. In short, on the basis of advice from the police the Home Secretary considers that for national security reasons it is necessary for the police to have immediately available a power to stop and search without reasonable suspicion:<sup>35</sup>

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35 Required Information, para16.

“the experience of the police since the suspension of the current powers in July last year has indicated that there is a clear operational gap in responding to specific threat scenarios which cannot be met by other, existing powers.”

37. However, the Home Office memoranda do not go beyond this general assertion to give any examples of the sorts of circumstances in which this operational gap has arisen in practice. We therefore wrote to the Metropolitan Police and ACPO on 6 April 2011 to ask what evidence they are able to provide, without disclosing sensitive intelligence information, in support of the Home Secretary’s statement. In particular, to help us understand the nature of any operational gap in counter-terrorism powers which had been opened up by the suspension of s. 44, we asked if they could provide any specific examples of the sorts of circumstances which have arisen since the suspension of the powers in which the availability of the power to stop and search without reasonable suspicion was considered necessary to prevent an act of terrorism.

38. The Metropolitan Police response refers to two major events for which a s. 44 authorisation was required “in order to provide security, safety and reassurance”: the New Year’s Eve celebrations and the New Year’s Day parades in central London. A s. 44 authorisation to stop and search vehicles and people in vehicles was given on the basis of the assessed threat for a specific area over a short period of time.<sup>36</sup> However, “the operational feedback from the Gold Commander for the New Year’s event stated that the actual authority, area defined and tactics that this restricted power afforded him, did not provide the required coverage, operational flexibility or the ability to search people who attended the event.”

39. The letter also promised to “detail” the operational gaps in a “Confidential Annex”. According to the letter, “since the beginning of last year several working/focus groups of practitioners and security experts have been assessing the risks involved in not having section 44 powers.” The operational gaps identified by that process have now been identified in the Confidential Annex which has been received from the Metropolitan Police, but which we are unable to publish with this Report. In our view, the Confidential Annex raises an important issue about operational capability which requires careful and detailed scrutiny. It identifies one potential operational difficulty in particular which raises a number of questions about what other powers already exist, how effective they are in practice and what plans there might be to change those powers. These are all questions which, in our view, should be subjected to careful and detailed scrutiny.

40. However, in the absence of more detailed information about the sorts of operational gaps which have already arisen because of the suspension of the current powers, it is difficult for Parliament to reach a view on whether the case for proceeding by way of a new urgent remedial order has been made out. All that Parliament has is the Home Secretary’s general assertion of the necessity for the immediate availability of the power, based on the general assertion of the police that they need the power. Given that in July 2010 the Home Secretary was content to suspend the power to stop and search without reasonable suspicion, we consider that Parliament is entitled to a more detailed explanation of what

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36 The Home Secretary’s statement suspending the powers explicitly envisaged that s. 44 authorisations could still be given in relation to searches of vehicles, although only where “necessary” and only to authorise stop and searches on the basis of reasonable suspicion.

has changed since that date which makes the immediate availability of the power necessary as a matter of national security.

**41. We recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the existence of an operational gap in the absence of a power to stop and search without reasonable suspicion since that power was suspended. In the absence of detailed scrutiny of such evidence, it is difficult both for us and for Parliament to reach a view as to the appropriateness of proceeding by urgent remedial order, rather than by the normal procedure.**

42. The Shadow Minister for Immigration and Counter-Terrorism, Gerry Sutcliffe MP, queries the Government's justification for using the urgent procedure for a remedial order. He asks what is the Government's basis for using an urgent remedial order rather than altering the non-statutory guidance which the Home Secretary has already given. It is that guidance, he argues, that has resulted in the gap in counter-terrorism provision. He questions whether in these circumstances it is a misuse of the urgent remedial order procedure to bring legislation into force, without debate, when the urgency stems not from the need to give effect to the judgment but to fill an operational gap which, he argues, was only created by the Minister's over-reaction to the judgment in the first place. The Shadow Minister suggests that the advice the Government received from the police and the security services prior to the Home Secretary's guidance in July 2010 should be made available to us so that we can see whether or not she was advised that the guidance suspending the power to stop and search without reasonable suspicion was a mistake.

43. The Home Secretary herself acknowledges that this is a somewhat unusual exercise of the power to introduce an urgent remedial order:<sup>37</sup> the urgency resides not in the need to prevent further violations of the rights of significant numbers of people (that has already been achieved by the Home Secretary's non-statutory guidance), but in the need to plug an operational gap which has only been created in the first place by the Home Secretary's guidance which, by removing the power to stop and search without reasonable suspicion altogether, arguably went further than was necessary to remove the incompatibility.

44. We accept the Government's argument that the urgent procedure provided by the Human Rights Act can properly be used where the urgency of the matter arises not because of the need to stop individual's Convention rights being infringed, but because the absence of legally certain powers to stop and search without suspicion undermines the police's ability to protect the public.

**45. We draw this unusual exercise of the power to use the urgent procedure to the attention of both Houses. If, however, Parliament is satisfied that the urgent operational need for a power to stop and search without reasonable suspicion is made out on the evidence, we find that the Government's reasons for proceeding by way of urgent remedial order, rather than the normal procedure, constitute a satisfactory justification for such an unusual exercise of the power. If the Government is able to demonstrate the urgent necessity of the power, we would therefore conclude that the Government is justified and acting *intra vires* in proceeding by the urgent procedure.**

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37 Letter from the Rt Hon Baroness Neville-Jones, 2 March 2011, Ev 36–37

## 3 Does the Order remove the incompatibility?

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### Introduction

46. If Parliament is satisfied that the Government has demonstrated both the need for a counter-terrorism power to stop and search without reasonable suspicion and the need for such a power to be introduced with immediate effect, the next question is whether the Order, as introduced, removes the incompatibility identified by the European Court of Human Rights in *Gillan*.

47. The incompatibility found by the Court, it will be recalled, was that the current counter-terrorism powers to stop and search without reasonable suspicion were in breach of the right to respect for private life in Article 8 ECHR because they are “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.”

48. The Remedial Order introduces a replacement power to stop and search which is still exercisable without reasonable suspicion, but is only available in more circumscribed circumstances and subject to stronger safeguards.

### (1) Is a power to stop and search without suspicion inherently incompatible with Article 8 ECHR?

49. The first compatibility issue raised by the Remedial Order is whether a power to stop and search without reasonable suspicion is inherently incompatible with the Convention, because the lack of any requirement for reasonable suspicion renders selection for stop and search arbitrary and invites discrimination in the exercise of the power.

50. The EHRC included with its submission a legal opinion it has obtained from Rabinder Singh QC and Professor Aileen McColgan as to the human rights compatibility of the replacement stop and search power contained in the equivalent provisions of the Protection of Freedoms Bill. Singh and McColgan advise that, although the replacement power is an improvement on the current law, the inherently arbitrary nature of stop and search without the need for reasonable suspicion is irredeemably incompatible with Article 8. In their view, nothing short of a requirement of reasonable suspicion on the part of the officer selecting for stop and search can provide a sufficient legal basis for interferences with the right to respect for private life in Article 8. The absence of such a requirement renders selection for stop and search arbitrary. As well as failing to remedy the incompatibility identified in *Gillan*, it is also, in Singh and McColgan’s view, inherently incompatible with the right to liberty in Article 5 ECHR (since stopping and searching involves a deprivation of liberty for the duration of the stop and search); is likely to give rise to breaches in practice of the rights to freedom of expression and peaceful protest in Articles 10 and 11 ECHR where the power is used against protestors, as it was in *Gillan* itself; and is likely to lead to discrimination in the enjoyment of Convention rights in breach of Article 14 ECHR because by authorising arbitrary stop and search it invites discrimination in the selection of individuals against whom to use the power.

51. Human Rights Watch, in its submission, also takes the view that a power to stop and search without reasonable suspicion is “fundamentally flawed” and, even with the best guidance to officers as to how to exercise the power, cannot be rendered compatible with Convention rights because of the irreducible arbitrariness of the selection of individuals to subject to the power. In Human Rights Watch’s view, the only human rights compatible power to stop and search is one which requires reasonable suspicion. On this view, the Order fails to remove the incompatibility identified in *Gillan* and either should not be approved or should be modified to include a requirement of reasonable suspicion.

52. The EHRC itself, however, does not appear to share this view that a power to stop and search without reasonable suspicion is inherently incompatible with Article 8 and other Convention rights. In its submission, it “recognises that there may be very exceptional circumstances in which it is necessary for there to be a power to stop and search without reasonable suspicion [...] for instance to prevent a real and immediate act of terrorism or to search for perpetrators or weapons following a serious incident.” The question for the EHRC, rather, is whether the restrictions on the scope of the power are sufficiently tightly defined and the safeguards against its misuse robust enough to ensure that the power is only used in those very exceptional circumstances when it is absolutely necessary.

53. The NIHRC, the IPCC, JUSTICE and Liberty all appear to take a similar position to the EHRC, accepting in principle that a power to stop and search without reasonable suspicion may be necessary in exceptional circumstances and focusing on the definition of the power in the Order and the adequacy of the safeguards provided in order to make sure that it is exercised compatibly with Convention rights.

54. We do not consider that a power to stop and search without reasonable suspicion is inherently incompatible with Article 8 ECHR, as well as Articles 5, 10, 11 and 14, because of its inherent arbitrariness. Although we see considerable force in the argument that the lack of a requirement of reasonable suspicion gives rise to a serious risk that the power will be exercised in breach of those rights, because there is an irreducible element of arbitrariness in the exercise of the power, in our view it is not clear from the *Gillan* judgment that the European Court of Human Rights goes this far. In particular, if the Court in that case had considered that the lack of a requirement of reasonable suspicion was of itself fatal to the compatibility of the power, it would not have been necessary to conduct the detailed analysis of the practical effectiveness of the limitations on the scope of the power and the adequacy of the safeguards against its misuse.

**55. In our view, a very tightly circumscribed power with sufficiently robust safeguards against abuse is not inherently incompatible with Convention rights, provided its definition and safeguards ensure that it is confined to the exceptional circumstances in which such a power is shown to be needed in order to prevent a real and immediate risk of terrorist attack.**

56. The main questions for our consideration are therefore whether in the Order as currently drafted the replacement power is sufficiently tightly defined and the safeguards sufficiently robust to prevent the abuse or arbitrary use of the power in practice.

## (2) The Definition of the Replacement Power

57. We have considered whether the replacement power to stop and search without reasonable suspicion is sufficiently tightly circumscribed as defined in the Order, or whether the Order should be modified to constrain further the discretion left both to authorising officers and to those exercising the power to stop and search.

58. The Government argues that the definition of the replacement power to stop and search without reasonable suspicion addresses the criticisms made in the *Gillan* judgment about the breadth of the discretion given by the current law to both the authorising officer and the individual officer exercising the power to stop and search. It points in particular to the following features of the replacement power which, it argues, ensure that the discretion conferred by the Order is “appropriately constrained”:

- 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);
- 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);
- An authorisation may cover an area or place no greater than the senior officer considers necessary;
- The Secretary of State may substitute an earlier date or time for the expiry of an authorisation when confirming an authorisation;
- The Secretary of State may substitute the area or place authorised for a more restricted area or place when confirming an authorisation;
- A senior police officer may substitute an earlier time or date or a more restricted area or place, or may cancel an authorisation;
- 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 section 45(1) of searching for articles of a kind which could be used in connection with terrorism);
- 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.

59. The replacement power is defined in a way which does meet a number of the criticisms made by the Court in *Gillan* concerning the breadth of the discretion left to both the authorising officer and the individual officer exercising the power. This is acknowledged in the representations of the EHRC, the NIHR, the IPCC, JUSTICE, Liberty and Human Rights Watch, as well as in the Legal Opinion of Rabinder Singh QC and Professor Aileen McColgan. Many of these representations, however, argue that there is scope to define the power more tightly and that this ought to be done in order to make it more likely that the

power will be exercised compatibly with the right to respect for private life and other Convention rights.

60. We have considered four main ways in which the scope of the power could be more tightly defined.

#### *(a) Objective grounds for authorising officer's view of necessity*

61. The European Court of Human Rights was critical of the fact that the statutory test for the giving of authorisations by the senior police officer was one of “expediency” rather than “necessity”.<sup>38</sup> This meant that there is no requirement of any assessment of the proportionality of the measure. The Order provides that an authorisation can be given if the authorising officer “reasonably suspects that an act of terrorism will take place”<sup>39</sup> and “considers” that the authorisation is necessary to prevent such an act, the specified area or place is no greater than is necessary to prevent such an act and the duration of the authorisation is no longer than is necessary to prevent such an act.<sup>40</sup>

62. We welcome the definition of the first part of the test for authorisations: reasonable suspicion that an act of terrorism will take place is, as the Metropolitan Police point out in their evidence, “a fundamental increase in the threshold.” We accept the Home Office’s explanation for preferring “reasonable suspicion” to “reasonable belief”: to ensure that the right balance is struck between the powers being significantly circumscribed and the powers still being useful.<sup>41</sup> The threshold of reasonable suspicion, rather than belief, reflects the reality that authorising officers will usually be acting on the basis of intelligence information which cannot necessarily be immediately corroborated but may need to be acted upon. On the other hand, the powers can only be authorised where there is reasonable suspicion that an act of terrorism “will” take place, rather than “may” take place, which is designed to ensure that the powers are only authorised in response to an immediate threat. We also welcome the fact that the Code of Practice makes clear that the authorising officer’s reasonable suspicion must relate to a particular act of terrorism rather than be based on a generic assessment that an act of terrorism is likely. We also note with interest the fact that as of 13 May 2011 the Metropolitan Police had not considered it appropriate to use the replacement power to stop and search “as the MPS have not been presented with sufficient intelligence to reach the threshold necessary to support the use of an authority.”<sup>42</sup> The fact that this period included the Royal Wedding confirms to us that the threshold in the Order is indeed significantly higher than in the previous legislation that it replaces.

63. However, there is no express requirement in the Order that the authorising officer’s views as to necessity be “reasonable” and therefore have an objective basis: on the face of the Order, the authorising officer’s subjective view as to necessity (however unreasonable) would therefore be sufficient.

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38 *Gillan*, above n. 2, para 80.

39 New s. 47A(1)(a) Terrorism Act 2000 as inserted by para 3(1) of the Remedial Order.

40 New s. 47A(1)(b) Terrorism Act 2000.

41 Home Office answers to JCHR questions on the Remedial Order repealing and replacing stop and search powers under the Terrorism Act 2000, appended to letter from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, 19 May 2011, Ev 40–43.

42 Letter from Assistant Commissioner Yates, 13 May 2011, Ev 37–40.



64. The Code of Practice provides authorising officers with detailed guidance as to how to apply the new statutory test for making an authorisation, including, for example, guidance that the consideration of necessity by the authorising officer must involve an assessment of why other measures, such as reasonable suspicion stop and search powers, are not sufficient to address the threat.<sup>43</sup> The Code of Practice also gives guidance on the information which should be provided by the authorising officer to the Secretary of State, including an explanation of why the use of the authorisation powers is considered an appropriate and necessary response to the circumstances and why other measures are regarded as inadequate.<sup>44</sup> However, while the Order contains an express requirement that a constable must have regard to the Code when exercising any powers to which the Code relates,<sup>45</sup> and that a failure to do so can be taken into account by a court or tribunal, there is no equivalent provision requiring authorising officers to have regard to the Code when issuing authorisations.

65. The EHRC welcomes the introduction of the reasonable suspicion requirement on the authorising officer and the provisions in the Code of Practice requiring an explanation as to why the powers are felt appropriate and necessary and why other measures are regarded as inadequate. However, they argue that there would be better checks on the use of the power if the Code of Practice provision were on the face of the Order and if there were also an express requirement that the authorising officer have a reasonable belief as to the necessity of the authorisation to prevent an act of terrorism and the necessity of its geographical scope and duration. Singh and McColgan similarly argue that a requirement for objective reasonableness as regards the senior police officer's view as to the necessity for the authorisation (its geographical and temporal extent, etc.) would facilitate subsequent legal challenge: "in the absence of such a requirement it is difficult to see what judicial control could apply after the fact."

66. JUSTICE, however, disagree, considering it unnecessary to introduce an additional requirement of reasonable belief, because "the courts would likely read in such a requirement in any event, as a matter of public law reasonableness if not compatibility with Article 8 ECHR."

**67. We consider that expressly requiring that the authorising officer's view of necessity be reasonable, and that those reasons be given, will both concentrate minds and facilitate effective judicial control of the authorisation process. We therefore recommend that the Order should be modified so as to include express requirements on the face of the Order that the authorising officer:**

**(i) have a "reasonable belief" as to the necessity of the three matters specified in new s. 47A(1)(b)(i)-(iii) Terrorism Act 2000; and**

**(ii) provide an explanation to the Secretary of State (or to the court if the Order is amended to provide for prior judicial authorisation<sup>46</sup>) as to why the powers**

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43 Code of Practice, paras 3.1.1–3.1.12.

44 Code of Practice, paras 3.2.1–3.2.7.

45 New s. 47C Terrorism Act 2000 as inserted by para. 4 of the Remedial Order.

46 See further below, paras 81–87.

**are necessary and appropriate and why other measures are regarded as inadequate.**

### *(b) Geographical area*

68. The Court in *Gillan* was critical of the potential geographical width of authorisations to stop and search without reasonable suspicion. Under the replacement power the geographical area of an authorisation must be no greater than the authorising officer considers necessary to prevent an act of terrorism.

69. The Code of Practice makes clear that any authorisations must be “as limited as possible” and the area authorised should be “no wider than necessary”. It also makes clear that force-wide authorisations are not justifiable (other than in respect of the City of London Police force, which covers the square mile of the City of London).

70. A number of representations received argued that absolute geographical limitations on the face of the Order would reduce the risk of the power being used arbitrarily. JUSTICE, for example, suggested that it may be desirable to include a maximum limit of no more than five square kilometres. The EHRC suggested a limit of no more than one square mile.

**71. We have given careful consideration to whether the geographical area or place to which an authorization applies should be more specifically defined on the face of the Order and, if so, what that limit should be. We have concluded that the combination of the tighter definitions and stronger safeguards that we are recommending, together with the clear guidance in the Code of Practice, makes it unnecessary to define a geographical limit on the face of the Order.**

### *(c) Duration*

72. The Order provides that authorisations may last for no longer than the authorising officer considers necessary to prevent an act of terrorism and for a maximum of 14 days (compared to 28 days under the current law).

73. Some representations we received also argued that stricter temporal limitations on the face of the Order would make it more likely that the power to stop and search without reasonable suspicion would in practice be exercised compatibly with the right to respect for private life and other Convention rights. The EHRC, for example, argued that authorisations should be subject to a maximum duration of 48 hours, with any longer period requiring judicial authorisation. JUSTICE, on the other hand, considered the 14 day limit to be sufficient, but only on the basis that authorisations are made by courts (see below).

**74. We welcome the stricter limit on the duration of an authorisation under the Order. We think that the power to stop and search without reasonable suspicion should be a wholly exceptional power which is only available where there is an imminent threat of terrorist attack, and this requires the duration of an authorisation to be as short as possible. We have therefore considered whether the duration of an authorization should be even more strictly defined in the Order, but we do not consider this to be**

necessary if our recommendation below concerning the renewal of authorisations is accepted.

#### *(d) Renewal of authorizations*

75. The Court in *Gillan* was critical of the fact that “rolling authorisations” were possible under the 2000 Act, and that such a rolling authorisation had been in place in respect of the Metropolitan Police area since the powers had come into force.

76. The provisions in the Remedial Order permit the renewal of authorisations.<sup>47</sup> The Code of Practice states that rolling authorisations are not permitted under the new powers, but that a new authorisation covering the same or substantially the same area or place “may be given if the intelligence which informed the initial authorisation has been subject to fresh assessment and the officer giving the authorisation is satisfied that the test for authorisation is still met on the basis of that assessment.”<sup>48</sup> Human Rights Watch argue that these provisions in the Code are not sufficient to avoid rolling authorisations. The EHRC suggest that the Order should specify a limit as to the number of authorisations that can be made consecutively in relation to the same place without new evidence, and JUSTICE favour the Order expressly preventing the giving of a new authorisation other than on the basis of new or additional information.

77. The Home Office points out that the Code of Practice makes clear that rolling authorisations of the kind made by some forces under the old s. 44 powers, where some geographical areas are repeatedly covered by authorisations based on the same information, are not permitted. It opposes a prohibition on renewal of authorisations, because this would mean that it would not be possible to authorise the powers in an area previously covered, even where the existing intelligence had been reassessed and remained current and credible.

78. We accept that a total prohibition on the renewal of an authorisation would not be desirable, but we note that there is nothing on the face of the Order to prevent rolling renewals and the mere assertion that these are not permitted by the Code of Practice cannot have that effect in the absence of some statutory words to that effect.

**79. We recommend that the Order should be modified so as expressly to prevent the giving of a new authorization other than on the basis of new or additional information or a reassessment of existing intelligence that the threat remains immediate and credible.**

### **(3) Adequacy of the Safeguards against Abuse**

80. We received a number of representations in favour of increasing the legal safeguards against possible abuse or arbitrary use of the replacement power to stop and search without reasonable suspicion.

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47 New Schedule 6B to the Terrorism Act 2000, para 11, as inserted by Schedule 1 to the Remedial Order.

48 Code of Practice, para 3.3.2.

*(a) Prior judicial authorisation*

81. The Court in *Gillan* was concerned about the adequacy of the provision in the legal framework for review of authorisations. It was particularly concerned by the limited review powers of the Secretary of State and lack of opportunity for effective judicial scrutiny of the powers.

82. In their written evidence, JUSTICE and the EHRC argued forcefully for prior judicial authorisation of the availability of the power to stop and search without reasonable suspicion. In the EHRC's view, this would increase the likelihood of robust and independent scrutiny of the necessity for authorisations and so make it more likely that authorisations would only be made when strictly necessary. In JUSTICE's view, the power is unlikely to be compatible with Article 8 in the absence of such prior judicial authorisation. Although it welcomes the additional safeguards in the Order as genuine improvements on the present position, it considers that they are not in themselves enough to ensure compatibility with Article 8 ECHR. It considers that the case for confirmation being made by a judge rather than a government minister is overwhelming, and recommends that the authorisation power in the Order be amended to require police authorisations to be approved by a High Court judge.

83. The Metropolitan Police, on the other hand, "cannot see a case for [prior judicial authorisation] as the current process has a significant level of oversight already as the application passes from the Assistant Commissioner to the Home Secretary and is scrutinised at each level."<sup>49</sup> The police regard prior judicial oversight as "adding an additional level of bureaucracy" and "an additional administrative phase." They point out that this is likely to be "in the midst of what may be a testing scenario" and suggest that the person exercising the judicial oversight would have to be vetted to the highest level and have access to the full intelligence picture, "in addition to a background of operational experience to make what, in effect, is an operational decision." The police do not however, rule out the possibility of prior independent oversight, but say any proposal for it would need to be looked at very closely, and suggest as a possible alternative model independent oversight by a commissioner, similar to the role performed by the Office of Surveillance Commissioners.

84. The Home Office says that the review of counter-terrorism and security powers considered judicial authorisation of the use of the new stop and search powers and decided that it was not appropriate, because it blurs the lines between the executive and judiciary. The Government should be responsible for national security decisions, and the judiciary for reviewing such decisions.

85. We understand why, from the police's perspective, having to obtain prior authorisation of the availability of certain counter-terrorism powers from an external, independent decision-maker will seem like, at best, the addition of an unnecessary layer of bureaucracy and, at worst, a distraction from dealing with urgent operational demands. We also understand concerns about the capacity of the independent overseer to understand and appreciate those operational demands. In our view, however, it is important not to lose sight of the fact that a power to stop and search without reasonable suspicion is a wholly

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49 Letter from Assistant Commissioner Yates, 13 May 2011, Ev 37–40.

exceptional power, the exercise of which can only be justified in the narrowest of circumstances. As Lord Bingham observed in the House of Lords in *Gillan*,<sup>50</sup>

“It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle. [...] [A]ny departure from the ordinary rule calls for careful scrutiny”.

86. We think it is right that the legal regime which makes this power available to be exercised in such exceptional circumstances should include a requirement of prior judicial authorisation. We do not regard this as blurring the lines between the executive and the judiciary as the Home Office suggests. Rather, it would guarantee independent scrutiny of the justification for making such an exceptional power available, and as such would be a crucial safeguard against the power being used in practice in wider circumstances than Parliament intended. Given the history of the operation in practice of the previous power in s. 44 of the Terrorism Act 2000, we regard prior judicial authorisation as an indispensable safeguard. We are pleased to see that the Metropolitan Police is not in principle opposed to some system of prior independent scrutiny of authorisations. We are confident that High Court judges can perform this important role, and that an urgent procedure can be devised to deal with genuine emergencies, whereby a police authorisation can have immediate effect, subject to judicial confirmation within 48 hours.

**87. We recommend that the Order should be modified so as to provide for prior judicial (as opposed to executive) authorization of the availability of the power to stop and search without reasonable suspicion, with an urgent procedure for police authorization subject to judicial authorization within 48 hours.**

### *(b) Strengthening the Code of Practice*

88. We welcome the fact that the Code of Practice accompanying the replacement power does expressly prohibit the selection of people for stop and search on grounds of ethnicity, except where the characteristic forms part of the description of a particular suspect.<sup>51</sup>

89. However, we note that while the IPCC welcomed many of the safeguards in the Code of Practice, it was concerned about the absence of a requirement to record a person's name and description of the person or vehicle being searched, because this may make it harder to monitor effectively the use of stop and search powers and thereby safeguard against their misuse. We also note that while constables exercising the power to stop and search without reasonable suspicion are obliged to comply with the Code of Practice, authorising officers are not.

**90. We recommend that the Code of Practice should contain stronger recording requirements in order to facilitate monitoring and supervision of the use of the replacement power to stop and search without suspicion. We also recommend that the**

<sup>50</sup> [2006] UKHL 12 at para 1.

<sup>51</sup> Code of Practice, paras 4.3.1–4.3.7.

**authorising officer should be obliged to comply with the Code of Practice, as well as the individual officers exercising the power to stop and search.**

### *(c) Public notification of authorisations*

91. Authorisations made under the replacement power will not be public. The EHRC argues that there should be public notification when authorisations are made, in order to enable better public scrutiny of the operation of the powers when they are made available, and also to facilitate judicial scrutiny. The Commission also considers that such notification may have a practical deterrent effect in relation to the risk of terrorist activities. JUSTICE, on the other hand, considers that advance public notification would be likely to reduce the operational effectiveness of authorisations, but sees no reason why they should not be publicised once the authorisation has ended.

92. We note the importance attached by the police to this power as a tactic to “disrupt, deter and prevent terrorism”, and its belief that “high visibility, overt policing tactics have changed behaviour and interfered with the activity of terrorist subjects.”<sup>52</sup> Use of the power for deterrence purposes would militate in favour of public notification of authorisations. We also note the comments of the Metropolitan Police that “the police have already moved towards a widely publicised version of any authorisations, stops and searches.”

93. We see the force of the argument that public notification of authorisations would facilitate accountability for the exercise of the power, including ex-post legal accountability through the courts. In our view, however, the case for public notification of authorisations is less pressing if authorisations require prior judicial approval, as we have recommended above. The case for retrospective publication of an authorisation, however, following its expiry, remains strong and would facilitate political accountability for the exercise of the power, including transparent review by the independent reviewer of terrorism legislation. **We recommend that the Order should be amended to include a requirement that authorisations be publicly notified when they have expired, so far as consistent with the protection of intelligence sources.**

### *(d) Role of the Independent Reviewer*

94. The Independent Reviewer of terrorism legislation will have an important role to play in ensuring political accountability for the exercise of these exceptional powers. Given the history of the operation of powers to stop and search without reasonable suspicion, and in particular the impact of such powers on minority communities, we think it is important that the Independent Reviewer keep a very close eye on the exercise of the replacement power in practice, and be free to report to Parliament as and when problems arise in practice.

**95. We recommend that the Independent Reviewer of Terrorism legislation should have the power to report to Parliament on the exercise of this power on an ad hoc basis, and not be confined to reporting annually as part of his report on counter-terrorism powers generally.**

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<sup>52</sup> Letter to the Chair from Assistant Commissioner Yates, 13 May 2011, Ev 37–40.

#### (4) Defective drafting

96. The Home Office has pointed out that there is a defect in the drafting which requires modification of the Order. Paragraph 2 of Schedule 2 to the Order (consequential amendments) provides that “the Code of Practice issued under section 66 of the Police and Criminal Evidence Act 1984 known as Code A is to have effect as if paragraphs 2.18 to 2.26 of the code were revoked”.

97. This should have read that PACE Code A is to have effect as if paragraphs 2.18A–2.26 were revoked. Those paragraphs relate to section 44 of the Terrorism Act 2000. Paragraph 2.18 is the last paragraph in a section of Code A on the stop and search powers in section 60 of the Criminal Justice and Public Order Act 1994 and should not have been included.

98. The Secretary of State did not have the *vires* to make provision to the effect that Code A is to have effect as if paragraph 2.18 were revoked as paragraph 2.18 is not incidental, supplemental or consequential on the substantive provisions in the remedial order (as it relates to a different stop and search power).

**99. We draw this defective drafting to the attention of each House and anticipate that it will be corrected by the Secretary of State modifying the Order.**

## 4 Overall recommendations

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100. We accept the necessity of introducing a replacement stop and search power which is exercisable without reasonable suspicion but only available in tightly circumscribed circumstances.

101. We agree with the Government that there are compelling reasons for using the remedial order procedure to introduce the replacement power to stop and search without reasonable suspicion.

102. However, we recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the existence of an operational gap in the absence of a power to stop and search without reasonable suspicion since that power was suspended. In the absence of detailed scrutiny of such evidence, it is difficult both for us and for Parliament to reach a view as to the appropriateness of proceeding by urgent remedial order, rather than by the normal procedure.

103. If such evidence exists, and is provided, to the satisfaction of both Houses, we are satisfied that although this is an unusual exercise of the power to make an urgent remedial order, it is appropriate and justifiable to do so in the circumstances.

104. However, we recommend that the Order be replaced with a new Order modifying the provisions of the original Order in the ways specified in this Report, because the Order in its current form does not go far enough to remove the incompatibility identified by the European Court of Human Rights in *Gillan* and therefore risks giving rise to further breaches of Convention rights. We recommend, in particular, that the Order should be modified so as to:

- Require the authorising officer to have a reasonable basis for his belief as to the necessity of the authorisation and to provide an explanation of those reasons;
- Prevent the renewal of authorisations other than on the basis of new or additional information or a fresh assessment of the original intelligence that the threat remains immediate and credible;
- Require prior judicial authorisation of the availability of the power to stop and search without reasonable suspicion; and
- Require authorisations to be publicly notified once they have expired.

105. We also recommend that, in view of concerns about the racially discriminatory exercise of the previous power, the Code of Practice should be strengthened in certain ways and the role of the independent reviewer should also be bolstered in relation to this exceptional counter-terrorism power in order to enhance political accountability for its exercise.



# Conclusions and recommendations

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## 2 Is the Order necessary?

1. We welcome the Government's swift and constructive response to the Court's judgment. Providing interim administrative guidance about the use of a power which has been found to be in breach of the ECHR, pending amendment of the power by legislation, is a commendable approach to the implementation of European Court of Human Rights judgments. It helps to give swift effect to those judgments and so prevent repetitive violations which are responsible for much of the backlog before the European Court. The Home Secretary's interim guidelines to the police have undoubtedly prevented further breaches of individuals' right to respect for their private life pending Parliament's consideration of a longer term solution. (Paragraph 23)
2. This introduction of what were, in effect, interim general measures constitutes a significant step by the UK towards implementing the Interlaken Declaration and Action Plan, which calls on states to commit themselves to ensuring that the necessary measures are taken at national level to prevent further similar violations, as well as ensuring that Parliaments are more closely involved in decisions about implementation of Court judgments. We look forward to this sensible and pragmatic approach to interim measures being taken by the Government in other cases, where appropriate. (Paragraph 24)
3. We accept the necessity of introducing a replacement stop and search power which is exercisable without reasonable suspicion but only available in tightly circumscribed circumstances. In our view the case for having such a narrowly defined and exceptional power has been made out in the review of counter-terrorism and security powers. The necessity, in our view, is for a power to conduct random stop and searches of people and vehicles in the exceptional circumstances where credible intelligence is received about an imminent threat to a specific location but that intelligence is not sufficiently specific to give rise to reasonable suspicion about the identity of the person or vehicle. (Paragraph 31)
4. We agree with the Government that there are compelling reasons for using the remedial order procedure to introduce the replacement power to stop and search without reasonable suspicion. We accept that awaiting the enactment of the Protection of Freedoms Bill would ensure that the operational gap continues for another year, until that Bill receives Royal Assent. We also accept the Government's reasons for proceeding by way of a remedial order rather than altering the administrative guidance that has already been given about the current law. We would add to those reasons the additional consideration that a remedial order provides much greater opportunity for parliamentary scrutiny of the detail of the replacement power than the mere announcement of new administrative guidance. (Paragraph 35)
5. We recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the

existence of an operational gap in the absence of a power to stop and search without reasonable suspicion since that power was suspended. In the absence of detailed scrutiny of such evidence, it is difficult both for us and for Parliament to reach a view as to the appropriateness of proceeding by urgent remedial order, rather than by the normal procedure. (Paragraph 41)

6. We draw this unusual exercise of the power to use the urgent procedure to the attention of both Houses. If, however, Parliament is satisfied that the urgent operational need for a power to stop and search without reasonable suspicion is made out on the evidence, we find that the Government's reasons for proceeding by way of urgent remedial order, rather than the normal procedure, constitute a satisfactory justification for such an unusual exercise of the power. If the Government is able to demonstrate the urgent necessity of the power, we would therefore conclude that the Government is justified and acting *intra vires* in proceeding by the urgent procedure. (Paragraph 45)

### 3 Does the Order remove the incompatibility?

7. In our view, a very tightly circumscribed power with sufficiently robust safeguards against abuse is not inherently incompatible with Convention rights, provided its definition and safeguards ensure that it is confined to the exceptional circumstances in which such a power is shown to be needed in order to prevent a real and immediate risk of terrorist attack. (Paragraph 55)
8. We consider that expressly requiring that the authorising officer's view of necessity be reasonable, and that those reasons be given, will both concentrate minds and facilitate effective judicial control of the authorisation process. We therefore recommend that the Order should be modified so as to include express requirements on the face of the Order that the authorising officer:
  - (i) have a "reasonable belief" as to the necessity of the three matters specified in new s. 47A(1)(b)(i)-(iii) Terrorism Act 2000; and
  - (ii) provide an explanation to the Secretary of State (or to the court if the Order is amended to provide for prior judicial authorisation) as to why the powers are necessary and appropriate and why other measures are regarded as inadequate. (Paragraph 67)
9. We have given careful consideration to whether the geographical area or place to which an authorization applies should be more specifically defined on the face of the Order and, if so, what that limit should be. We have concluded that the combination of the tightened definitions and stronger safeguards that we are recommending, together with the clear guidance in the Code of Practice, makes it unnecessary to define a geographical limit on the face of the Order. (Paragraph 71)
10. We welcome the stricter limit on the duration of an authorisation under the Order. We think that the power to stop and search without reasonable suspicion should be a wholly exceptional power which is only available where there is an imminent threat of terrorist attack, and this requires the duration of an authorisation to be as short as

possible. We have therefore considered whether the duration of an authorization should be even more strictly defined in the Order, but we do not consider this to be necessary if our recommendation below concerning the renewal of authorisations is accepted. (Paragraph 74)

11. We recommend that the Order should be modified so as to provide for prior judicial (as opposed to executive) authorization of the availability of the power to stop and search without reasonable suspicion, with an urgent procedure for police authorization subject to judicial authorization within 48 hours. (Paragraph 87)
12. We recommend that the Code of Practice should contain stronger recording requirements in order to facilitate monitoring and supervision of the use of the replacement power to stop and search without suspicion. We also recommend that the authorising officer should be obliged to comply with the Code of Practice, as well as the individual officers exercising the power to stop and search. (Paragraph 90)
13. We recommend that the Order should be amended to include a requirement that authorisations be publicly notified when they have expired, so far as consistent with the protection of intelligence sources. (Paragraph 93)
14. We recommend that the Independent Reviewer of Terrorism legislation should have the power to report to Parliament on the exercise of this power on an ad hoc basis, and not be confined to reporting annually as part of his report on counter-terrorism powers generally. (Paragraph 95)
15. We draw this defective drafting to the attention of each House and anticipate that it will be corrected by the Secretary of State modifying the Order. (Paragraph 99)

#### 4 Overall recommendations

16. We accept the necessity of introducing a replacement stop and search power which is exercisable without reasonable suspicion but only available in tightly circumscribed circumstances. (Paragraph 100)
17. We agree with the Government that there are compelling reasons for using the remedial order procedure to introduce the replacement power to stop and search without reasonable suspicion. (Paragraph 101)
18. However, we recommend that the Government provide Parliament with more detailed evidence of the sorts of circumstances in which the police have experienced the existence of an operational gap in the absence of a power to stop and search without reasonable suspicion since that power was suspended. In the absence of detailed scrutiny of such evidence, it is difficult both for us and for Parliament to reach a view as to the appropriateness of proceeding by urgent remedial order, rather than by the normal procedure. (Paragraph 102)
19. If such evidence exists, and is provided, to the satisfaction of both Houses, we are satisfied that although this is an unusual exercise of the power to make an urgent remedial order, it is appropriate and justifiable to do so in the circumstances. (Paragraph 103)

20. However, we recommend that the Order be replaced with a new Order modifying the provisions of the original Order in the ways specified in this Report, because the Order in its current form does not go far enough to remove the incompatibility identified by the European Court of Human Rights in *Gillan* and therefore risks giving rise to further breaches of Convention rights. We recommend, in particular, that the Order should be modified so as to:

- Require the authorising officer to have a reasonable basis for his belief as to the necessity of the authorisation and to provide an explanation of those reasons;
- Prevent the renewal of authorisations other than on the basis of new or additional information or a fresh assessment of the original intelligence that the threat remains immediate and credible;
- Require prior judicial authorisation of the availability of the power to stop and search without reasonable suspicion; and
- Require authorisations to be publicly notified once they have expired. (Paragraph 104)

21. We also recommend that, in view of concerns about the racially discriminatory exercise of the previous power, the Code of Practice should be strengthened in certain ways and the role of the independent reviewer should also be bolstered in relation to this exceptional counter-terrorism power in order to enhance political accountability for its exercise. (Paragraph 105)

# Formal Minutes

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**Tuesday 7 June 2011**

Members present:

Dr Hywel Francis MP, in the Chair

Lord Bowness	Mike Crockart
Baroness Campbell of Surbiton	Mr Dominic Raab
Lord Dubs	Mr Virendra Sharma
Lord Morris of Handsworth	
Baroness Stowell of Beeston	

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Draft Report, *Terrorism Act 2000 (Remedial) Order 2011 : Stop and Search without Reasonable Suspicion*, proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 105 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Fourteenth Report of the Committee to each House.

*Ordered*, That the Chair make the Report to the House of Commons and that Lord Bowness make the Report to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 8 March, 19 May, 24 May and 7 June was ordered to be reported to the House for printing with the Report.

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[Adjourned till Tuesday 14 June at 2.00 pm]

## Declaration of Lords Interests

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No members present declared interests relevant to this Report.

A full list of members' interests can be found in the Register of Lords' Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

## List of written evidence

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- 1 Letter to the Committee Chair, from Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office, 2 March 2011 p 36
- 2 Letter from the Committee Chair, to Sir Hugh Orde, President of the Association of Chief Police Officers (ACPO), 6 April 2011 p 37
- 3 Letter from the Committee Chair, to Sir Paul Stephenson, Commissioner, Metropolitan Police Service, 6 April 2011 p 37
- 4 Letter to the Committee Chair, from Assistant Commissioner John Yates, Metropolitan Police Service, 13 May 2011 p 37
- 5 Letter to the Committee Chair, from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, Home Office, 19 May 2011 p 40

# Written Evidence

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## 1. Letter to the Committee Chair, from Baroness Neville-Jones, Minister of State for Security and Counter-Terrorism, Home Office, 2 March 2011

As you will be aware, the Government's recent review of counter terrorism and security powers recommended the replacement of Sections 44 to 47 of the Terrorism Act 2000 with a severely circumscribed stop and search power exercisable without reasonable suspicion which was much more targeted and compliant with Convention rights in the light of the European Court of Human Rights' judgment in *Gillan and Quinton*. That recommendation is reflected in the clauses on stop and search included in the Protection of Freedoms Bill which was introduced on 11 February.

In order to fill the current operational gap in 'no suspicion' stop and search terrorism powers, the review also recommended that consideration be given to whether the replacement provisions could be implemented more quickly than would be the case through the Protection of Freedoms Bill.

We have been considering this issue in the light of the current threat environment. The Prime Minister made clear in his New Year address that the threat from terrorism was as serious as it ever has been. This remains the case. The clear police advice is that there is an operational gap in respect of their ability to use "no suspicion" stop and search powers in exceptional circumstances where they suspect that an act of terrorism will take place and reasonable suspicion powers are not sufficient to address that threat. The police are concerned that waiting for the provisions in the Protection of Freedoms Bill to be commenced will mean that they are not able to effectively protect the public from the risk of terrorism in the meantime.

When I gave evidence to your Committee on 8 February, I was asked whether the Government intended to make a legislative change to Section 44 by way of a remedial order. At the time I said that I expected the Government would make a decision extremely shortly. We have considered how best to close the operational gap and consider that there are compelling reasons for proceeding under section 10 of the Human Rights Act 1998 to make a Remedial Order to make immediate changes to the primary legislation. The Home Secretary informed the House of this decision yesterday in her opening speech in the 2<sup>nd</sup> Reading of the Protection of Freedoms Bill.

Such an order would be temporary however, and the provisions concerning these powers would remain in the Protection of Freedoms Bill to ensure that Parliament has the opportunity to fully scrutinise them by means of primary legislation. The remedial order would then be repealed on commencement of the Protection of Freedoms Bill.

A remedial order that replaces sections 44 to 47 with Convention-compatible powers would remove the incompatibility of the Terrorism Act 2000 with Convention rights. Whilst the Home Secretary's statement of 8 July put an end to the possibility of these powers being used in a manner which is incompatible with Convention rights, sections 44 to 47 remain on the statute book. The Home Secretary's guidelines on 8 July do not therefore represent an implementation of the *Gillan* judgment which can only be accomplished by amending the primary legislation.

Given the operational urgency, we intend to use the urgency procedure provided by the Human Rights Act to make the remedial order. The police assess that they need the powers to be available now. Home Office Ministers have concluded on the basis of advice that the availability of these powers (on a revised basis) as soon as possible is in the interests of national security, in particular the protection of the public from terrorism. In taking this decision, we recognise that there are different interpretations of the legislation as to what factors can have a bearing on the Secretary of State's view that the 'urgency of the matter' requires the order to be made without advance Parliamentary approval and the other procedural requirements normally attached to making a remedial order.

I am aware that previous JCHRs have expressed the view that the urgency can only relate to the need to stop individuals' Convention rights being infringed. While we accept that this is a key factor, 'urgency' arises in this instance because the absence of legally certain 'no suspicion' powers



## **2. Letter from the Committee Chair, to Sir Hugh Orde, President of the Association of Chief Police Officers (ACPO), 6 April 2011**

The Joint Committee on Human Rights is scrutinising this urgent Remedial Order concerning exceptional counter-terrorism powers to stop and search without reasonable suspicion.

I am writing to draw your attention to the Committee's call for evidence in relation to the Remedial Order (attached). We would welcome any evidence you may wish to submit in relation to any of the issues identified in our call for evidence.

In particular, we would be interested in any evidence you are able to provide in support of the statement by the Home Secretary that "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" (paragraph 16 of the "Required Information" published by the Home Office with the Remedial Order—available on the Home Office website). Without disclosing sensitive intelligence information, can you provide specific examples of circumstances which have arisen since the Home Secretary's statement on 8 July 2010, in which a power to stop and search without reasonable suspicion was considered necessary to prevent an act of terrorism? I am writing in the same terms to the Metropolitan Police Service.

It would be helpful if we could receive your reply by 3 May 2011. I would also be grateful if you could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

**6 April 2011**

## **3. Letter from the Committee Chair, to Sir Paul Stephenson, Commissioner, Metropolitan Police Service, 6 April 2011**

The Joint Committee on Human Rights is scrutinising this urgent Remedial Order concerning exceptional counter-terrorism powers to stop and search without reasonable suspicion.

I am writing to draw your attention to the Committee's call for evidence in relation to the Remedial Order (attached). We would welcome any evidence you may wish to submit in relation to any of the issues identified in our call for evidence.

In particular, we would be interested in any evidence you are able to provide in support of the statement by the Home Secretary that "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" (paragraph 16 of the "Required Information" published by the Home Office with the Remedial Order—available on the Home Office website). Without disclosing sensitive intelligence information, can you provide specific examples of circumstances which have arisen since the Home Secretary's statement on 8 July 2010, in which a power to stop and search without reasonable suspicion was considered necessary to prevent an act of terrorism? I am writing in the same terms to the Association of Chief Police Officers.

It would be helpful if we could receive your reply by 3 May 2011. I would also be grateful if you could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

**6 April 2011**

## **4. Letter to the Committee Chair, from Assistant Commissioner John Yates, Metropolitan Police Service, 13 May 2011**

Thank you for your letter dated the 6th April 2011 and the opportunity to provide evidence in the matter of the replacement power to stop and search without reasonable suspicion Section 47A Terrorism Act 2000 and the Joint Committee on Human Rights (JCHR) call for evidence of any 'operational gaps'.

I intend to deal with this response in two forms: Firstly to provide you and the Committee with a broad outline of the main challenges that we face in terms of counter terrorism legislation and its use, and secondly in the confidential annex<sup>1</sup> detail the operational ‘gaps’ as I see them in relation to the current threat picture.

You will know that Section 44 Terrorism Act 2000 (Section 44) provided a power exercised by police on the basis of a detailed authority provided by an officer of at least the rank of a Commander within the Metropolitan Police Service (MPS). In practice this has always been undertaken at a more senior level, by the Assistant Commissioner of Specialist Operations. The Section 44 power provided police with an ability to stop and search persons for articles of a kind that could be used in connection with terrorism, whether or not the officer had grounds to suspect the presence of such articles. This was a unique feature of the power but one of the main public concerns in relation to its use.

Section 44 Powers were then considered by the Secretary of State who reviewed the documented evidence, before confirming authority within 48hrs of the application. Authority was granted for a period of 28 days at a time and each refreshed request required a new submission by a Commander or above. The Secretary of State had power to withdraw her authority at any time.

The format of the Section 44 request was always submitted on the basis of Home Office defined categories requiring detailed information about the terrorist threat. Any submission was therefore predominantly based upon a highly confidential documented assessment of that current threat by the Police, Security Service and JTAC, as well as specific relevant operational updates.

Responsibility for developing the threat picture itself lies with the Security Service (MI5 [http://www.mpa.gov.uk/committees/mpa/2007/070531/07/-fn0\\_02](http://www.mpa.gov.uk/committees/mpa/2007/070531/07/-fn0_02))<sup>2</sup> working to the Director General. Essentially the police respond to the information generated by a complex process of analysis. Our intelligence partners assess a wide range of different and generic sites to be (at the very least) aspirational terrorist targets. Of particular importance is the potential vulnerability of sites across the whole of the MPS area. Unsurprisingly, these include the transport systems, economic targets, the utilities, crowded and iconic/tourist attractions, shopping centres and other ‘soft’ targets, making London a ‘special case’ in terms of vulnerability or threat. This was a sentiment strongly expressed by Lord Carlile, the Independent Reviewer of Terrorist Legislation (2001 to 2011)<sup>3</sup>. Were the threat against London to increase, it is likely that (because of the very high threat level in which we are now continually operating) this would be on the basis of very specific new intelligence. Rather than lowering the threat elsewhere in the Capital, this would simply focus further activity in response to the intelligence received.

There was broad agreement amongst legislators and police (and contained in the judicial and government reviews that have taken place) that the exercise of Section 44 is a tactic to disrupt, deter and prevent terrorism, and helped create a hostile and uncertain environment for terrorists who wished to operate in London. Research based case studies from Belfast and the City of London<sup>4</sup> demonstrated in practical terms how a power such as Section 44 could protect and secure major cities. The research indicated the intrinsic value of specific target hardening activity through robust search regimes, described as ‘opportunity-blocking against highly determined offenders’. Specifically, where robust search regimes were applied to vulnerable locations, terrorist activity was displaced outwards. The implications of the research supported the view that prevention tactics, including searching, can be seen as legitimate and necessary in increasingly wide circles beyond a particular site, event or geographic location.

The effectiveness of (broad) Stop and Search powers to prevent, deter and disrupt criminality is much debated. The MPA Scrutiny Report on Stop and Search identified issues that arise from the use of these powers, and in particular the impact on minority communities. The scrutiny did not come to a position on effectiveness. Both Lord Scarman in 1981 and Lord McPherson in 1999 addressed the issue of Stop and Search, and both pointed to the same issue of negative community impact—but both believed it was an important tool in preventing and detecting crime. Criticism surrounding the balance between the number of

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1 Procedural arrangements in respect of confidential submissions and protocols discussed with the Clerk of the Committee (Mr Mike Hennessy) prior to any documents being submitted.

2 MI5 Website address: [www.mi5.gov.uk](http://www.mi5.gov.uk)

3 Lord Carlile of Berriew Q.C. was appointed in 2001 as the independent reviewer of the Terrorism Act 2000 and he has reported annually on its operation, including the use of Section 44 powers.

4 Coaffee, J. (2003) *Terrorism, risk and the City: The making of a contemporary Urban Landscape Hampshire, England*: Ashgate Publishing

stops and arrests resulting would appear to miss the point that the legislation and its use deliver a deterrent factor. Measurement of success is challenging to quantify as success could be that nothing has happened.

Millar, Bland and Quinton (2000)<sup>5</sup> summarised previous documented evidence on the effectiveness of stop and search, concluding it has a “disruptive impact on crime by intercepting those going out to commit offences” and that “where searches are used intensively in particular locations they may have a localised deterrence or displacement effect.” There is “evidence that the very existence of stops may prevent crime, whether or not they involve searches”.

DAC Peter Clarke (now retired) had described Section 44 as “contributing to the safety and security of the capital”. His comment that “Intelligence shows that London is considered by terrorists to be a hostile operating environment.” was made in the context of the commencement of the 2009 MPS review<sup>6</sup> and in respect of the tactical role of Section 44 in countering threat.

The MPS believes that high visibility, overt policing tactics have changed the behaviour and has interfered with the activity of terrorist subjects, for example altering travel routes, forcing periods of inactivity etc. Section 44 also had resonance with other stop and search powers exercised daily by the police (locally and nationally) in that it is a disruption/prevention/reassurance measure. It was used pan London and more latterly in targeted protection of particular crowded and iconic places.

Evaluating how Section 44 contributed to the safety of Londoners is a demanding goal, but the process included customer satisfaction and customer confidence indicators, rather than a crime detection framework. The MPS recognised then and acknowledged the concerns of the MPA, the media and the community and view these matters seriously. The MPS continues to engage with Londoners in a more open discussion about the role, function and legitimacy of the use of any stop and search power.

Before moving from Section 44, it is important to state that Section 44 had been subject to considerable public and media attention since its inception, most notably through annual reviews undertaken by Lord Carlile and through Judicial Review proceedings and other legal challenges. It was also the subject of ACPO practice advice published in 2006 and 2009. During use of the legislation the police have sought, working in conjunction with the community, to respond to criticism and legal challenges. Fine tuning of the application process saw a move from the more ‘blanket’ style approach to the targeting of specific and defined geographical areas. However, events were overtaken by the case of Gillan & Quinton which brought about the decision by the European Court of Human Rights in 2010 in ruling the use of the S44 power as unlawful when used whilst based upon grounds without suspicion.

## Call for Evidence

Having placed previous use of CT stop and search powers into context, I would like now to move onto the specific areas of interest of the JCHR. In your letter you have asked for evidence of a clear operational gap in counter terrorism which requires the immediate availability of a replacement power to stop and search without suspicion.

Having had the Section 44 power (with all its documented considerations and restrictions), the MPS found itself without a CT Stop and Search without suspicion power from July of last year. The two major events for which a Section 44 authority were required, in order to provide security, safety and reassurance, were the New Years Eve Celebrations and the New Years Day parades in central London. A Section 44(1) authority (stop and search vehicles and persons within the vehicles) was authorised on the basis of a assessed threat for a specific area over a short period of time.

The operational feedback from the ‘Gold Commander’ for the New Year’s Eve event, stated that the actual Authority, area defined and tactics that this restricted power afforded him, did not provide the required coverage, operational flexibility or the ability to search people who attended the event. In terms of operational gaps, since the beginning of last year several working/focus groups of practitioners and security experts have

5 Millar, J., Bland, N. and Quinton, P. (2000) The impact of stops and searches on crime and the community, Police Research Series Paper 127 [lib5.leeds.ac.uk/rlists/law/law5010.htm](http://lib5.leeds.ac.uk/rlists/law/law5010.htm)

6 Section 44 Terrorism Act 2000 - tactical use review Report: 10, Date: 7 May 2009. [www.mpa.gov.uk/search/?qs=1&sc=2&qu=MPS+section+44+stop+and+search+report+2009&search](http://www.mpa.gov.uk/search/?qs=1&sc=2&qu=MPS+section+44+stop+and+search+report+2009&search)

been assessing the risks involved in not having Section 44 powers. The initial areas identified are provided at *Confidential Annexe A*.

### The New Powers (47A)

Section 47A has provided the police with a power that is sufficiently circumscribed as there is a robust statutory Code of Practice and in addition to this new police guidance is currently being drafted to further support any usage in the near future. In terms of any operational deployments of the new power, the remedial order provides a clearer definition and therefore a more targeted and proportionate power.

Much discussion has been had around the issue of the Authorising Officer having to be satisfied that they have to now have 'reasonable grounds to suspect that an act of terrorism will take place' instead of the previous wording around preventing acts of terrorism. This is a fundamental increase in the threshold for the relevant statutory. The difficulties in assessing the distinction between reasonable belief, grounds and suspicion cannot be underestimated and our view is that the threshold should not be set so high as to make it unachievable.

As part of the extensive work with the Home Office, their legal advisers and the ACPO lead for "Stop and Search" Chief Constable Craig Mackey, the MPS was fully sighted on the discussion that took place prior to any submissions to the Home Secretary and the Attorney General. In respect of the specific points raised around the authorising process, duration of an authority and the manner in which it is sanctioned and ratified, I am content with the recommendations as stated in the remedial order.

In terms of any pre-authority judicial oversight (as opposed to executive oversight), I cannot see a case for this as the current process has a significant level of oversight already as the application passes from the Assistant Commissioner to the Home Secretary and is scrutinised at each level. We would need to look very closely at adding an additional level of bureaucracy especially if it were in the midst of what may be a testing scenario. If an additional administrative phase were to be added, I could see that the person having that judicial oversight would need to be vetted to the highest level (Developed Vetted) and have access to the full intelligence picture in addition to a background of operational experience to make what, in effect, is an operational decision. An alternative process could see a model where the applications are submitted by the police to an independent 'S47A Commissioner' similar to the role performed by the Office of Surveillance Commissioners (OSC) which appears to work well with recognised independence.

As you will remember with the Section 44 work, prior to its suspension, extensive consultation was undertaken around the notification and publication stages of its use. The new 47A powers are in essence in the same space as the suspended powers in that, the police have already moved towards a widely publicised version of any authorities, stops and searches.

As you will also be aware, at this time the MPS have not considered it appropriate to use these powers as the MPS have not been presented with sufficient intelligence to reach the threshold necessary to support the use of an authority, however should the intelligence threat change to one of where an authority is warranted then the MPS would consider an authority subject to the conditions laid out in the legislation. The MPS is mindful of the continuing need to assess the developing intelligence picture in and around the Olympic events in 2012.

**13 May 2011**

### **5. Letter to the Committee Chair, from James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, Home Office, 19 May 2011**

I am grateful for the opportunity to respond to a number of questions raised by the Committee in respect of the remedial order laid down before Parliament on 17 March, concerning terrorism and stop and search powers. Please accept my apologies for the delay in responding to you.

**What evidence is the re of the existence of a clear operational gap in counter-terrorism powers which requires the immediate availability of a replacement power to stop and search without reasonable suspicion?**

The Government set out the reasons for introducing powers in both the “required information” and the explanatory memorandum which accompanied the remedial order. In brief, the explanatory memorandum states that:

The review (of counter terrorism and security powers) 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 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 to 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.

**Is the replacement power to stop and search without reasonable suspicion sufficiently tightly circumscribed? In particular:**

- **Should there be a requirement that the authorising officer have a “reasonable belief” as to the necessity of the three matters specified in new s. 43B(1)(b)(i)–(iii) Terrorism Act 2000?**

The powers contained in the remedial order can only be authorised where an authorising officer has “reasonable suspicion that an act of terrorism will take place and the powers are necessary to prevent it”. As the robust draft Code of Practice makes clear, the reasonable suspicion must relate to a particular act of terrorism rather than be based on a generic assessment that an act of terrorism is likely.

The exact wording of the test for authorisations was considered in great detail during the counter-terrorism review by the Home Office and by the police. The potential wording considered was whether an authorising officer should “reasonably believe” or “reasonably suspect” that an act of terrorism “will” or “may” take place.

One of the primary concerns was to draft the new powers in a way which ensured they were significantly circumscribed but remained useful. A threshold of “reasonable belief” would, in our opinion, be too high to ensure that chief officers were able to authorise the powers on the basis of the information available, especially if that information consisted of intelligence which could not be immediately corroborated but need to be acted upon. A threshold of “suspicion” allows the chief officer to authorise the powers as long as that suspicion is reasonable. However, in order to ensure that the powers are only authorised in response to an immediate threat, the powers can only be authorised where there is reasonable suspicion that an act of terrorism “will” take place, rather than where one “may” take place. If the grounds for an authorisation cease to apply, the legislation is clear that an authorisation must be cancelled.

- **Should the geographical area or place to which an authorisation applies be more specifically defined?**
- **Should the duration of an authorization be more strictly defined?**

The remedial order makes it clear 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 length of 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.

We are aware that in submissions to the Counter Terrorism Review, some respondents, in particular Liberty, suggested that the authorisation period be as limited as 24–48 hours and for only a very small geographical area of up to 1km square. The review considered this and found that such an approach would be operationally unworkable given intelligence of an expected attack is rarely so detailed to give exact times and places. The legislation makes clear, however, that authorisations should be as time and geographically limited as possible.

In some respects the new proposals go further than Liberty has suggested. Liberty has suggested that the police should be allowed to stop and search people in the vicinity of particularly critical or sensitive buildings or during important events. The new proposals would only allow this if there was some intelligence to suggest that event or place was under threat of attack.

- **Should the legislation expressly prevent the giving of a new authorization other than on the basis of new or additional information?**

While the legislation does not expressly prevent the giving of a new authorisation upon the expiry of one previously made, the Code of Practice published alongside the remedial order makes it clear that “rolling” authorisations of the kind made by some forces under the old section 44 powers, where similar geographical areas are repeatedly covered by authorisations based on the same information, are not permitted.

However, if no new authorisations were allowed at all, this would mean that it would not be possible to authorise the powers in an area previously covered, even where the existing intelligence had been reassessed and remained current and credible. This reassessment is crucial for meeting the threshold of an authorisation; if supporting evidence is out of date and the authorising officer cannot show reasonable suspicion that an act of terrorism will take place, then an authorisation cannot be made. Conversely, if the information available shows that a threat persists, then the threshold for an authorisation may be met.

**Is the replacement power to stop and search without reasonable suspicion subject to sufficient legal safeguards against possible abuse? In particular:**

- **Should there be prior judicial (as opposed to executive) authorization of the availability of the power to stop and search without reasonable suspicion, with a urgent procedure for police authorization subject to judicial authorization within 48 hours?**

The review of counter-terrorism and security powers considered the judicial authorisation for the use of the new terrorism stop and search powers and decided that it was not appropriate. The Government as the executive needs to be responsible for national security decisions and the judiciary should be able to review such decisions as necessary. Blurring the lines between the executive and the judiciary would not be helpful.

- **Should there be a requirement that authorizations be publicly notified?**

We considered whether authorisations should be publicly notified as part of the review of Section 44 and concluded that it was not a necessary additional safeguard and that it would be counter-productive. On the first point, the European Court of Human Rights in their *Gillan* judgment did not make specific mention of the lack of publication of the authorisations in their main criticisms of the Section 44 powers. We consider that the very significant steps that the Government has taken to replace Section 44 with a much more tightly defined and circumscribed power with enhanced safeguards means that the new powers comply with Convention rights. On the second point, the police advised that publishing information on when and where authorisations were in place would allow terrorists to regulate their behaviour. It would, in effect, provide them with an extra reconnaissance tool giving information about which areas were subject to authorisations, and if authorised on the basis of specific intelligence, could allow terrorists to make a connection between the areas authorised and the intelligence which the police had access to.

- **Does the Code of Practice contain any safeguards which ought to be on the face of the legislation?**

We consider that the legislation already includes very significant safeguards and limits to ensure that the power is proportionate. This includes:

- The threshold for senior police officer to authorise the use of the proposed powers is much higher. The senior police officer must reasonably suspect that an act of terrorism will occur and consider that the powers are necessary to prevent that act of terrorism.
- The length of time that any authorisations are in place has been halved and authorisations must be as geographically and temporally limited as possible.
- The Secretary of State has greater power to refuse and amend authorisations.
- The purpose of a search has been narrowed.
- The legislation requires a statutory code of practice.

Whilst the statutory Code of Practice includes important guidance and supporting information to police officers, all of the key safeguards are already on the face of the legislation.

- **Should the Code of Practice contain any additional safeguards?**

We consider that the Code of Practice for the remedial order contains sufficient safeguards, but we look forward to the Committee's views as to whether there are any additional safeguards that it considers necessary.

The Protection of Freedoms Bill makes the Secretary of State responsible for preparing a Code of Practice containing guidance about the exercise of the powers conferred by sections 43 and 43A; the exercise of the powers to give an authorisation under section 43B (to be amended to 47A); the exercise of the powers conferred by such an authorisation; and such other matters that the Secretary of State considers appropriate. The Code of Practice for the remedial order provides, in effect, interim guidance for the section 43B (to be amended to 47A) power provided by the Protection of Freedoms Bill. I will be undertaking a wide ranging public consultation of the draft Code of Practice for the stop and search powers provided by the Protection of Freedoms Bill before it comes into force.

**19 May 2011**

## List of Reports from the Committee during the current Parliament

### Session 2010-11

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141

## List of Reports from the Committee during the last Session of Parliament

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### Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-	HL Paper 45/ HC 328



	second Report of Session 2008–09	
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children’s Rights: Government Response to the Committee’s Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee’s First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament’s Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111