STOPWATCH Research and action for fair and accountable policing

StopWatch's response to the Home Office Consultation on changes to the Schedule 7 Code of Practice further to changes by the Anti-Social Behaviour, Crime and Policing Act 2014.

2nd May 2014

How clearly, in your view, does the revised Code of Practice set out the following changes to Schedule 7:

1) The reduction of the maximum period of examination from nine to six hours

The total maximum period of any combination of an examination and detention has been reduced from nine hours down to six hours although it could have been reduced much further. There is a welcomed clarity now on the difference between an *examination*, which can only last a maximum of one hour after which the examinee must be released or detained, and a *detention* which can proceed for anything up to the sixth hour from the start of the examination.

Detentions should only take place where there is a justified reason for the continued detention of an examinee otherwise the person should be released and the code of practice should reflect this in order to avoid an increase in unnecessary detentions.

2) The extension to individuals detained at a port of the statutory rights to have a person informed of their detention and to consult a solicitor privately

StopWatch welcomes the re-introduction into the Schedule 7 code of practice the provision for legal consultation to those examined and detained at ports including the ability for people to speak to them privately and in person (paragraphs 41-42; 50a) although a senior officer still reserves the ability to delay this right (paragraph 41) and the attendance of the legal representative could be over the phone.

Given the ability for examining officers to use innovative methods to ensure legal representation (e.g. over the phone, video-conference, etc) it is hard to imagine why any officer would have to delay this right particularly when Schedule 7 does not require any grounds for suspicion to examine or detain a person. Access to legal advice is a fundamental human right which should not be interfered with and, given the nature of modern terrorism, it is even more important that examining officers uphold the highest legal and moral standards when applying their powers of counter-terrorism.

In both examinations and detentions, officers can still carry out a search of the person's property and electronic items (e.g. phones, laptops, tablet PCs, etc) before legal advice is obtained or the solicitor has arrived. As stated in our answer to question 9 of this consultation, this provision should not be exercised as a matter of routine and, where questioning has been suspended pending the arrival of a solicitor, the search of property should also be suspended particularly that of electronics due to the lack of information relating to what these procedures involve, where the information taken from electronic items is stored, who it is shared with and how long it is retained.

Examinees and detainees have the right to have someone informed of their detention. Again, this is left to the discretion of officers and the deferral of this right should not be exercised routinely unless the person is deemed to be likely to be involved in terrorism and communicating with the outside world would risk public safety. In this case the person should be arrested under the Terrorism Act 2000 and managed through those provisions. In other words, under schedule 7, it is hard to see why officers should ever have to defer a person's right to have someone informed of their detention and the code of practice should reflect this.

3) The clarification that the right to consult a solicitor includes consultation in person

StopWatch welcomes the clarification that legal consultation for those examined and detained at ports includes the ability for them to have legal representation in person (paragraphs 41-42; 50a) although a senior officer still reserves the ability to delay this right. If solicitors are thought to take too long to arrive because of the distance of the port, other means can be used such as the telephone or video-conference. As the draft code of practice suggests, police officers should wait for the arrival of the solicitor in person before questioning starts but it does for allow the searching of belongings and electronic items in the meantime. These searches should also be postponed until the arrival of the solicitor as a way of preventing any abuse of power and that the person examined or detained is fully aware of the nature of searches.

4) Ensuring access to legal advice for all individuals examined for more than one hour

See answer to questions 2 & 3.

5) The introducing of a statutory review of the need for continued detention

StopWatch welcomes the new legislative provision introducing a statutory review into the continued detention of individuals at ports. If carried out properly and independently of the examining officers conducting the detention, then this introduces an important safeguard for people detained under Schedule 7 and will, potentially, not only reduce the length of time people are detained unnecessarily but also the sheer scale of multiple inconveniences placed upon them despite not being suspected of any crimes. For this reason, we believe that periodic reviews should take place at intervals of no longer than every hour. Periodic reviews would also ensure that police officers are held to account for the application of their extraordinarily broad discretionary powers which is a welcomed break from the past.

The requirement of review officers to provide detainees and their legal representative with the opportunity to question their detention during each periodic review and, if applicable, provide them with a reason for their continued detention (paragraph 62) is an important step in ensuring officers are directly held to account by those detained under Schedule 7. This review process should also include scrutiny of examining officers' decision to download information from people's electronic items and, where

applicable, the taking of their biometric data (see our response to question 8 for more on biometrics).

6) The introduction of a statutory requirement for training of examining and reviewing officers

StopWatch welcomes the requirement for all examining and review officers to undergo training and accreditation before using Schedule 7 and Schedule 8 (paragraphs 8-13). If the training is rigorous, then this would help to professionalise ports policing and hopefully avoid the *'if they have nothing to hide then they have nothing to fear'* attitude that pervades many examining officers: a philosophy which not only promotes practices that lack any sense of proportionality, such as the taking of people's biometric or electronic data regardless of the outcome of the encounter, but also places the onus upon the examinee and detainee to prove their innocence rather than treating them as innocent until proven guilty. Training should also address the bizarre and aggravating questions some people face in relation to their religious practice and deeply personal matters which has caused a great deal of resentment towards counter-terrorism policing. It is extraordinary that so many innocent people are asked questions about their faith and legitimate political activities despite the consensus built by many empirical studies that there is no single pathway into international or domestic terrorism and that a strong religious background can actually protect against violent-extremism.

In addition, College of Policing holds the responsibility for accrediting police officers (annex b) according to national standards set by the Association of Chief Police Officers. The establishment of a rigorous set of national standards that are enforced locally by each chief officer team is right and any officer failing to performance to those standards should have their accreditation removed and made to undergo retraining. However, it is not clear what role community organisations and independent scrutiny groups can play in the training of officers nor how members of the public can feed into its parameters. The draft code of practice should introduce some provision for seeking local views and provide for direct community involvement in the training of examining and review officers locally and nationally. The Home Secretary recently announced a package of measures for the reform of general stop and search powers and wrote to all chief constables and Police and Crime Commissioners warning them to exercise their duty to consult communities on stop and search otherwise she would force through primary legislation to this effect[1]; this should be extended to Schedule 7 in order to avoid counter-terrorism powers being siloed away from public scrutiny as has long been the case. People often do not distinguish between one legal power to stop and search and another which means that the effect of a port stop or one on the streets both have serious and similar implications for trust and confidence in the entire array of police activities.

Finally, the draft code of practice makes it clear that non-accredited officers may use Schedule 7 and Schedule 8 powers where *"a senior police officer believes that this is necessary due to an exceptional urgent operational need"* for example *"during a period of heightened threat"* (paragraph 14). Britain has faced a 'heightened' security threat

[1] The full speech and Parliamentary debate can be read at:
http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140430/debtext/140430-0001.htm#14043038000002

for a number of years and so it is not clear whether this means that non-accredited officers will be allowed to use the power as a matter of routine since, again, we face a 'heightened threat' for the longer term or if a more proportionate approach will be taken. This example is confusing and if it remains unchanged in the code of practice may result in the routine use of this power by untrained and unaccredited officers.

7) The establishment of a statutory basis for undertaking strip searches to require suspicion that the person is concealing something which may be evidence that the person is involved in terrorism and a supervising officer's authority

The draft code of practice makes clear that strip searches (the removal of outer clothing) can only take place where a person is detained and there are "reasonable grounds" to believe that they are concealing items proving their involvement in terrorism (paragraph 55). It, rightly, emphasises that this power should not be used as a matter of routine (paragraph 55) although other powers to strip search could be used instead (paragraph 56), and it sets out a number of procedures that must be observed during the search (see paragraph 57). A record must be made of: the search, officers present, rationale and outcome of the strip search (paragraph 58) and all of these are important steps in ensuring that the power is not used routinely. The code of practice should make it clearer that this should only be used when *absolutely necessary* and, should the individual be suspected of being involved in terrorism, then they should be arrested and governed under the relevant legislation (Schedule 8 also governs people arrested for terrorism). Figures on strip searches should be collated centrally and published regularly alongside the existing data on Schedule 7 made public in the Home Office Statistical Bulletins on counter-terrorism arrests and outcomes. StopWatch welcomes the special recognition that the draft code of practice has of children facing the possibility of a strip-search as well as vulnerable adults.

8) The repeal of the power to seek intimate samples (e.g. blood, semen)

StopWatch welcomes the repeal of taking intimate biometric samples (paragraph 71) particularly given that Schedule 7 is a power that does not require any level of suspicion for use in the first place. However, the taking of non-intimate samples (e.g. hair, mouth swab) and fingerprints remain and should be removed from this power. If a person is suspected of being involved in terrorism then there is enough grounds to arrest him or her and take their biometric data under the Terrorism Act's powers of arrest.

The draft code of practice outlines six conditions under which non-intimate biometrics can be taken (paragraph 70) but the second one: *"for the sole purpose of assisting in a determination of whether the person is or has been involved in the commission, preparation or instigation of acts of terrorism",* is too generic and open to abuse. One of the strongest grievances people examined and detained in the past have against the police is why their biometric data was taken from them despite not being suspected of any wrongdoing and this has left many feeling deeply insulted and, in their words treated as "terrorists" and "pedophiles". StopWatch is aware of past practice were some ports took (and may still be taking) people's biometric data even before any questioning or searches had taken place; this policy lacks any sense of proportionality and fairness. To address this, biometric data should not be taken as a matter of routine

and, where a person is suspected of being involved in terrorism, they should be arrested and have their biometrics taken under the powers of arrest. This policy should also apply to the taking of their profile picture which the draft code of practice currently indicates can be taken without their consent. Review officers should scrutinise the decision to take a person's biometric data and record the outcome of their decision.

9) The express provision that an examining officer may make and retain a copy of information obtained or found in the course of an examination

StopWatch is gravely concerned about this provision. Examining officers must inform persons examined and detained that they have a duty to answer questions and to give *"the officer any information in his or her possession which the officer requests for the purpose of examination"* (paragraph 29) which includes providing them with electronic equipment and passwords (paragraphs 32, 33, 38-40) even before the person's solicitor is present. Considering that people examined and detained are not suspected of being involved in any crimes, let alone being involved in terrorism, this blanket policy lacks any form of proportionality and is extraordinarily broad. StopWatch is aware of the practice in many ports across the UK where the searching of information in electronic items (phones, laptops, tablet PCs, etc) is conducted whilst the examinee or detainee is distracted by questioning or a physical search; this means that electronics are being scanned and information downloaded from them without their prior knowledge. This has been taking place even before this express power was introduced by the Anti-Social Behaviour, Crime and Police Act 2014. David Anderson QC, in his written supplementary evidence to the Home Affairs Select Committee inquiry on counter-terrorism in November 2013[2], called these powers *"strong ones indeed"* and argued persuasively for the introduction of a minimum threshold of suspicion to be met before this provision is applied. The code of practice should introduce a minimum level of suspicion for use and the exercise of this provision should be postponed until the arrival of the solicitor. Further, where it has been exercised, the data should be removed from the police system once the person has been released. StopWatch would welcome the strong leadership of the Home Office on this issue and recognises the unique role that it can play in introducing a much fairer and proportionate policy.

10) Do you have any other comments on the revised Code?

We welcome the emphasis that all examinations and detentions should be done with respect and in a courteous manner (paragraph 18) and that the decision to examine must not be arbitrary (paragraph 19).

Given the role of Behavioural Assessment Screening System (BASS) and Passenger Assessment Screening System (PASS) in forming a decision to examine or detain a person, there should be an independent review of its effectiveness and the results made public in order to gain public trust in the use of those strategies (paragraph 19). The code of practice should dedicated more attention to both BASS and PASS and the role is has in relation to the various provisions of schedule 7.

[2] See: http://www.parliament.uk/documents/commons-committees/home-affairs/CT%2011a%20David%20Anderson%20QC%20supplementary.pdf

The draft code of practice takes a dismissive attitude to initial screening questions by suggesting that it could take place under common law (paragraph 20) and treating it as, essentially, a 'conversation'[3]. Most encounters under Schedule 7 will take place as initial screening questions and this forms an important part of the decision to examine and detain people. Therefore, to appreciate the full extent of Schedule 7, these encounters should be recorded and officers should be made aware of the negative impact of such questioning on perceptions of policing held by many passengers, particularly those repeatedly stopped. Furthermore, the draft code of practice rightly highlights how people screened are not obliged to answer questions but most people would not be aware of this right; the code of practice should encourage officers to inform passengers of the voluntary nature of the encounter. For those passengers who are already well aware of their rights and decline to answer questions, the draft code of practice should be clear in advising examining officers that this alone should not form the basis of a decision to examine or detain that person.

One of the most deeply offensive aspects of Schedule 7 to many examined or detained at ports is the bizarre questions relating to people's religious practice or other deeply personal matters. The draft code of practice could help to remove the likelihood of this occurring by providing greater guidance on the types of questioning that should not take place. This should also be covered in the training as part of the accreditation process.

The most successful cases of Schedule 7 leading to the arrest and conviction of people involved in terrorism have arisen from an intelligence-led approach[4], typically where advanced information existed of a person travelling before they reached the port. Therefore, there is considerable benefit in the draft code of practice providing better guidance on how examining officers may adopt an intelligence-led approach and the role of up-to-date ports circulars in this regard.

The code of practice should place a duty upon examining officers to provide as much assistance as they possibly can to people who have missed their flights or any other transportation as a result of an examination or detention. This includes helping people find alternative travel arrangements and speaking to the airline or other transport company to help passengers argue their case. This is already the recommended best practice in a handful of ports around the country and should be adopted by all others nationwide.

The code of practice states that only the ethnicity of the person examined or detained, the length of the encounter and, if relevant, the time of the detention should be recorded (paragraph 43). The taking of biometric data should also be included in this list and is something that is already collated centrally by ACPO and published annually by the Home Office; the loss of this information will erode the only means by which senior officers and members of the public officers can understand the extent to which biometric data is taken under Schedule 7/8. The code of practice should also ensure that the number of occasions that people's electronic information was downloaded is recorded given how broad and unregulated those powers are. Finally, the code of practice should ensure that the outcome of all examinations and detentions are

[3] This was the same rationale used to scrap the recording of the police use of street stop and accounts in 2010.
[4] See: Anderson, D (2011) *Report on the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*. London: The Stationary Office. 18 July 2011.

recorded including the number of terrorism-related arrests arising from those encounters. As with the existing data, these should be collated centrally by ACPO and published by the Home Office. Currently, only the number of arrests arising from people failing to comply with Schedule 7/8 at ports is recorded and this suggests that it is in fact possible to use existing recording mechanisms to collate the number of terrorism-related arrests. It is strange that whilst the number of arrests for general stop and search powers are recorded and published regularly and subject to robust scrutiny, the number of schedule 7 examinations or detentions leading to arrests or convictions for terrorism-related purposes remain unknown despite it being the most wide-ranging and under-regulated of all police powers to stop and search in the country. All of this would help senior police officers, national policing bodies including the Home Office, community groups and politicians to judge the effectiveness of the power.