



Without Suspicion

Stop and Search under the Terrorism Act 2000

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Executive Summary

Police in the United Kingdom have long used “stop and search” powers to question and temporarily detain people suspected of involvement in criminal activity. In 2000, the British Parliament approved a new terrorism “stop and search” power giving police throughout the UK the power to stop and search vehicles and members of the public in order to prevent terrorism, without need for reasonable suspicion that a crime has occurred. Failure to cooperate is a criminal offence punishable by up to six months in prison, a £5000 (approximately \$7,500) fine, or both.

Since 2007, use of this stop and search power—often referred to as section 44 after the clause in the legislation that created it—has skyrocketed. In England, Scotland, and Wales, the number of recorded stops rose almost seven-fold in just two years (from 37,000 in the year ending April 2007 to over 256,000 for the year ending April 2009). With Northern Ireland included, the total for the year ending April 2009 is 269,244.

Numbers have since fallen, in part because of reforms introduced by some police forces. But the fact remains that in the last 12 months for which complete data is available (January 2009 to December 2009), section 44 powers resulted in more than 148,000 people being stopped in England, Scotland, and Wales, without any suspicion they were engaged in terrorism or other criminal wrongdoing. With Northern Ireland included, the figure rises to 173,339.

Senior police officers say that the power is intended to be preventive, making it harder for terrorists to operate and easier for police to disrupt their plots. But despite almost 450,000 section 44 stops and searches throughout the United Kingdom between April 2007 and April 2009, no one was successfully prosecuted for a terrorism offence as a result, and according to Britain’s independent reviewer of terrorism legislation, little if any useful intelligence about terrorist plots was obtained. The government has failed to demonstrate that section 44 serves its stated purpose.

Human Rights Watch’s research indicates that the power is being used improperly—including to stop railway enthusiasts, photographers, and even children. Analysis of the stop and search statistics indicates that South Asians and blacks are more likely to be stopped than whites, suggesting that police may be engaging in ethnic profiling in deciding whom to stop. There is anecdotal evidence that in some locations whites are being stopped to balance the statistics, masking the extent to which ethnic minorities are being targeted.

Section 44 has been used without authorization. In June 2010, the government admitted that police in London and elsewhere had carried out hundreds and possibly thousands of stops and searches prior to 2008 without proper authorization, including 840 in one operation in London alone.

Section 44 is used inconsistently. Forces in London have carried out hundreds of thousands of searches, while forces in other major urban areas that have been the target of terrorist attacks or plots, such as Glasgow, Manchester and Birmingham, have made little or no use of it.

In addition, safeguards that were intended to prevent misuse of section 44—including required authorization from the Home Secretary, geographic and temporal limits on its use, assessments of community impact, and guidance for police when using the power—have proved ineffective.

Authorizations by the Home Secretary appear to be little more than rubber stamping exercises, with rolling authorizations across the whole of London for April 2002 until May 2009. When asked in Parliament in May 2009 for examples of section 44 authorizations requested by police that had been refused or modified by the Home Office, the previous government said it did not have that information.

Neither the police nor the Home Office are giving proper weight to the impact of section 44 on relations between the police and ethnic minority communities when deciding to authorize the power, despite a requirement in the law and long-standing evidence that the misuse of stop and search powers can have a damaging effect on confidence in the police.

Section 44 stops and searches are damaging community relations, and undermining confidence in the police, especially in London where most stop and searches occur, and within Muslim communities. It is difficult to assess quantitatively whether Muslims are more likely to be stopped than those of other religions, because religion, unlike ethnicity, is not recorded during stops. But the harm done to the perceptions of the police within Muslim communities is evident.

The damage to community relations and confidence in the police potentially hampers the effectiveness of counterterrorism policing and undermines the cooperation of witnesses that could lead to arrests and help disrupt terrorist plots.

The use of section 44 violates the UK's human rights obligations. The European Court of Human Rights ruled in January 2010 that the use of section 44 violates the right to privacy, overturning a decision by the Britain's highest court. The higher rate of stops of ethnic minorities provides evidence that the power violates the principle of non-discrimination.

Section 44 can also violate the right to liberty: members of the public have no choice to submit to a search, and there is evidence of the arbitrary and unlawful use. There is also evidence that the use of the power can breach the right to peaceful protest.

The Metropolitan Police Service (MPS) and British Transport Police (BTP)—the two forces that carry out most stops and searches—have made significant efforts to reform their use of section 44. In 2009, the MPS significantly narrowed the circumstances in which the power can be used and greatly reduced the geographic scope of the authorization, so that it now covers around a tenth of geographic London. The BTP also reduced the geographic scope of the power. Police in Hampshire, southern England, went even further: after almost 3,500 stops in 12 months failed to result in a single terrorism arrest, they announced in April 2009 that they were suspending use of section 44.

The MPS and BTP deserve credit for taking these initiatives, as does Hampshire Police for halting use of section 44 entirely. Human Rights Watch has given considerable weight to these reform efforts, and to the view of senior officers in the MPS and BTP that the power is necessary to combat terrorism (although senior officers in other parts of the UK evidently take a different view in relation to their own forces). We have also given serious consideration to the possibility of restricting the power to major transport hubs in London.

However, we believe that even if the law were improved—if its geographic scope were permanently narrowed or its use restricted to specialist officers—the reforms would not entirely address the risk of arbitrary use, including profiling of ethnic minorities or stops of children. It is impossible to give clear guidance to officers on the use of a power that requires no reasonable suspicion. The risk of arbitrary use also makes the power incompatible with the traditional discretion given to UK police officers in course of their duties. The use of section 44 compromises the UK's human rights obligations and is counterproductive.

There is also a risk that if the government raises its terrorist threat assessment, whether in the run up to the 2012 Summer Olympics or otherwise, police could increase their use of section 44 and the number of persons stopped and searched under the power could rise again.

As a result of these negative consequences, Human Rights Watch calls for the repeal of section 44 which, despite the efforts of some police forces, has proved structurally unsuited to reform.

It would be far better for police to attempt to combat terrorism using stop and search powers that require reasonable suspicion. Such powers, such as section 43 of the Terrorism Act 2000, are themselves imperfect. But they have the benefit of clarity and accountability.

Both the Conservatives and Liberal Democrats, which together form Britain's new coalition government, pledged to review section 44 prior to the elections. On June 10, 2010, the Security Minister Baroness Neville-Jones confirmed the government's intention to do so. The coalition agreement states the government "will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion," and "introduce safeguards against the misuse of anti-terrorism legislation." Repealing section 44 should be part of that agenda.

Recommendations

To the Coalition Government of the United Kingdom:

- Repeal section 44 of the Terrorism Act 2000.
- Combat terrorism using stop and search powers that require reasonable suspicion, such as section 43 of the Terrorism Act 2000.
- Amend section 43 of the Terrorism Act 2000 to include searches of vehicles, where an officer has a reasonable suspicion that the driver or passenger is involved in terrorism.
- Amend Code A of the Police and Criminal Evidence Act 1984 to make it clear that there are no circumstances in which it is permissible to take into account a person's ethnic origin when determining whom to stop. Such an amendment would not prohibit the police from stopping a person where that person matched the physical description of a person wanted by the police.
- Amend the Race Relations Act 1976 to remove its national security exception, which is incompatible with human rights law.

I. Background

“Stop and search” refers to the power of the police to stop an individual (usually on foot, but sometimes while driving a vehicle) in public places; to question the person about his or her identity and movements; and to detain the person temporarily in order to search him or her for prohibited articles, such as illegal drugs or weapons, stolen goods or articles for use in crime, such as tools. According to the Home Office (Interior Ministry) website, “Stop and search powers allow the police to combat street crime and anti-social behaviour, and prevent more serious crimes.”¹

Stop and search powers have a long and controversial history in the United Kingdom. They were first introduced by the Vagrancy Act 1824 (suspicion of intent to commit a criminal offence, known as the “sus” laws), and the Metropolitan Police Act 1839 (suspicion of carrying a stolen article).² Both laws remained on the statute books until the 1980s.³

Use of the power has been a long-standing source of tension between the police and ethnic minority communities, particularly those of black African-Caribbean origin, who have historically been subject to disproportionate stops and searches, in the absence of “reasonable suspicion” (despite a requirement in the law that such suspicion was required). The misuse of stop and search powers was identified as a contributing factor to the 1981 riots in the Brixton, an area of London with a large black community.⁴

A subsequent public inquiry into the riots chaired by Lord Scarman recommended changes to the operation of stop and search, and to policing in minority communities generally, including an independent complaints mechanism, greater community consultation, and law reform to ensure that the safeguard of reasonable suspicion is applied when stop and search powers are exercised.⁵

¹ “The Police: Police Powers: Stop and Search,” Home Office website, (undated)
<http://www.homeoffice.gov.uk/police/powers/stop-and-search/> [accessed September 9, 2009].

² “Report of the MPA Scrutiny Panel on MPS Stop and Search Practice,” Metropolitan Police Authority, October 2004,
<http://www.mpa.gov.uk/downloads/stop-search/stop-search-report-2004.pdf> [accessed September 7, 2009], p.16.

³ Ibid.

⁴ Ibid.

⁵ Lord Leslie Scarman, *Report to the Secretary of State for the Home Department on the Brixton Disorders of 12-18 April 1981*, (London: Penguin Books, 1981).

Police and Criminal Evidence Act, 1984 (PACE)

Some of the recommendations were included in the 1984 Police and Criminal Evidence Act (PACE), which brought about major reforms to policing in England and Wales, including through the introduction of codes of practice for the police.⁶ In particular, PACE strengthened the requirements that a decision to stop and search a suspect must be based on reasonable suspicion, and introduced the recording of such stops.⁷

Code A of PACE defines “reasonable suspicion” in the context of stop and search:

Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. ...Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.⁸

PACE Code A also governs the use of other stop and search powers, including those under section 44 of the Terrorism Act.

It is notable that the stop and search model introduced by PACE—with a clear requirement of reasonable grounds coupled with recording and ethnic monitoring of stops—is now regarded by some experts as European best practice. In May 2009, the non-governmental organization Open Society Justice Initiative published “Addressing Ethnic Profiling by Police,” a 99-page report that detailed the experience of a European Union-funded project designed to improve stop and search practices by police in Bulgaria, Hungary and Spain.⁹ The 18-month project, which commenced in January 2007, included visits by Bulgarian, Hungarian and Spanish police officers to the UK and by UK police officers to the three countries.

⁶ Northern Ireland is covered by related legislation, the Police and Criminal Evidence (Northern Ireland) Order 1989. In Scotland, which has a separate legal system, The Criminal Procedure (Scotland) Act 1995 applies.

⁷ The Police Foundation, “The Briefing –Stop and Search, Series 1, Edition 1,” November 2008, <http://www.police-foundation.org.uk/files/POLICE0001/Briefing%20-%20Stop%20%20Search%20Final.pdf> [accessed September 7, 2009].

⁸ Police and Criminal Evidence Act 1984, Code A, Amended January 1, 2009, section 2.2, <http://police.homeoffice.gov.uk/publications/operational-policing/pace-code-a-amended-jan-2009> [accessed September 7, 2009].

⁹ Open Society Justice Initiative, “Addressing Ethnic Profiling by Police—A Report on the Strategies for Effective Police Stop and Search Project,” May 2009, http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/profiling_20090511 [Accessed November 9, 2009].

However, the introduction of PACE in the UK did not fully resolve concerns over the use of stop and search powers. That was partly because it failed to end disproportionate stops and searches of ethnic minorities (although the recording of such stops meant that disproportion in a particular area can now be measured and steps taken to resolve it).¹⁰ Concern also persisted because of other stop and search powers, which were not subject to recording and ethnic monitoring required under PACE. Unlike PACE stops, they also did not require reasonable suspicion.

Those powers include section 60 of the Criminal Justice and Public Order Act 1994, which allows a police officer to stop and search people and vehicles for weapons where the officer believes there may be “serious violence” in a local area. In financial year 2007/8 (ending April 2008), there were 53,250 stops and searches under the power.¹¹ The power has been criticized for being disproportionately used against young people from ethnic minority communities in the context of efforts to curb knife crime.¹²

The Macpherson Report

The 1999 public inquiry into the failure of police to hold anyone criminally accountable for the murder of Stephen Lawrence, a black teenager, six years earlier also looked at wider questions of policing in ethnic minority communities. The report of the inquiry (known as “The Macpherson Report” after its lead author, Sir William McPherson) noted that “[w]herever we went we were met with inescapable evidence which highlighted the lack of trust which exists between the police and the minority ethnic communities,” adding that “if there was one area of complaint which was universal it was the issue of ‘stop and search.’”¹³

Although the report (which was finalized prior to the enactment of the Terrorism Act 2000) concluded that stop and search powers should remain unchanged, it recommended:

¹⁰ The UK Equality and Human Rights Commission is currently considering litigation against certain police forces if they fail to take positive steps to tackle the persistent disproportion in the ethnicity of those stopped and search under PACE and other powers that require suspicion. Such an intervention would not be possible in the absence of data on the ethnicity of those stopped. Afua Hirsch, “Equalities watchdog rebukes police over disproportionate use of stop and search,” *The Guardian*, June 2, 2010, <http://www.guardian.co.uk/law/2010/jun/02/police-stop-search-black-asian> [accessed June 9, 2010].

¹¹ “Statistics on Race and the Criminal Justice System 2007/8,” Ministry of Justice, Table 4.6a, April 2009, <http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf> [accessed June 30, 2010], Table 4.5..

¹² See, for example, Rebekah Delsol, “Section 60 stop and search powers,” in *Ethnic Profiling: The Use of 'Race' in UK Law Enforcement*, The Runnymede Trust, February 2010, <http://www.runnymedetrust.org/events-conferences/econferences/ethnic-profiling-in-uk-law-enforcement/the-report/young-people-and-section-60/section-60-stop-and-search-powers.html> [accessed June 2, 2010].

¹³ “The Stephen Lawrence Inquiry, Report Of An Inquiry By Sir William Macpherson Of Cluny” (hereafter “Macpherson Report”), February 1999, Chapter 45, paras, 45.6 and 45.8, <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm> [accessed September 7, 2009].

[T]hat a record is made by police officers of all “stops” and “stops and searches” made under any legislative provision (not just the Police and Criminal Evidence Act). Non-statutory or so called “voluntary” stops must also be recorded. The record to include the reason for the stop, the outcome, and the self-defined ethnic identity of the person stopped. A copy of the record shall be given to the person stopped.¹⁴

The Macpherson Report also recommended:

That these records should be monitored and analysed by Police Services and Police Authorities, and reviewed by HMIC [Her Majesty’s Inspectorate of Constabulary] on inspections. The information and analysis should be published.¹⁵

In July 2009, the Joint Committee on Human Rights published a report of its inquiry into the status of the Macpherson Report recommendations 10 years later. The report noted progress, but highlighted continuing disproportionality in the number of black people being stopped under PACE. As a result, it repeated a recommendation from an earlier inquiry that “strategies for the use of Stop and Search should explicitly recognize the balance that needs to be struck between use of the power to prevent or detect crime and the negative impact its use has on public cooperation with, and support for, the police.”¹⁶

In March 2010, the Equality and Human Rights Commission, an independent publicly-funded body responsible for ensuring respect for human rights and equality in the UK, issued the results of a five-year study into stop and search powers across the UK, focusing on stops under PACE and other legislation that require reasonable suspicion, and excluding those under the Terrorism Act.¹⁷ It found that disproportionality in relation to stops of black and Asian people had actually risen during the period under review (financial years 2001/2 to 2007/8), and concluded that this “has a huge impact on the experience that people from these groups have of the police.”¹⁸

¹⁴ Macpherson Report, Chapter 47, paras. 60 and 61.

¹⁵ Macpherson Report, Chapter 47, para. 62.

¹⁶ UK Parliamentary Joint Committee on Human Rights, “The Macpherson Report-Ten Years On,” July 2009, <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/427/427.pdf> [accessed November 9, 2009], para. 7

¹⁷ UK Equality and Human Rights Commission, “Stop and Think: A critical review of the use of stop and search powers in England and Wales,” March 15, 2010 http://www.equalityhumanrights.com/uploaded_files/raceinbritain/ehrc_stop_and_search_report.pdf [accessed March 22, 2010]. The other stop and search powers assessed are those under the Misuse of Drugs Act 1971 and the Firearms Act 1968. Both require reasonable suspicion.

¹⁸ Equality and Human Rights Commission, “Stop and Think,” p.10 (impact), p.24 (trends).

Introduction of the Terrorism Act 2000

The Terrorism Act was adopted by Parliament in July 2000, following debate in the final quarter of 1999 and first half of 2000. The Act consolidated and replaced several counterterrorism laws in the United Kingdom, some of which had been introduced as temporary measures in response to terrorism linked to Northern Ireland.¹⁹ It applies throughout the UK. The power to stop and search pedestrians and vehicles, their drivers and passengers, without suspicion is created by section 44 of the Act.²⁰ An authorization may be given only by a senior police officer and “only if the person giving it considers it expedient for the prevention of acts of terrorism.”²¹

The Act also contains, in section 43, a power to stop and search a person (but not vehicles) where there is a reasonable suspicion that the person is a terrorist.²² It differs from the general PACE power in that it does not require the officer carrying out the stop to have a reasonable suspicion that a particular offence has been committed. It is sufficient that the officer reasonably suspects the person to be a terrorist.²³ There is a wide definition of terrorism under the Act, which includes serious damage to property as well as attacks on people, and acts committed anywhere in the world.²⁴

The power under section 44 of the Act replaced similar powers introduced by Criminal Justice and Public Order Act 1994 (amending the Prevention of Terrorism (Temporary Provisions) Act 1989) and the Prevention of Terrorism (Additional Powers) Act 1996. The power introduced by the 1994 Act allowed officers to stop and search of persons and vehicles without suspicion solely on the authorization of a senior police officer with no confirmation by the Home Secretary required.²⁵ The 1996 Act introduced a requirement that for the search of pedestrians, confirmation from the Home Secretary was required within 48 hours.²⁶

¹⁹ Prevention of Terrorism (Temporary Provision) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996.

²⁰ Terrorism Act 2000, section 44, http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1 [accessed November 9, 2009].

²¹ Terrorism Act 2000, section 44(3).

²² Terrorism Act 2000, section 43.

²³ Explanatory Notes to Terrorism Act 2000, August 15, 2000, http://www.opsi.gov.uk/acts/acts2000/en/ukpgaen_20000011_en_1 [accessed May 24, 2010].

²⁴ Terrorism Act, section 1.

²⁵ Criminal Justice and Public Order Act 1994, section 81, http://opsi.gov.uk/acts/acts1994/ukpga_19940033_en_1 [accessed March 25, 2010]. See also, House of Commons Library, Research Paper 99/101 - The Terrorism Bill, December 13, 1999 <http://www.parliament.uk/commons/lib/research/rp99/rp99-101.pdf> [accessed September 7, 2009].

²⁶ Prevention of Terrorism (Additional Powers) Act 1996, section 1, http://www.uk-legislation.hmso.gov.uk/acts/acts1996/ukpga_19960007_en_1 [accessed March 25, 2010].

During the Parliamentary debate around the bill, some opposition was expressed to the stop and search power under section 44 and its compatibility with human rights law. But it was not given particular focus, perhaps because the power already existed and was apparently not greatly used.²⁷

The section 44 power entered into force in February 2001. During the first year of the existence, its use was relatively limited, notwithstanding the September 11 attacks in the United States, which led to the introduction of draconian legislation in the UK allowing foreign terrorism suspects to be indefinitely detained without charge. In the financial year 2001/2 (ending April 5, 2002), there were 946 pedestrian and 7,604 vehicle stops under the power.²⁸ No breakdown of stops and searches by gender is available for this or other years.

In recent years, however, the use of section 44 has ballooned. Two police forces account for the vast majority of the stops: the Metropolitan Police Service (MPS), which covers London (with the exception of London's financial district, the City of London, which has its own force), and the British Transport Police (BTP), a specialized national force with a mandate covering the rail network, underground trains in London and Glasgow and the Birmingham tram systems and Croydon.²⁹

²⁷ Hansard, HC Deb 14 December 1999, vol. 341 cc152-233 http://hansard.millbanksystems.com/commons/1999/dec/14/terrorism-bill#S6CV0341Po_19991214_HOC_272 [accessed November 9, 2009]. See for example, "Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1989 for 1999," (undated), <http://www.nationalarchives.gov.uk/ERORrecords/HO/421/2/oicd/revpta99.htm> [accessed March 25, 2010].

²⁸ "Statistics on Race and the Criminal Justice System—2003," Home Office, July 2004, <http://www.homeoffice.gov.uk/rds/pdfs04/s95race2003.pdf> [accessed November 9, 2009], p.29.

²⁹ The UK has a series of separate regional police forces rather than a single force with responsibility for the entire country. The majority of the forces are under the oversight of the Home Secretary (interior minister) as well as independent bodies known as Police Authorities. The British Transport Police is subject to the oversight of the Secretary of State for Transport and the British Transport Police Authority. It is regulated by the Railways and Transport Safety Act 2003. The Ministry of Defence police are subject to oversight by the Minister of Defence and a Ministry of Defence Police Committee.

ANNUAL SECTION 44 STOP AND SEARCH STATISTICS 2006/7-2008/9

	MPS	British Transport Police	Scottish Police forces	Ministry of Defense Police	Police Service of Northern Ireland	Other Police Forces in England & Wales	UK Total
Year ending April 6, 2007	25,255	No data available	No data available	No data available	No data available	11,942	37,197
Year ending April 6, 2008	101,751	69,635	39	5,651	3,358	16,872	197,306
Year ending April 6, 2009	185,086	58,522	160	3,670	9,548	12,258	269,244

In financial year 2006/7 (ending April 6, 2007), the total number of stops by Home Office forces in England and Wales was 37,197, of which the MPS carried out 25,255.³⁰ The total relates to both vehicle occupants under section 44(1) and pedestrians under 44(2). No figures from British Transport Police, Scottish police, the Ministry of Defence (MOD) police or the Police Service of Northern Ireland are available for that period.³¹

In financial year 2007/8 (ending April 6, 2008), there were 188,297 section 44 stops in England, Wales and Scotland (excluding by MOD police). That number includes 101,751 stops by the MPS and 69,635 by the BTP. South Wales accounted for the next largest number of stops in mainland Britain (3,096).³² In Northern Ireland, whose statistics are held separately by the Police Service of Northern Ireland, there were 3,358 stops under section 44 during that period.³³ Ministry of Defence Police carried out a total of 5,651 stops under

³⁰ "Statistics on Race and the Criminal Justice System 2007/8," Ministry of Justice, Table 4.6a, April 2009, <http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf> [accessed November 9, 2009]. That number was lower than the previous financial year, 2005/6, in which there were 45,000 stops.

³¹ Until the publication of a November 2009 Home Office statistical bulletin on the police use of counterterrorism powers, statistics for BTP stops were not publicly available. In June 2010, the BTP published on its website stop and search data for April 2009 to March 2010.

³² Home Office, "Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches, Great Britain 2008/09," November 25, 2009, <http://www.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf> [accessed November 27, 2009], Table 2.1, p.46.

³³ Police Service of Northern Ireland, "Quarterly Report: Stop and Search Statistics, Quarter 4, 2008/09, January 1, 2009 to March 31, 2009," (undated), http://www.psni.police.uk/pace_tact_jsa_-_nlpb_-_q4_200809.pdf [accessed March 26, 2010].

section 44 in the UK (5,326 of them in London).³⁴ That makes a total of 197,306 stops in the whole of the United Kingdom.

In financial year 2008/9 (year ending April 6, 2009), there were 256,026 section 44 stops in England, Wales and Scotland (excluding by MOD police). The MPS carried out 185,086 and the BTP 58,522 of those stops. The next largest number of stops in mainland Britain was carried out by the MOD Police (3,670).³⁵ In Northern Ireland, there were 9,548 stops during that period, making a total of 269,244 stops in the United Kingdom.³⁶

In the third quarter and fourth quarters of 2009, there were 29,396 and 20,906 stops respectively in England, Wales and Scotland (including by the BTP but excluding MOD police), a significant reduction in comparable figures from the same periods a year earlier (63,356 and 72,896).³⁷ As will be discussed below, these reductions reflect revised national policing guidance on the use of section 44, a change of power's use and geographic scope by the MPS, a change in the power's geographic scope by the BTP, and lowering of the threat level.³⁸

Nonetheless, the overall number of stops and searches under section 44 in England, Scotland and Wales remain extremely high: with a total of 148,798 from January 2009 to December 2009 (excluding stops by the Ministry of Defence police for whom figures are not yet available).³⁹ The number of stops in Northern Ireland increased significantly during the

³⁴ Ministry of Defence Police and Guarding Agency, *Annual Report and Accounts 2007—2008*, July 2008, <http://www.official-documents.gov.uk/document/hco708/hco6/0699/0699.pdf> [accessed May 20, 2010], pp.31,33.

³⁵ Ministry of Defence Police and Guarding Agency, *Annual Report and Accounts 2008 -2009*, July 2009, http://www.mod.uk/NR/rdoonlyres/B2F48A0A-3E8A-46BC-96FD-3EB5C7CE9DD9/o/MDPGA_annualreport_o809.pdf [accessed May 20, 2010], p. 47.

³⁶ Police Service of Northern Ireland, "Quarterly Report: Stop and Search Statistics, Quarter 4, 2008/09, January 1, 2009 to March 31, 2009," (undated), http://www.psni.police.uk/pace__tact__jsa_-_nipb_-_q4_200809.pdf [accessed March 26, 2010].

³⁷ Home Office, "Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches, Quarterly update to December 2009," June 10, 2010, <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1010.pdf> [accessed June 25, 2010].
September 2009, February 25, 2010, <http://www.homeoffice.gov.uk/rds/pdfs10/hosbo410.pdf> [accessed March 22, 2010], p.16.

³⁸ The threat level is a five stage categorization of the government's official threat assessment ranging from "low" to "critical." See Home Office website, <http://www.homeoffice.gov.uk/counter-terrorism/current-threat-level/> [accessed June 8, 2010].

³⁹ Home Office, "Terrorism Act Quarterly update," June 10, 2010, <http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1010.pdf> [accessed June 25, 2010].

same period, with 24,541 stops (including 11,291 stops in the third quarter of 2009 alone).⁴⁰ This makes a total for the United Kingdom of 173,339, excluding Ministry of Defence stops.

Growing Domestic Criticism

Use of section 44 stop and search has encountered growing criticism in the UK, including from the UK's independent reviewer of terrorism laws; the Parliamentary Joint Human Rights Committee; the Metropolitan Police Authority (MPA) that oversees the Metropolitan Police Service (MPS); the Equality and Human Rights Commission (EHRC), a non-departmental government body; and the non-governmental groups, Muslim Safety Forum and Liberty.

Lord Carlile

A vocal opponent of the way that the power has been used is Lord Alex Carlile, a Liberal Democrat member of the House of Lords appointed by the then-Labour government in September 2001 to review the operation of the Terrorism Act (a role later widened to include the review of subsequent counterterrorism legislation).⁴¹

In March 2010, Lord Carlile used a speech on effective responses to terrorism to call for the power's repeal. He noted that section 44 stop and search between October 2008 and September 2009 had "resulted in zero arrests for terrorism offences, and at most morsels of counter-terrorism intelligence." However, it had "caused, and continues to cause, a disproportionately bad effect on community relations."⁴² Lord Carlile said that the power should be replaced "with a much restricted power" that would be limited to use after a terrorist attack, to protect critical national infrastructure, and iconic events where the risk of terrorism is assessed as severe.⁴³

In calling for repeal and replacement of the power, Lord Carlile went further than his most recent annual report on the Act published in June 2009 that criticized inconsistent use of

⁴⁰ Police Service of Northern Ireland, "Quarterly Report: Stop and Search Statistics, Quarter 3, 2009, October 1, 2009 to December 31, 2009," (undated), http://www.psni.police.uk/page__tact__jsa_-_nipb_q3_200910-2.pdf [accessed March 26, 2010].

⁴¹ See, for example, "Report on the Operation in 2007 of the Terrorism Act 2000 and of Part 1 of The Terrorism Act 2006 by Lord Carlile," June 2008, "Once again I would highlight early in this report issues related to TA2000 section 44," and Report on the operation in 2006 of the Terrorism Act 2000, June 2007, "The section, which permits stopping and searching for terrorism material without suspicion, is rightly perceived as a significant intrusion into personal liberties...[I]t is still used too much..." Available at: <http://security.homeoffice.gov.uk/legislation/independent-review-legislation/> [accessed November 11, 2009].

⁴² Lord Carlile, "Terrorism: Pragmatism, Populism, and Libertarianism – The Inaugural John Creaney Memorial Lecture," March 3, 2010, http://www.policyexchange.org.uk/assets/Carlile_Transcript.pdf [accessed June 2, 2010].

⁴³ Ibid.

section 44 among police forces, stating, “I find it hard to understand why section 44 authorisations are perceived to be needed in some force areas, and in relation to some sites, but not others with strikingly similar risk profiles.”⁴⁴ The report concluded:

The alarming number of usages of the power (between 8,000 and 10,000 stops per month as we entered 2009) represents bad news..... The figures and a little analysis of them, show that section 44 is being used as an instrument to aid non-terrorism policing on some occasions, and this is unacceptable..... There is little or no evidence that the use of section has the power to prevent an act of terrorism as compared with other statutory powers of stop and search.⁴⁵

The Parliamentary Joint Human Rights Committee

The Parliamentary Joint Human Rights Committee expressed concerns about the power in a March 2009 report on respecting human rights in the policing of public protest, stating that it was “concerned by the reports we have received of police using counter-terrorism powers on peaceful protestors.”⁴⁶ The Committee also heard evidence from the National Union of Journalists “that the police had relied on the Terrorism Act 2000 to prevent journalists from leaving demonstrations.”⁴⁷ The Committee’s report recommended that, “[T]he new guidance on the use of the section 44 stop and search power be amended to make clear that counter-terrorism powers should not be used against peaceful protestors.”⁴⁸

Misuse of section 44 against protestors was also referred to in a July 2009 report on public order policing by Her Majesty’s Inspectorate of Constabulary, a national policing regulatory body.⁴⁹

⁴⁴ Lord Carlile, “Report on the Operation in 2008 of the Terrorism Act 2000 and of part 1 of the Terrorism Act 2006,” June 2009, <http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/Lord-Carlile-report-2009/Lord-Carlile-report2835.pdf?view=Binary> [accessed March 22, 2010].

⁴⁵ Ibid.

⁴⁶ Joint Committee on Human Rights, “Demonstrating respect for rights? A human rights approach to policing protest,” March 2009, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4702.htm> [accessed November 9, 2009], para. 93.

⁴⁷ Ibid, para. 87

⁴⁸ Ibid, para. 93.

⁴⁹ Her Majesty’s Inspectorate of Constabulary, “Adapting to Protest – Nurturing the British Model of Policing,” July 2009, http://www.hmic.gov.uk/SiteCollectionDocuments/Individually%20Referenced/PPR_20091125.pdf [accessed June 8, 2010].

The Metropolitan Police Authority (MPA)

The MPA, which oversees the MPS, has also been critical of the power. In 2004, the police authority convened a scrutiny panel to examine stop and search powers generally, including section 44. The panel's report concluded:

[T]he number of stops and searches used under Section 44 of the Terrorism Act has increased dramatically. The Panel has already noted that the Home Secretary should publish data on all stops and searches, including those carried out under Section 44. In addition, the lack of awareness of one's rights when stopped under this power, the differential impact on Black and minority ethnic communities, and the lack of a need for reasonable suspicion, are all issues of concern to the Scrutiny Panel. The Panel is concerned that the power is being excessively used and improperly used.⁵⁰

A 2007 public consultation in London into counterterrorism policing in London organized by the Metropolitan Police Authority said in relation to the section 44 power in London that "the damage to community relations is significant, and the deterrent effect is dubious" and called for the Metropolitan Police to conduct an "urgent review" of the power.⁵¹

During the course of the same consultation, then-Assistant Commissioner of the Metropolitan Police in charge of counterterrorism, Andy Hayman, expressed his own reservations: "It's a power that's well intended: it's there to try and prevent, deter and disrupt terrorist activity. So, the test is: to what extent does it achieve that aim? And I have to say, it doesn't...There's a big price to pay for probably a very small benefit."⁵²

The Equality and Human Rights Commission (EHRC)

The Equality and Human Rights Commission identified the section 44 stop and search among the human rights concerns it raised with the United Nations Human Rights Committee in advance of its review of the UK's compliance with the International Covenant on Civil and Political Rights. The Commission's submission stated that "the manner in which the law is being exercised may constitute racial profiling of certain ethnic groups, not be proportionate and therefore may be unlawful racial discrimination," and added that

⁵⁰ Metropolitan Police Authority, "Report on MPS Stop and Search Practice," October 2004.

⁵¹ Metropolitan Police Authority, "Counter-Terrorism: The London Debate," February 2007, <http://www.mpa.gov.uk/work/counterterrorism/> [accessed November 9, 2009].

⁵² Quoted in Metropolitan Police Authority, "Counter-Terrorism: The London Debate," February 2007.

“substantial evidence exists that the stop and search powers have had an adverse impact on race relations.”⁵³

Muslim Safety Forum

The Muslim Safety Forum, a non-governmental umbrella group that represents over 40 Muslim organizations in the UK, is also concerned about the power. The MPS regularly consults the organization, as well as Liberty, a non-governmental human rights group, on section 44 stop and search policing (including on recent the tactical use review discussed below). The organization’s lead representative on counterterrorism issues, Azad Ali, told Human Rights Watch that while the Forum had worked to reform the use of the power, “we feel that section 44 needs to be repealed,” a view that he said was shared by some senior police officers.⁵⁴

Liberty

Liberty has repeatedly criticized the use of section 44 stop and search, including in the context of policing protest. It has also recommended that the authorization process be significantly tightened, and the circumstances narrowed in which the power is used, most recently with proposed parliamentary amendments to the Crime and Policing Bill 2010.⁵⁵ Liberty initiated litigation in the UK courts and the European Court of Human Rights in the case of Kevin Gillan, a journalist, and Pennie Quinton, a protestor, to challenge the lawfulness of the power on human rights grounds. The two applicants in the case were stopped and searched under section 44 on their way to an arms fair in London in September 2003.

⁵³ Equality and Human Rights Commission, “Submission on the United Kingdom's sixth periodic report under the International Covenant on Civil and Political Rights,” June 2008, http://www2.ohchr.org/english/bodies/hrc/docs/ngos/Equality_HR_Commission_UK93.doc [accessed May 21, 2010].

⁵⁴ Human Rights Watch interview with Azad Ali, Muslim Safety Forum, London, August 25, 2009.

⁵⁵ Liberty, “Liberty’s Second Reading Briefing on the Crime and Security Bill in the House of Commons – non DNA provisions,” January 2010, <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill.pdf> [accessed May 20, 2010]; See also, Liberty, “National Centre for Policing Excellence Stop and Search Practical Advice – Liberty Response to Consultation,” May 2006, <http://www.liberty-human-rights.org.uk/pdfs/policy06/ncpe-stop-and-search-practice.pdf> [accessed November 9, 2009].

II. Section 44 Stop and Search Safeguards

The stop and search power under section 44 of the Terrorism Act 2000 is supposed to contain safeguards to prevent its misuse. The use of the power requires authorization by a senior police officer, and confirmation by the Home Secretary within 48 hours. Authorizations are limited to 28 days, and are limited to the geographic area specified in the authorization. In recognition of the potential of the power to damage community relations, authorizations must also contain a community impact assessment. Stops are recorded, including the ethnicity of the person stopped. Officers are also given guidance on the use of the power. The effectiveness of these safeguards is assessed below.

Authorization Process

Under the Terrorism Act 2000, the power to stop and search without suspicion must be authorized by a senior police officer and confirmed by the Home Secretary within 48 hours. The authorization process is set out in section 44 of the Act and accompanying Home Office guidance, and is intended to safeguard against misuse or excessive use of the power. It requires political approval at the highest level; limits the time of the authorizations to 28 days; requires officers seeking authorization to state why stop and search powers that do require reasonable suspicion are insufficient; and requires consideration of the likely impact of the use of the power's on community relations.

In practice, however, the authorization process appears to be little more than a rubber-stamp exercise. Requests are rarely, if ever, modified or refused and rolling authorizations are given. The authorization process also includes little effort to assess the impact of the power on community relations, or to take that assessment into account when determining whether to grant authorizations.

Police

For a police force to use the power, it must first be authorized by a senior officer (an assistant chief constable, or in the case of the MPS and City of London police, a commander). The authorization request must specify the geographic area and duration for which authorization is sought.⁵⁶

⁵⁶ Terrorism Act 2000, section 44.

According to Home Office guidance, the senior officer must complete an authorization form that states the duration of the power, its geographic scope and the reasons for exercising it in order to authorize its use.⁵⁷ The power must be confirmed by the Home Secretary within 48 hours, otherwise it will lapse.⁵⁸ The Home Secretary has discretion whether to refuse to authorize the request, or to make a more limited authorization.

The authorization form should include an ongoing assessment of the terrorist threat and new information specific to the force's area of operation that is relevant to the authorization. It should explain why section 44 powers are deemed an appropriate response and why powers under section 43 of the Terrorism Act or PACE powers (both of which require suspicion) are not deemed sufficient. There should be an explanation as to the particular geographic scope requested, the training given to officers using the powers and how the powers will be implemented in practice. The authorization form should also provide details of a mandatory Community Impact Assessment (CIA), to be completed prior to the authorization.

The law and accompanying Home Office guidance make clear that authorizations should be time-limited to 28 days.⁵⁹ The guidance states, "In view of their importance, authorisations are subject to considerable scrutiny before being confirmed by the Secretary of State [i.e. the Home Secretary]." It also sets out "the principles that should underpin an authorization" which are: (1) intelligence (2) heightened terrorist threat; (3) target/symbolic location. The guidance adds that "the authorizing officer should be clear how the use of section 44 powers will disrupt, deter or detect terrorist action."⁶⁰

Home Office

The requirement that the Home Secretary confirm all authorizations within 48 hours is intended to serve as a primary safeguard against misuse of the power.

In practice, however, the evidence indicates that the Home Secretary and Home Office fail to give sufficient scrutiny to authorization requests. Human Rights Watch was unable to find

⁵⁷ Home Office, "Authorisation to Stop and Search – S.44 under the Terrorism Act 2000" (undated). Annexed at: <http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2008/027-2008/> [accessed November 25, 2009].

⁵⁸ Terrorism Act 2000, section 46(4).

⁵⁹ Terrorism Act 2000, section 46; Home Office circular 027/2008, "Authorisations of stop and search powers under section 44 of the Terrorism Act 2000," December 2, 2008, <http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2008/027-2008/> [accessed November 25, 2009].

⁶⁰ Home Office circular 027/2008.

any examples of authorization requests that had been refused by the Home Secretary, or even examples of where they had been modified.

In response to a parliamentary question on the subject in May 2009, then-Security Minister Lord Alan West stated:

The information requested can only be provided at disproportionate cost because the information is held on individual paper files. The onus is on police forces to authorise and seek confirmation from the Secretary of State to use the powers, and to keep records of applications made.⁶¹

Human Rights Watch was unable to meet with officials from the Home Office's Crime and Policing Group and its Office for Counterterrorism and Security to discuss the authorization process and other aspects of the section 44 power, despite repeated requests.

Assessing the authorization process is made difficult by the fact that the requests, supporting documents and decisions are secret. Although Lord Carlile is able to review these documents, others with a legitimate interest are not.

Mike Franklin, a Commissioner with the Independent Police Complaints Commission (IPCC), which has statutory power to investigate allegations of abuse by the police, told Human Rights Watch that the IPCC had sought completed force applications for section 44 authorization and ministerial responses to them and that this had been refused.⁶² He also said that when the IPCC asked the Home Office whether there ever had been a ministerial refusal of a section 44 authorization request, the Home Office was "unable to say."⁶³ The unwillingness of the Home Office to provide this information to the statutory body responsible for investigating police abuse reveals a fundamental lack of transparency.

Efforts by campaigners to obtain these documents through Freedom of Information Act requests have also proved unsuccessful. In February 2010, the Office of the Information Commissioner, an independent body that adjudicates refusals by government agencies to provide information to the public under the Freedom of Information Act, upheld a decision

⁶¹ House of Lords, Hansard, Terrorism Act: Section 44 Powers, Question by Baroness Miller of Chilthorne Domer, May 20, 2009, <http://services.parliament.uk/hansard/Lords/ByDate/20090520/writtenanswers/parto48.html> [accessed June 8, 2010].

⁶² Human Rights Watch interview with Mike Franklin and Nicholas Long, Commissioners, Independent Police Complaints Commission, London, August 11, 2009.

⁶³ Human Rights Watch interview with Mike Franklin and Nicholas Long.

by the Home Office to refuse on national security grounds to provide information about the content, basis and geographic scope of section 44 authorizations.⁶⁴

Lord Carlile told Human Rights Watch that he has made clear to the Home Office that it was not acceptable for the police to “simply recycle old reasons” when seeking a renewed authorization.⁶⁵ He has called publicly for greater Home Office scrutiny of requests. In his 2008 report, for example, he said “in future authorisations should be examined more critically by the Home Office.”⁶⁶

There were rolling 28 day authorizations for the Metropolitan Police Service in place for the entire London metropolitan area from at least February 2002 until at least May 2009, when the force introduced its tactical use review, which limits the geographic scope of MPS section 44 authorization (discussed below).⁶⁷ The City of London police have had a separate authorization in place over the whole of the City of London, for the same period.⁶⁸ The City of London-wide authorization remains in effect.⁶⁹

The fact that successive home secretaries authorized the rolling use of the power across the entirety of London, including its suburbs, for more than seven years, and that the eventual narrowing of its geographic scope came not from the Home Secretary but from the MPS, provides further evidence that the Home Secretary and Home Office fail properly to scrutinize such requests.⁷⁰ It is difficult to see how serious scrutiny of such a request according to the Home Office’s own guidance could result in the authorization of the section 44 powers across every borough in London more than 90 times in a row.

In June 2009, then-Home Secretary responded to criticism of the London-wide authorization, not by taking responsibility for having failed to exercise sufficient scrutiny over the authorizations as the law requires, but by welcoming the decision by the Metropolitan Police

⁶⁴ Information Commissioners’ Office, Freedom of Information Act 2000 (Section 50), Decision Notice, February 8, 2010, http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50198733%20.pdf [accessed March 22, 2010].

⁶⁵ Human Rights Watch interview with Lord Carlile, Independent Reviewer of Terrorism Legislation, London, July 6, 2009.

⁶⁶ Lord Carlile, “Report on the Operation in 2007 of the Terrorism Act 2000 and of part I of the Terrorism Act 2006,” June 2008; <http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/lord-carlile-report-07/lord-carliles-report-20082835.pdf?view=Binary> [accessed March 22, 2010], para. 128.

⁶⁷ Lord Carlile, “Report on the Operation in 2002 and 2003 of the Terrorism Act 2000,” January 2004, http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/TerrorismAct_rpt12835.pdf?view=Binary [accessed March 24, 2010], para.79.

⁶⁸ Lord Carlile, “Report on the Operation in 2008 of the Terrorism Act 2000,” para. 79.

⁶⁹ City of London police website, “Stop and Search,” January 13, 2010, <http://www.cityoflondon.police.uk/CityPolice/Utility/stopandsearch.htm> [accessed May 24, 2010].

⁷⁰ Lord Carlile, “Report on the Operation in 2008 of the Terrorism Act 2000,” para. 147.

to review its decision to seek authorizations on a London-wide basis.⁷¹ In effect, the then-Home Secretary was commending the police for taking steps to exercise restraint that ought properly to be exercised by the Home Secretary.

Community Impact Assessments

The Home Office circular that governs authorizations under section 44 states that “[a] Community Impact Assessment (CIA) should be completed by all forces prior to a section 44 authorisation being confirmed and details of this should be provided by the authorising officer. The CIA should be reviewed continually throughout the life of the authorisation.”⁷² The requirement for police forces wishing to use the section 44 power to submit community impact assessments with requests for authorization indicates that the British Parliament was aware that the power had potential to adversely impact relations between communities and the police. Given the history of stop and search powers, this is hardly surprising.

CIA's should provide an opportunity for the police to evaluate the impact of the power on relations with the community, and presumably to assess the costs and benefits of the use of the power.

At the political level, the CIA's are clearly intended to inform the Home Secretary's decision as to whether to authorize use of the power in a particular location. In practice, however, community impact assessments appear to have little or no bearing on whether the Home Secretary approves an authorization request.

Commander Simon O'Brien, the then-lead on stop and search within the MPS told Human Rights Watch that “we are in regular contact with communities” at the borough level.⁷³ He said that the impact on community relations was an important consideration in the exercise of the section 44 power, indicating that it had served as an impetus for the force's tactical

⁷¹ Home Office, “The Government Reply to the Report by Lord Carlile of Berriew Q.C.,” June 2009, <http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/Lord-Carlile-report-2009/gov-reply-to-Lord-Carlile2835.pdf?view=Binary> [accessed March 22, 2010].

⁷² Home Office circular 027/2008, “Authorisations of stop and search powers under section 44 of the Terrorism Act 2000,” December 2, 2008, <http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2008/027-2008/> [accessed March 22, 2010].

⁷³ Human Rights Watch interview with Commander Simon O'Brien, Metropolitan Police Service, London, October 6, 2009. (He has since retired from the MPS). London is divided administratively into 32 boroughs, each with its own local government (“Council”). The MPS organizes local policing in London through borough-level operational command units. <http://www.met.police.uk/about/organisation.htm> (accessed March 24, 2010).

use review (discussed later). But Commander O'Brien acknowledged that the written "assessment can look a bit wooden."⁷⁴

The Metropolitan Police Service (MPS) prepares an equality impact assessment for all stop and search operations, including those under section 44. The assessment is publicly available and covers a four-year period. The most recent version, dated October 2008 and due to expire in October 2011, is submitted to Home Office together with section 44 authorization requests.⁷⁵

The MPS general equality impact assessment has scant information on section 44. It largely concentrates on the mechanics of the Metropolitan Police's consultation with community and other groups, and on the use of power to stop and search for knives under section 60 of the Criminal Justice and Public Order Act 1994 (another power that requires no reasonable suspicion for its exercise).

The assessment notes that "at various meetings held with members of the Muslim community it is evident that some have a perception that stop and search powers, particularly those under the Terrorism Act, are being used unfairly against the Muslim community." However, it goes on to state that since religion is not recorded during stops "the MPS is unable to comment on disproportionality issues."⁷⁶

The assessment seeks to justify the use of the section 44 power through the prism of community impact stating that "[t]he threat from International Terrorism and other forms domestic terrorism has the potential to affect all communities within London." It concludes that the use of "stop and search by the MPS is regarded as an important tactic in preventing terrorism."⁷⁷

The equality impact assessment fails to engage with the potentially negative impact of section 44 powers on minority communities and their relations with the police by saying that it lacks the data to make an assessment. Instead, it argues that such powers are necessary to prevent terrorism which it points out would affect ethnic minority and other communities.

⁷⁴ Human Rights Watch interview with Commander Simon O'Brien, Metropolitan Police Service, London, October 6, 2009.

⁷⁵ Metropolitan Police Service, "Equality Impact Assessment," October 1, 2008, http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/corporate/mps_stop_and_search_impact.pdf (accessed March 22, 2010); Human Rights Watch interview Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

⁷⁶ Metropolitan Police Service, Equality Impact Assessment, October 1, 2008.

⁷⁷ Metropolitan Police Service, Equality Impact Assessment, October 1, 2008.

It is evident the MPS is engaged in consultation with communities in relation to stop and search powers generally, notably at borough level. The need for consultation is reflected in the force's own guidance on the use of section 44. The MPS Standard Operating Procedure for section 44 (discussed in more detail below) states that "every BOCU [Borough Operational Command Unit] will need to complete an annual EIA [Equality Impact Assessment] for terrorism searches."⁷⁸

Human Rights Watch understands that community impact information from the borough level is communicated to senior officers in the MPS headquarters on a regular basis. But as the equality impact assessment suggests, it does not appear that the MPS has the same degree of engagement in relation to section 44 as it does with other stop and search powers, including in relation to preparing community impact assessments required for section 44 authorizations.

Representatives from the Muslim Safety Forum and the Community Stop and Search Monitoring Network, with whom the MPS regularly consult on stop and search policy, told Human Rights Watch that they had never seen a copy of any section 44 community impact assessment nor been asked to comment on it.⁷⁹

Indeed, it is evident that the MPS is not submitting a fresh section 44 specific community impact assessment each month when it renews its authorisation request, as the law and guidance requires, but instead relies on its broad, and infrequently updated equality impact assessment for stop and search generally, which as noted above has little information on section 44.

Lord Carlile told Human Rights Watch that conducting a community impact assessment every four years is too long an interval.⁸⁰ It also undermines what Parliament intended to be an important safeguard in the authorization process.

The British Transport Police is also required to submit community impact assessments when it seeks renewed authorization of its section 44 powers. Alan Pacey, a BTP Assistant Chief Constable who chairs the force's Stop and Search Steering Group, told Human Rights Watch

⁷⁸ Metropolitan Police Service, "Section 44 Terrorism Act 2000, Standard Operating Procedures," February 7, 2008. http://www.met.police.uk/foi/pdfs/policies/stop_and_search_s44_tact_2000_sop.pdf [accessed March 23, 2010].

⁷⁹ Human Rights Watch interview with Azad Ali, Muslim Safety Forum, August 25, 2009; Human Rights Watch interview with Chris Roffey, Co-Chair, Stop and Search Community Monitoring Network, and Abu Sufian, Chair of Tower Hamlets Monitoring Group, London, August 14, 2009.

⁸⁰ Human Rights Watch interview with Lord Carlile, Independent Reviewer of Terrorism Legislation, London, July 6, 2009.

that the force updates its community impact assessment every month, but that the assessment doesn't change that much, stating that "our community is the travelling public."⁸¹

Assistant Chief Constable Pacey said that the force consults with its stop and search group (composed of its National Independent Advisory Group and community representatives), and local police, and said that in several cases the BTP had decided to postpone or cancel planned operations after feedback indicated that they would have a negative impact.⁸²

Human Rights Watch has not seen examples of the BTP's community impact assessments submitted in support of section 44 authorization requests. They are not made public. The information that the force postponed or cancelled operations on grounds of adverse community impact suggests that the force takes such matters into account in respect of particular operations, and reflects the force's own guidance (discussed below).

But it is important to note that pre-planned operations account for only around half of BTP stops. Ad hoc stops and searches are capable of having an equally adverse impact. Human Rights Watch has also seen no evidence that community impact assessments have had a bearing on decisions by the force to seek renewed authorization of section 44 powers.

Guidance on the Use of Section 44

Section 44 power does not require individual suspicion as grounds for a stop, meaning that police officers have wide discretion as to its use. The powers are often used by ordinary police officers on the beat, rather than specialized counterterrorism officers. As a result, it is important that officers are clearly guided on its proper use. This is especially true for the MPS and BTP, since both forces are able to exercise the power widely across their jurisdictions.

Extensive guidance exists on the use section 44. National guidance is set out in Code A of the Police and Criminal Evidence Act 1984 (amended to reflect the introduction of the section 44 power), and a 58-page "practice advice" from the National Policing Improvement Agency (NPIA), a UK-wide police training and professional standards body. The MPS and BTP also have their own force-level guidance.

⁸¹ Human Rights Watch interview with Alan Pacey, Assistant Chief Constable, British Transport Police, London, November 13, 2009.

⁸² *Ibid.*

The guidance from the NPIA, MPS and BTP offer thorough and thoughtful attempts to provide clarity on the use of section 44 stop and search in a manner that is neither arbitrary, nor based on profiling.

However, those attempts ultimately fail because of the contradiction inherent in the section 44 power: its goal to prevent terrorism, while allowing for people to be stopped even if they are not suspected of terrorist involvement.

In 2009, the Independent Police Complaints Commission (IPCC) developed a set of principles for the use of police stop and search powers in the UK. The first principle is that an officer stopping a person should always be able to answer the question, “Why did you stop me?” in a way that exceeds references to existence of the authorization.⁸³

Unfortunately the guidance provided at both a national and force-level fails that principle. It lacks clarity and precision, especially in relation to the most critical question for a power with no suspicion is required: how does an individual officer decide who should be stopped and searched? Senior BTP and MPS officers interviewed by Human Rights Watch acknowledged the difficulty related to providing a satisfactory answer to that question.⁸⁴

During the Metropolitan Police Authority’s 2007 consultation on counter-terrorism powers (referred to earlier), Andy Hayman, the-then Assistant Commissioner of the Metropolitan Police in charge of counterterrorism, was asked the same question. He replied:

This is a bit where it's very, very flaky and I won't be at all convincing, I know that, but it would be around professional judgment, what they see around the circumstances: the behaviour of the individual and the circumstances all fall together, lead them to make a judgment. That is so flaky, you know, even I feel embarrassed saying that. But that is the truth as to what they do.⁸⁵

Hayman’s response reveals the challenge in providing effect guidance to officers on the proper use of the power.

The use of section 44 stop and search powers is governed by Code A of PACE, which states:

⁸³ IPCC position regarding police powers to stop and search, June 2009. On file with Human Rights Watch.

⁸⁴ Human Rights Watch interview with Alan Pacey, November 13, 2009; Human Rights Watch interview with Simon O’Brien, London, October 6, 2009.

⁸⁵ Metropolitan Police Authority, “Counter-Terrorism: The London Debate,” February 2007, p. 52.

The selection of persons stopped under section 44 of Terrorism Act 2000 should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities).⁸⁶

Compliance with Code A is an obligation. Code A makes clear that section 44 powers should only be used for terrorism stops, and calls on officers not to discriminate. But it provides little assistance to officers in determining whom to stop. It fails to specify what other factors beyond ethnic origin might be relevant, what weight can legitimately be given to ethnic origin, and when and whether specific intelligence would be required for ethnicity to be a legitimate factor.

Moreover, the suggestion that there may be circumstances where ethnicity could be a legitimate factor in determining whether to stop someone in the absence of reasonable suspicion (which would apply when the police are looking for a specific suspect and the person stopped matches the description) is likely to encourage ethnic profiling.

According to a leaked 2008 "operational briefing note" from the Security Service (MI5) entitled "Understanding Radicalisation and Violent Extremism in the UK" obtained by *The Guardian* newspaper, "[i]ndividuals who become involved in violent extremism in the UK have varied characteristics and backgrounds and are, on the whole, demographically unremarkable."⁸⁷ According to *The Guardian*, the note also states that "assumptions cannot be made about suspects based on skin color, ethnic heritage or nationality."

⁸⁶ PACE, Code A, 2.25.

⁸⁷ Alan Travis, "MI5 Report Challenges Views of Terrorism in Britain," *The Guardian*, August 20, 2008, <http://www.guardian.co.uk/uk/2008/aug/20/uksecurity.terrorism1> [accessed March 25, 2010]. The quotation is taken from a photograph of the cover of the briefing note accompanying the article.

NPIA Guidance

More detailed guidance is produced by the National Policing Improvement Agency (NPIA). The NPIA’s “Practical Advice on Stop and Search in Relation to Terrorism” was updated in 2008, on behalf of the Association of Chief Police Officers.⁸⁸ This advice is non-binding.

The updated guidance is the result of a major review by the Home Office, carried out in consultation with the police and civil society organizations.⁸⁹ It is the main national guidance on section 44. The sixty-three page document contains advice on community engagement, the legal and policy framework, the authorization process, and a suggested wording for police leaflets and posters to inform the public about use of the power.

Specific guidance about operational use of the power is contained in the “legal and policy framework” section of the NPIA guidance. It reiterates PACE Code A in making clear that section 44 powers “must only be used to stop and search people in relation to terrorism.”⁹⁰ It also says that, “In order to maintain public support and confidence for counter-terrorism activity, the grounds or rationale and purpose of every search should be fully explained to the subject.”⁹¹

The guidance states that a decision to stop and search under section 44 should be made on “a quality and not quantity basis,” and that the number of stops should not be used “as a measure of individual or team performance.”⁹² It also correctly notes that the absence of a requirement of suspicion “represents a significant change in the relationship between the police and the public,” adding “this power should be used “sparingly.”

But the guidance about how officers should decide (or be briefed as to how to decide) whom to stop—to ensure, in other words, that stops are based on “quality” and “used sparingly”—is at best confusing, and at worst arguably contradictory.

The NPIA guidance states that “every person searched under section 44 should be told explicitly that they are not suspected of being a terrorist.” It also states that the power

⁸⁸ National Policing Improvement Agency, “Practical Advice on Stop and Search in Relation to Terrorism,” November 2008, <http://www.npia.police.uk/en/11700.htm> [accessed March 22, 2010].

⁸⁹ Annex to Letter from (then) Home Secretary Jacqui Smith sent to Human Rights Watch in response to a letter about reviews of the UK’s human rights record by the UN Human Rights Council and UN Human Rights Committee, October 23, 2008. On file with Human Rights Watch.

⁹⁰ NPIA, Practical Advice on Stop and Search, p.10.

⁹¹ NPIA, Practical Advice on Stop and Search, p.11.

⁹² NPIA, Practical Advice on Stop and Search, p.13.

“should never be used to conduct arbitrary searches,” and that officers should “always use objective criteria to select people for search.” These criteria “could be” related to the individual, their location or a combination of the two.

The guidance does not elaborate on what criteria related to an individual or location might constitute objective criteria on which a non-arbitrary stop would be based, although a checklist for briefing officers later on suggests that the potential implications of a person’s behaviour, clothing or items they are carrying should be “considered” when using section 44.⁹³

The NPIA guidance counsels officers to “take care to avoid any form of racial or religious profiling when selecting people to search under section 44 powers,” noting that such profiling may amount to unlawful discrimination.⁹⁴ It states that “[a] person’s appearance or ethnic background will sometimes be a factor, but an officer’s decision to search them under section 44 should be made only if it is a result of evaluated intelligence.”⁹⁵ A way of protecting against profiling, according to the guidance, is “to compare the backgrounds of people being searched in proportion to the demographic make-up of the area where searches take place.”⁹⁶

In the words of Mike Franklin, an IPCC Commissioner, “the current guidance is confusing for officers.”⁹⁷ It tells officers that stops should be based on objective criteria in order to avoid arbitrary searches, but it fails then to specify what those criteria might be, other than that they “could be” connected to the person or place in which the operation takes place. Potentially useful advice that a person’s behaviour, clothing or carried items might be relevant is contained in a separate part of the document on how to brief officers.

The guidance tells officers to avoid profiling, and to only stop based on appearance if it is supported by evaluated intelligence. Yet by advising officers to look at the demographic makeup of the area in which the searches are based, it effectively encourages officers to be mindful of potential disproportion in deciding whom to stop, thereby encouraging the use of ethnicity or religion as a factor (even if as a negative factor, whereby an officer would

⁹³ NPIA, Practical Advice on Stop and Search, p.17.

⁹⁴ NPIA, Practical Advice on Stop and Search, p.14

⁹⁵ NPIA, Practical Advice on Stop and Search, p.14.

⁹⁶ NPIA, Practical Advice on Stop and Search, p.14.

⁹⁷ Human Rights Watch interview with Mike Franklin and Nicholas Long, London, August 11, 2009.

determine not to stop someone because they belong to an ethnic group from whom many people had already been stopped that day).

It is also arguably contradictory—the guidance to avoid “arbitrary” searches is impossible to reconcile with the advice that forces should look at demographics as a yardstick in determining whom to stop. By doing so, they would be failing to use the “objective criteria” which the guidance suggests.

The Home Office circular on section 44 states that “officers should expect to explain the use of the powers and why they are being used.”⁹⁸ But it does not offer any guidance what form that explanation should take, beyond referring to the NPIA document.

MPS Standard Operating Procedures

The MPS has standard operating procedures for section 44 to supplement the NPIA guidance.⁹⁹ The 35-page document includes sections on community engagement, the need to take into account cultural and other sensitivities when carrying out a search, public engagement, monitoring, and a section entitled “Appropriate Use.” The section on community engagement stresses the need for community consultation at borough level prior to operations, and the use of existing communication channels, such as stop and search monitoring groups, for accountability, monitoring and feedback.¹⁰⁰

The section on “appropriate use” says that searches must not be “random” (similar to the not “arbitrary” advice in the NPIA guidance).¹⁰¹ It states that “the choice of persons stopped should normally be based on the location, time, intelligence or behaviour,” adding that behaviour may “include unusual actions or presence near a vulnerable location.”¹⁰² But it notes that the “behaviour may not amount to ‘reasonable grounds’ and may not be much more than an intuition on behalf of the officer.”¹⁰³

The MPS standard operating procedures also advise officers that “officers must never use stereotypical images of ‘terrorists’ when deciding to use their powers of stop and search”

⁹⁸ Home Office circular 027/2008.

⁹⁹ Metropolitan Police Service, “Section 44 Terrorism Act 2000, Standard Operating Procedures,” February 7, 2008. http://www.met.police.uk/foi/pdfs/policies/stop_and_search_s44_tact_2000_sop.pdf [accessed March 23, 2010].

¹⁰⁰ *Ibid*, p.13.

¹⁰¹ *Ibid*, p.15.

¹⁰² *Ibid*, p.15.

¹⁰³ *Ibid*, p.15.

because to do so could lead to targeting communities, disproportion, discrimination and “terrorists avoiding detection whilst carrying out their objective.”¹⁰⁴ This was confirmed by an interview with a senior MPS officer who led the force’s review of section 44, who indicated the MPS had stayed away from profiling and instead looked for “people who stand out.”¹⁰⁵

The guidance states that stops should be based on an objective assessment. The following factors are identified as relevant to that assessment: the information contained in the current authorization document; the current threat assessment; other briefing material; local areas deemed vulnerable to attack; and the borough command counter-terrorist profile (described as “a list of the areas of vulnerability.”)¹⁰⁶

While the MPS standard operating procedures provides more detail than the NPIA guidance on selection criteria, and factors used to justify stops, it does not provide greater clarity. While the advice not to engage in stereotyping is important, the factors set out to explain the choice of persons stopped are generally not person specific, and do not provide much help for officers wishing to avoid such stereotyping. The reference to behaviour is also broad (it includes mere presence in a location), and is qualified by the admission that often it may amount to a “hunch” on the part of the officer (which cannot properly be deemed an objective factor and may inadvertently lead to stereotyping). The factors enumerated as relevant to making an objective assessment are again not person specific.

British Transport Police Guidance

The BTP also produces its own guidance for the use of section 44.¹⁰⁷ The guidance states that, “Selection should not be based on arbitrary criteria such as a numerical count or all persons with bags, etc. and officers must not be set numerical targets in relation to the number of searches obtained.”

It correctly notes that, “The ability for a police officer to search any person without grounds has potential to be misused and/or mis-targeted, adding that “[t]he way in which people are selected for stop and search has a far-reaching effect on the public and their acceptance of counter terrorism powers.”¹⁰⁸ The BTP guidance contains similar language to the MPS

¹⁰⁴ MPS, Section 44 Standard Operating Procedures, p.15.

¹⁰⁵ Human Rights Watch interview with Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

¹⁰⁶ MPS, Section 44 Standard Operating Procedures, p.19.

¹⁰⁷ British Transport Police, “Briefing Note – England & Wales Searches Under the Terrorism Act 2000, version 2.1 E&W,” (undated). On file with Human Rights Watch. The force has slightly modified guidance for Scotland.

¹⁰⁸ BTP, Briefing Note, Searches Under the Terrorism Act 2000.

guidance on the need to avoid stereotyping and the negative consequences that can arise from stops based on stereotypes.

The guidance sets out three circumstances in which the BTP will use section 44 stop and search: (1) justifiable intelligence based selection; (2) intuitive selection; and (3) proactive search operations.

Stops in the first category, based on specific intelligence, will clearly be related to characteristics particular to the individual, although the rationale for using section 44 as opposed to a power that requires reasonable suspicion (such as under section 43) is not clear from the guidance.

The second category makes reference to behaviour, allowing officers to carry out stops of persons who the officers “feel are acting suspiciously or give rise for some sort of concern.”¹⁰⁹ It notes that officers trained in “behavioral assessment screening” (a technique developed by the BTP and discussed below) may find it useful to “verbalize why they feel the person is suspicious and determining whether a search is required.” This was confirmed to Human Rights by a senior BTP officer during our observation of a section 44 stop and search operation at London’s St. Pancras railway station in February 2010.¹¹⁰

The third category refers to pre-planned operations, where some or all persons in a particular transport location are searched.¹¹¹ Officers are instructed that searches must not be arbitrary, such as a numerical count or all persons with bags.

The guidance differs from that offered by the MPS in that it aims to regulate the use of stops through limiting the operational circumstances in which a person can be stopped, rather than enumerating the factors and selection criteria used to make stops. But it shares with the NPIA and MPS guidance a lack of person-specific criteria, beyond specific intelligence (which might give rise to a reasonable suspicion obviating the need for section 44 stop), or a person’s behavior, which, while it might give rise to a reasonable suspicion (obviating the need for section 44 powers), also gives discretion to officers to rely on subjective intuitions or hunches in determining whom to stop.

¹⁰⁹ BTP, Briefing Note, Searches Under the Terrorism Act 2000.

¹¹⁰ Human Rights Watch discussion with Chief Inspector Robert Noddings, British Transport Police, during observation of stop and search operation, St. Pancras railway station, London, February 10, 2010.

¹¹¹ BTP, Briefing Note, Searches Under the Terrorism Act 2000.

The guidance for using stop and search during pre-planned operations suggests that the reason for the stop is not specific to the person at all (particularly where all persons are searched). While it warns officers not to conduct stops in an arbitrary manner, it fails to consider that stopping all persons at a particular location simply because they are present may itself be arbitrary.

The BTP's guidance discloses the fundamental difficulty in seeking to develop effective advice for officers on the proper use of section 44 when stops are not based on specific intelligence or suspicious conduct.

Inadequate Transparency

There is a significant lack of transparency around the operation of the section 44 stop and search power, although some forces have begun to make more information publicly available.

The Home Office quarterly, annual data available on the operation of police powers under the Terrorism Act 2000, and Ministry of Justice annual data on race and the criminal justice system, all offer some insight into the operation of the section 44. Statistics for BTP stops were not publicly available until the publication of a November 2009 Home Office statistical bulletin on the police use of counterterrorism powers. Stops carried out by the BTP, Ministry of Defence Police, and Police Service of Northern Ireland stops are not currently included in the Ministry of Justice data: the latter two forces publish their own data.

The Metropolitan Police Service, with encouragement from its police authority, now makes a significant amount of data relating to section 44 available on its website, including its general stop and search equality impact assessment, its standard operating procedure, and borough level stop and search statistics. The City of London police also makes data available through its website, including stop and search statistics and general stop and search policy.

The British Transport Police made data available to Human Rights Watch on request, including its guidance on stop and search, and data on stops, and makes data available to its Independent Advisory Group. In June 2010, the force published stop and search data on its website for the first time, including data on section 44 stop and search for April 2009 to March 2010.¹¹² BTP Assistant Chief Constable Alan Pacey told Human Rights Watch that the

¹¹² British Transport Police, "Stop Search and Account - Total Usage," (undated), http://www.btp.police.uk/freedom_of_information/publication_scheme/monitoring_records.aspx [accessed June 30, 2010].

force is discussing with Ministry of Justice the possibility of including BTP statistics found in its annual race and criminal justice report.¹¹³ This would be a welcome development.

However, despite some moves to openness, other aspects of the section 44 process remain shrouded in secrecy, with many forces offering national security justifications to withhold information from the public.

Several key areas lack transparency. One is the authorization process (as discussed above), with even the statutory body responsible for investigating complaints against the police unable to access information about Home Office scrutiny of authorization requests.

Another area is the geographic and temporal scope of section 44 authorizations. A recent survey by the *British Journal of Photography* (prompted by concerns about the use of section 44 and other terrorism powers against photographers, discussed in more detail below) revealed the results of Freedom of Information Act requests made to 46 police forces across the UK.¹¹⁴ Thirty-three of the forces either refused to provide any information or failed to respond at all as to whether they had carried out section 44 searches and sought section 44 authorizations.¹¹⁵ Of the 13 forces that responded to the *British Journal of Photography*'s requests (including the MPS, BTP, and City of London Police), one force declined to say whether an authorization was in place at all, and two forces, including the BTP, declined to indicate the geographic scope of their authorization.

While there may be operational reasons for withholding information in relation to current area and temporal authorizations, it is less clear why historic data should be routinely withheld. It may be argued that since national statistics on actual stops and searches are available, it is unimportant to have details about temporal and geographic scope of authorizations in relation to particular forces. However, this argument ignores the fact that lack of information about whether a section 44 authorization is in place at a given time in a particular police force area, in the absence of a requirement of reasonable suspicion, makes it almost impossible for persons stopped outside London to know whether they have been

¹¹³ Human Rights Watch interview with Alan Pacey, November 13, 2009.

¹¹⁴ "Not a Crime," *British Journal of Photography*, (Summary of Freedom of Information Act requests to UK police forces on section 44 Terrorism Act 2000) (undated), http://db.riskwaters.com/global/bjp/notacrime/index_foi.htm [accessed March 24, 2010].

¹¹⁵ *British Journal of Photography, Not a Crime.*

stopped lawfully. Following the positive decision by the MPS to narrow the geographic scope of its section 44 authorization, the same concern could now arise in London.¹¹⁶

Inadequate transparency in the authorization process and operation of section 44 powers is inherently problematic. That concern is further elevated when one factors in the importance of public confidence in the exercise of the policing powers; the historic criticism of the lack of openness in the exercise of stop and search powers in particular—which led to the explicit recommendation in the Macpherson Report on the need to publish data and analysis; the risks of arbitrary use inherent in the exercise of a power that requires no suspicion; and the importance of authorization as a control in those circumstances.¹¹⁷

¹¹⁶ A senior MPS told Human Rights Watch in April 2010 that the force would monitor use of section 44 stop and search to ensure that it was not used in areas outside those covered by the authorization, and take disciplinary measures against any officer found to do so. Human Rights Watch interview Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

¹¹⁷ Macpherson Report, Recommendation 62.

III. Police Use of Section 44 Stop and Search

Being stopped and searched under section 44 stop is an intrusive process. Provided an authorization is in place at your location, an officer may detain you or stop your vehicle without any requirement of suspicion; search you and anything in your possession or your vehicle; and “seize and retain” anything discovered in your possession or your vehicle that is suspected to be for use “in connection with terrorism.”¹¹⁸

The officer can require you to remove “headgear, footwear, an outer coat, a jacket or gloves” in public.¹¹⁹ Failure to cooperate with a search (either by failing to stop, or by willfully obstructing it) is a criminal offence punishable with up to six months imprisonment, a £5,000 (approx US\$7,500) fine, or both.¹²⁰

In the year to December 2009, the most recent 12-month period for which statistical information is available, people were stopped more than 220,000 times, mostly in London. It is impossible to determine how many people were subject to multiple stops, but anecdotal evidence suggests that some people are indeed subject to such stops.¹²¹

In many cases officers on the beat—rather than counterterrorism officers—conduct section 44 stops.¹²² The BTP, as previously noted, carries out around half its stops during pre-planning operations by specially-trained officers, but the remainder take place during ordinary policing, mostly by officers on the beat. As a Metropolitan Police Authority official explained, it is “fundamental to British policing that the individual constable has discretion.”¹²³

Given the lack of a requirement that the person stopped is suspected of involvement in terrorism, the geographic scope of the power in London and elsewhere, and the fact that many stops are carried out by ordinary beat officers, it should come as little surprise that the section 44 power is subject to overuse, in circumstances that clearly have no connection to

¹¹⁸ Terrorism Act 2000, section 45(2); Terrorism Act 2000, section 45 (1) and 45 (4).

¹¹⁹ Terrorism Act 2000, section 45(3).

¹²⁰ Terrorism Act 2000, section 47.

¹²¹ Human Rights Watch interview with Chris Roffey, Co-Chair, Stop and Search Community Monitoring Network, and Abu Sufian, Chair of Tower Hamlets Monitoring Group, London, August 14, 2009.

¹²² Human Rights Watch interview with Commander Simon O’Brien, Metropolitan Police Service, London, October 6, 2009.

¹²³ Human Rights Watch interview with Martin Davis, Lead on Stop and Search, Metropolitan Police Authority, June 10, 2009.

terrorism. According to Azad Ali from the Muslim Safety Forum, the main problem with section 44 is “police officers on the beat using section 44 inappropriately.”¹²⁴

Use of Section 44 without Authorization

At least 14 police forces have carried out stops and searches using section 44 powers in the absence of proper authorizations.

In June 2010, Security Minister Baroness Pauline Neville-Jones gave a written ministerial statement to government ministers indicating there were at least 40 occasions where stop and search operations had been carried out without proper authorizations.¹²⁵ The operations involved 14 forces, including the Metropolitan Police, and took place between 2001 and 2008.¹²⁶ Most cases involved authorizations made for longer than the 28 days permitted.

In one Metropolitan Police operation in April 2004, 840 people were stopped in the absence of a valid authorization, with the then-home secretary failing to confirm it in 48 hours as the law requires.¹²⁷ The numbers stopped under the other operations had not been collated at this writing, but the total is likely to be in the thousands. The Security Minister told Parliament that the Home Office was conducting an internal review into the authorization process, and was working with National Policing Improvement Agency and Association of Chief Police Officers “with the aim of ensuring there are no incidents in future.”¹²⁸

In 2007, Lord Carlile, who has access to the authorizations, identified five cases in 2007 where section 44 powers were exercised in the absence of a valid authorization.¹²⁹ Those five cases are included in the total of 40. His report noted that “[t]he purported use of the powers without authorisation is an intolerable invasion of the civil liberties of those affected.” The Home Office response attributed the failure to “human error” and said that in only one of the cases (in Sussex) had stops actually been made under the power without proper authorization, affecting 12 persons.¹³⁰

¹²⁴ Human Rights Watch interview with Azad Ali, Muslim Safety Forum, August 25, 2009.

¹²⁵ Written Ministerial Statement, Minister of State for Security, Baroness Neville-Jones, Home Department: Stop-and-Search Authorisation, June 10, 2010, <http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/100610.htm#d2e358> [accessed June 10, 2010].

¹²⁶ *Ibid.* A table showing the forces involved and the details of the erroneous operations is annexed to the statement.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ “Report on the operation in 2006 of the Terrorism Act 2000, June 2007,” para. 126.

¹³⁰ UK Government, “The Government Reply to the Report by Lord Carlile of Berriew Q.C., Report on the Operation in 2007

Inappropriate Stops and Searches

Among those reported to have been subject to section 44 stops are young children, some of them under the age of 10, railway enthusiasts (known in the UK as “trainspotters”), photographers, and peaceful protestors.¹³¹

In August 2009, a nine-year-old boy, together with two other boys under the age of 13, was stopped and searched in the London borough of Lambeth under section 44 of the Terrorism Act, prompting criticism from children’s rights advocates.¹³² In September 2009, the IPCC announced they were launching an investigation after two officers allegedly stopped and searched a 43-year-old man, his 11-year-old daughter, and a neighbour’s six-year-old daughter, using section 44 of the Terrorism Act. The incident took place in an unnamed part of South London in July 2009. According to a newspaper report, there were a total of 94 complaints to the IPCC about the use of section 44 in the 18 months to December 2009.¹³³

Although Home Office and Ministry of Justice data on section 44 stops are not broken down by age, figures for 2008 released by the Metropolitan Police Authority suggest that section 44 stops of children are widespread in London. According to the MPA, the Metropolitan Police in 2008 stopped searched 2,331 children aged 15 or under.¹³⁴ That figure includes 58 children under the age of 10.

Parliamentary questions in December 2009 on the numbers of children and “young people” stopped under section 44 across the UK were the subject of an interim response from a minister in the previous government in charge of policing, indicating that data are not centrally held by the Home Office or Ministry of Justice.¹³⁵ At this writing, no further information appears to have been provided to the MPs who asked the questions.

of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006,” June 2008, <http://www.official-documents.gov.uk/document/cm74/7429/7429.pdf> [accessed March 24, 2010].

¹³¹ The issue was taken up by Norman Baker MP, the Liberal Democrat transport spokesman. Ben Leach, “Trainspotters being stopped under anti-terror powers,” *Daily Telegraph*, January 5, 2009, <http://www.telegraph.co.uk/news/uknews/road-and-rail-transport/4123672/Trainspotters-being-stopped-under-anti-terror-powers.html> [accessed March 24, 2010].

¹³² “Anger over child stop and search,” BBC News, August 18, 2009, <http://news.bbc.co.uk/1/hi/england/london/8206546.stm> [accessed March 24, 2010]; *Daily Mail*, “Mother’s outrage after Met officers stop and search her nine-year-old son,” August 19, 2009, <http://www.dailymail.co.uk/news/article-1207407/Mothers-outrage-Met-officers-stop-search-year-old-son.html> [accessed March 24, 2010].

¹³³ Robert Booth, “Police stop church photographer under terrorism powers,” *The Guardian*, December 8, 2009, <http://www.guardian.co.uk/uk/2009/dec/08/police-search-photographer-terrorism-powers> [accessed March 25, 2010].

¹³⁴ Vikram Dodd, “Metropolitan police used anti-terror laws to stop and search 58 under-10s,” *The Guardian*, August 18, 2009, <http://www.guardian.co.uk/politics/2009/aug/18/met-police-stop-search-children> [accessed March 25, 2010].

¹³⁵ Answers from David Hanson, MP, then-Minister for Policing and Security. UK Parliament, Hansard, Written Answers, Column 570, Stop and Search: Children (Question from Adam Holloway MP); Stop and Search: Young People (Question from Tim Loughton MP), December 10, 2009, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091210/text/91210w0010.htm>

The use of section 44 powers against protestors has caused widespread concern. As discussed, the Joint Committee on Human Rights criticized use of section 44 in the context of policing public protest, with witnesses expressing concern that the impact of its use—even if it was not its intention—was to discourage participation in protest.¹³⁶ The report cites several examples, including the use of section 44 powers against a 87-year-old Labour party member who was prevented from re-entering the party conference in 2005 after shouting during a speech by former Foreign Minister (later Justice Minister) Jack Straw, and its use against demonstrators at military bases, and people wearing slogans on t-shirts.¹³⁷

The Committee also cited a 2003 case of a protestor and a journalist who were stopped outside an arms fair in London. The Gillian case was the subject of long-running litigation in the British courts, culminating in a far-reaching ruling in January 2010 by the European Court of Human Rights that the stops were unlawful, overturning earlier findings by the British courts.

Stops of photographers have also proved controversial, with MPs supporting complaints from professional and amateur photographers (including tourists) that their cameras and images were confiscated.¹³⁸ The high profile given to the complaints prompted a Home Office circular and letter to police forces from the Association of Chief Police Officers clarifying that the taking of photographs in public places should not give rise to section 44 searches, and that the power does not permit officers to confiscate equipment or images.¹³⁹

Given the nature of the power, there is a risk that it will be used by officers for purposes unconnected with terrorism, for example to carry out a search for stolen goods where the office lacks the reasonable suspicion necessary to do so.

[accessed March 24, 2010].

¹³⁶ Joint Committee on Human Rights, “Demonstrating respect for rights?,” March 2009

¹³⁷ *Ibid*, para. 88.

¹³⁸ Chris Cheeseman, “Photographers’ Terror Stops Spark Fresh Commons Petition,” *Amateur Photographer*, December 7, 2009, http://www.amateurphotographer.co.uk/news/Police_terror_photography_U_turn_ACPO_letter_revealed_in_full_news_292634.html [accessed March 24, 2010]; Letter: “365 of Britain’s most eminent photographers write to Telegraph to ask for a change in anti-terrorist legislation,” *Daily Telegraph*, December 27, 2009, <http://www.telegraph.co.uk/comment/letters/6873728/Police-should-stop-treating-photographers-as-terrorists.html> [accessed March 24, 2010]. Scott Warren, “Police told to stop questioning photographers for taking pictures of tourist landmarks,” *Daily Mail*, <http://www.dailymail.co.uk/news/article-1233454/Police-told-stop-questioning-photographers-taking-pictures-tourist-landmarks.html> [accessed June 9, 2010].

¹³⁹ Home Office circular 012/2009, “Photography and Counter-terrorism legislation,” August 18, 2009, <http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2009/012-2009/index.html> [accessed March 24, 2010]; Association of Chief Police Officers, “Letter to Chief Constables and Commissioners, Section 44 Terrorism Act and Photography,” December 4, 2009, reproduced in *Amateur Photographer*, http://www.amateurphotographer.co.uk/news/Police_terror_photography_U_turn_ACPO_letter_revealed_in_full_news_292652.html?offset=&offset=1 [accessed March 24, 2010].

Zaheer Ahmad, President of the National Association of Muslim Police, which supports the existence of the section 44 power with caveats, noted to Human Rights Watch that a “blanket search area is open to abuse in performance driven service.”¹⁴⁰

Following the introduction of the national Policing Pledge in December 2008, which is aimed at making police more responsive to the needs of the communities they serve, forces are supposed to have moved away from the use of performance targets based on the number of stops or arrests an individual officer carries out within a certain time period.¹⁴¹

Senior BTP officers told Human Rights Watch that since the pledge was introduced, they had dropped targets based on stops and instead used “reassurance targets” aimed at increasing public confidence in policing.¹⁴² But it is not evident that the pledge and the move away from targets has impacted the number of people stopped. The significant reductions in MPS and BTP stops in the second half of 2009 are tied to reductions in geographic scope of their authorizations.

Inconsistent Geographic Use

Further evidence that section 44 powers are not used on an objective basis can be drawn from the fact that while some forces (notably the MPS and BTP) use them a great deal, other forces use them very little or not at all. Given that London is the capital, the seat of government, and has twice been the target of terrorist attacks since 2005, it is perhaps not surprising that a large proportion of section 44 stops have taken place in city. But it is notable that the use of the power by police forces operating in other major cities has been limited (with the exception of BTP use in Scotland).

In Manchester, which was the target of a 1996 bomb in its city centre, Greater Manchester Police stopped eight people under section 44 in financial year 2006/7, 181 people in financial year 2007/8, and 1,164 in financial year 2008/9.¹⁴³ In Birmingham, the UK’s second largest city, which has been the subject of active counterterrorism investigations in recent

¹⁴⁰ Human Rights Watch interview with Zaheer Ahmad, President, and Yousef Dar, Vice-President, National Association of Muslim Police, London, August 26, 2009.

¹⁴¹ Policing Pledge, available at: http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_172297.pdf [accessed March 24, 2010].

¹⁴² Human Rights Watch interview with Philip Trendall, Superintendent, Counter Terrorism Support Unit, and Robert Noddings, Chief Inspector, British Transport Police, London, February 10, 2010.

¹⁴³ Financial year 2006/7 and financial year 2007/8 data from Ministry of Justice, Statistics on Race and the Criminal Justice System 2007/8, Table 4.6a, p.55; Financial year 2008/9 data from Home Office, Operation of police powers under the Terrorism Act 2000, 2008/9, Table 2.1, p.46.

years, West Midlands Police carried out zero stops in 2006/7, 332 stops in 2007/8, and zero stops in 2008/9.¹⁴⁴

Scotland provides another interesting contrast. Its largest city, Glasgow, was the target of a failed attack on its airport in 2007.¹⁴⁵ Data is not available for Strathclyde Police in Glasgow, but police forces in Scotland as a whole stopped only 39 people in 2007/8, and 160 in 2008/9.¹⁴⁶ This stands in contrast to the extremely large number of stops carried out in Scotland by the BTP during 2007/8.

In the six months following the airport attack, the BTP, which has a mandate for Scottish railways and Glasgow's underground (but not its airport), carried out 15,336 stops in Scotland.¹⁴⁷ In 2007/8, the BTP carried out 18,000 section 44 stops.¹⁴⁸ Following significant criticism, including from the Scottish Executive, linked to the fact that the other forces in Scotland were barely using the power, the BTP revised its approach to the use of section 44 in Scotland. In 2008/9, the figure was reduced to just 20. Human Rights Watch understands that the current BTP section 44 authorization does not extend to the rail network in Scotland.¹⁴⁹

The discrepancy in use between forces in large urban areas and between the BTP and other forces in Scotland provides further evidence that the use of the power is not based on objective criteria. That is hardly surprising given absence of clear guidance as to its use, and the wide discretion the power offers.

Disproportionate Stops of Minorities

An ongoing concern with the use of police stop and search powers around the world is that they disproportionately target ethnic and religious minorities. As previously noted, a recent survey by the Equality and Human Rights Commission (EHRC) has found that blacks (those of

¹⁴⁴ Financial year 2006/7 and financial year 2007/8 data from Ministry of Justice, *Statistics on Race and the Criminal Justice System 2007/8*, Table 4.6a, p.55; 2008/9 data from Home Office, *Operation of police powers under the Terrorism Act 2000, 2008/9*, Table 2.1, p.46. According to the 2001 census, the population of metropolitan Greater Manchester area is 2,240,230.

¹⁴⁵ According to the 2001 census, the population of Glasgow is 629,501.

¹⁴⁶ Home Office, "Operation of police powers under the Terrorism Act 2000, 2008/9," Table 2.1, p.46. According to the 2001 census, the population of the metropolitan West Midlands area is 2,284,093.

¹⁴⁷ "Minister supports stop and search," BBC News, December 27, 2007, http://news.bbc.co.uk/1/hi/scotland/glasgow_and_west/7155027.stm [accessed March 25, 2010].

¹⁴⁸ Stuart MacDonald, "Transport police cut random searches that 'fuel race hate,'" *The Sunday Times* (London), March 7, 2010, <http://www.timesonline.co.uk/tol/news/uk/scotland/article7052595.ece> [accessed March 25, 2010].

¹⁴⁹ Human Rights Watch interview with Philip Trendall, Superintendent, Counter Terrorism Support Unit, and Robert Noddings, Chief Inspector, British Transport Police, London, February 10, 2010.

African and Caribbean origin or descent) and “Asians” (a term used in the UK to describe people of South Asian origin or descent) are far more likely to be stopped and searched under the ordinary stop and search powers than are whites.

Work by the Open Society Justice Initiative on ethnic profiling by police forces in Europe identified disproportionate use of stop and search against minorities and those perceived as foreigners.¹⁵⁰ Concerns over disproportionate use against ethnic minorities have driven the debate and efforts towards reform of stop and search powers in the UK.

Assessing disproportion is complex and only possible because police must record a person’s self-defined ethnicity when they subject them to stop and search. However, there is presently no mechanism for recording stops based on a person’s self-defined religion. It is therefore very difficult to assess disproportion in relation to British Muslims compared to other religious groups. One cannot use “Asians” as a proxy, since they may be Hindu, Sikh, or another religion.

Recording the Religion of Those Stopped?

Human Rights Watch asked many of its interlocutors whether they believed that stop and search monitoring by religion would be helpful to allow stops to be broken down by religion as well as ethnic group. The overwhelming consensus was that collecting such information would be very difficult, in part because people stopped were likely to misinterpret, or refuse to answer, the question. Human Rights Watch does not therefore call for such recording to be added to stop and search monitoring forms.

The Ethnic Breakdown of Section 44 Stops and Searches

According to Ministry of Justice statistics, section 44 searches across Great Britain increased between financial year 2006/7 and financial year 2007/8 for all ethnic groups. However, the biggest rise was for blacks (322 percent), followed by Asians (277 percent), those in the “Other” category (262 percent), and lastly whites (185 percent).¹⁵¹ The statistics are based on “self-defined ethnicity,” meaning that if the person does not volunteer their ethnicity, the

¹⁵⁰ Open Society Justice Initiative, “Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory,” May 2009, http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/profiling_20090526 [accessed March 26, 2010]; Open Society Justice Initiative, “Addressing Ethnic Profiling by Police - A Report on the Strategies for Effective Police Stop and Search Project,” May 2009.

¹⁵¹ Ministry of Justice, “Statistics on Race and the Criminal Justice System 2007/8,” p.29. “Other” refers to “Chinese and other ethnic group,” which break down into two separate subcategories. The fifth category is “Mixed,” which also breaks down into subcategories.

stop is counted in a separate category, “not stated/known.” No ethnic breakdown is available for stops carried out by the Police Service of Northern Ireland.

The picture in London, where most stops take place, is particularly complex. According to the most recent census data from 2001, whites make up approximately 71 percent of the capital city’s population, blacks approximately 10 percent, and (south) Asians approximately 12 percent.¹⁵² In England and Wales, as a whole, whites make up 91.3 percent of the population, blacks 2.2 percent, and Asians 4.4 percent.¹⁵³

MPS Figures

Metropolitan Police Service figures suggest that whites are underrepresented in stops, blacks very slightly overrepresented, and Asians overrepresented, although it is notable that more than 12 percent of those stopped declined to state their ethnicity.

Of the 185,086 people stopped and searched by the MPS under section 44 in financial year 2008/9, around 58 percent defined themselves as white (107,853); around 11 percent (21,496) as black; around 16 percent (29,716) as Asian; around 4 percent (8,548) grouped as “Chinese” or “other”; around 2 percent (4,322) said they were of mixed background; and around 7 percent (13,151) declined to indicate ethnicity.¹⁵⁴

BTP Figures

It is harder to analyze BTP statistics, which are currently not included in Ministry of Justice data. BTP stopped 58,522 people in financial year 2008/9, of whom approximately 65 percent (38,402) defined themselves as white, around 4 percent (2,646) as black, and around 12 percent (7,209) as Asian, with 11 percent (6,564) declining to indicate ethnicity.¹⁵⁵

The demographics of those who travel on trains and “the Tube”—London’s underground railway system—may be slightly different than in the general population, although one would not expect it to be significantly so. Human Rights Watch has been told informally by police officers that about 70 percent of BTP stops are in London. If all stops were in London, and assuming that those who decline to indicate ethnicity mirror the ethnic breakdown of

¹⁵² Data for Greater London from 2001 National Census, obtained from <http://www.neighbourhood.statistics.gov.uk> [accessed March 25, 2010].

¹⁵³ Ibid.

¹⁵⁴ Home Office, “Operation of police powers under the Terrorism Act 2000, 2008/9,” Table 2.2, p.47.

¹⁵⁵ Home Office, “Operation of police powers under the Terrorism Act 2000, 2008/9,” Table 2.2, p.47.

the population in London, that would indicate an under-representation of whites and blacks and an expected number of stops of Asians.

However, London is significantly more ethnically diverse than most of the UK. Using national ethnicity figures for the estimated 30 percent of stops outside London, this would suggest underrepresentation of whites and overrepresentation of blacks and Asians. But it is hard to draw firm conclusions without data about the location and demography of BTP searches outside London, or information about the more than 11 percent of stops where ethnicity is unknown.

Forces Outside London (Excluding the BTP)

Looking at forces in England and Wales outside London (excluding the BTP), and using data on average ethnic representation in the national population, there were 12, 258 stops in financial year 2008/9. In around 79 percent (8,793) of stops people defined themselves as white; in around 4 percent (572) as black, and around 11 percent (1,071) as Asian. Around 3 percent (432) declined to state their ethnicity. This suggests that whites are underrepresented, blacks overrepresented, and Asians significantly overrepresented in stops by forces in England and Wales outside London (excluding the BTP).

Overall, statistical analysis suggests that Asians are overrepresented in the use of section 44 powers in forces outside London and by the MPS and may also be overrepresented in stops by the BTP, especially outside London. It suggests that black people are overrepresented in stops by forces outside London, and may be overrepresented in stops by the MPS, and possibly by the BTP outside London. While the evidence is less compelling than for ordinary stop and search powers, it is nonetheless a cause for concern, especially given how important stop and search encounters can be to community relations with the police.

“Balancing” Stops

One explanation for the lack of strong findings in relation to disproportionality is that stops of whites are being carried out in order to “balance” the statistics. There is anecdotal evidence to support this conclusion.

This may partly arise from the advice in the NPIA guidance for officers to “compare the backgrounds of people being searched in proportion to the demographic make-up of the

area where searches take place.”¹⁵⁶ While it is intended to guard against profiling, it may have the unintended consequence of encouraging officers to conduct balancing stops.

When the British Transport Police invited Human Rights Watch to observe a pre-planned section 44 stop and search operation in London, one officer told the group that the BTP tries to “balance ethnicity.”¹⁵⁷ By contrast, a senior MPS officer insisted the force’s officers were “not briefed” to conduct balancing stops.¹⁵⁸

In an interview with Human Rights Watch, Lord Carlile branded such stops “unacceptable,” and described emails, letters and calls that he receives from people who have been stopped under what they believe are such circumstances.¹⁵⁹ In his 2009 annual report, he also expressed concern about balancing stops, which he called a waste of police time and a violation of the civil liberties.¹⁶⁰ He concluded that “if an objective basis happens to produce an ethnic imbalance, that may have to be regarded as a proportional consequence of operational policing.”¹⁶¹

Human Rights Watch agrees with much of Lord Carlile’s analysis about section 44. But in light of the inherent problems with section 44 discussed in this report, we do not share the assessment that higher numbers of stops of ethnic minorities should not be a cause of concern provided stops are carried out “objectively.”

It cannot be safely assumed that stops of non-whites are more likely to be legitimate than those of whites, given that no suspicion is required for such stops and the MI5 briefing note indicating that demography is not a reliable indicator of risk. It is equally likely that stops of non-whites are the result of ethnic profiling, particularly stops of South Asian males, which would constitute discrimination.

Profiling constitutes a significant risk with stop and search generally. It is precisely for that reason that ethnic monitoring is carried out under PACE and other stop and search powers.

¹⁵⁶ NPIA “Practical Advice on Stop and Search in Relation to Terrorism.” This is discussed above.

¹⁵⁷ Human Rights Watch observation of pre-planned section 44 stop and search operation by the British Transport Police, St. Pancras Railway station, London, February 10, 2010.

¹⁵⁸ Human Rights Watch interview Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

¹⁵⁹ Human Rights Watch interview with Lord Carlile, Independent Reviewer of Terrorism Legislation, London, July 6, 2009.

¹⁶⁰ Lord Carlile, “Report on the Operation in 2008 of the Terrorism Act 2000,” para.140.

¹⁶¹ *Ibid.*

In the absence of specific intelligence and the requirement of suspicion, the risk of profiling is even greater. And while balancing stops may mask profiling, they do not eliminate it.

Former Metropolitan Police Service Commissioner Sir Ian Blair takes a different view from Lord Carlile, arguing in favour of widespread use of section 44 on the grounds that “inconvenience shared must be preferable” than the alternative, which he characterizes as targeting searches against “the particular community from which the current threat is seen mainly but not exclusively to come, young Muslims.”¹⁶² This suggests that the wider use of the power may already disguise profiling.

The fundamental difficulty with section 44 stops is that in the absence of specific intelligence or suspicious behaviour, there is no clear person-specific guidance as to who should be stopped. That makes the distinction between legitimate stops and illegitimate ones hard to draw or sustain.

It also greatly increases the risk of profiling, which is not only inherently problematic, but also an inefficient use of police resources. As Daniel Moeckli, a legal academic who has written extensively about profiling as a counterterrorism tactic, points out, “Profiles based on ethnicity can shift the attention of police officers away from more pertinent indicators such as behavioral patterns or psychological characteristics.”¹⁶³

¹⁶² Ian Blair, “In defence of stop and search,” *The Guardian*, January 13, 2010, <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jan/13/stop-and-search-defence> [accessed March 25, 2010].

¹⁶³ Daniel Moeckli, “The impossibility of terrorist profiling,” *OpenDemocracy*, September 12, 2008, http://www.opendemocracy.net/terrorism/article/racial_profiling_MI5_UK [accessed March 26, 2010].

IV. Human Rights Violations

Use of section 44 of Terrorism Act 2000 engages the United Kingdom's obligations under human rights law. The European Convention on Human Rights, to which the UK is party, and which is incorporated into domestic law through the Human Rights Act, protects the right to liberty, privacy, freedom of assembly, among others.¹⁶⁴ Similar protections exist in the International Covenant on Civil and Political Rights (ICCPR) to which the UK is party. The UK is obliged under the ECHR, ICCPR and domestic law to prohibit unlawful discrimination.¹⁶⁵

Permissible Limitations on Human Rights

Human rights law permits states under certain circumstances to restrict certain rights, including the right to privacy and freedom of assembly. But those rights (sometimes referred to as “qualified rights”) can only be restricted where the restriction is provided for in law; is for a legitimate purpose (such as protecting public order, preventing crime, protecting the rights of others); is necessary for that purpose; and is non-discriminatory. (The circumstances in which liberty can be restricted are even narrower).

The European Court of Human Rights, which supervises state compliance with the European Convention, makes clear that evaluating necessity must include an assessment of whether the restriction is proportionate to the objectives sought.¹⁶⁶ That means that even if a restriction is lawful, has a legitimate purpose, and is otherwise deemed necessary for that purpose, it may still breach human rights law if the scale of the interference is out of balance with the benefits it provides.

The purpose of section 44 power is clearly legitimate under human rights law: protecting the public against terrorism. However, the issue of whether section 44 is proportionate to its objectives falls into question when the way that it is practiced is considered. This in turn calls into question whether exercise of the power is compatible with the UK's human rights obligations.

¹⁶⁴ European Convention on Human Rights: Article 5 (Liberty), Article 8 (Privacy), Article 11 (Assembly). International Covenant on Civil and Political Rights: Article 9 (Liberty), Article 17 (Privacy), Article 22 (Assembly).

¹⁶⁵ ECHR Article 14; ICCPR Article 26; United Kingdom Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000); Equalities Act 2000.

¹⁶⁶ European Court of Human Rights, *Silver v. United Kingdom*, Judgment of March 25, 1983, para. 97.

The Home Office's most recent annual statistics, for the year ending September 2009, indicate that there were 965 arrests resulting from section 44 stops, an arrest rate of 0.5 percent. But the statistics do not indicate whether the arrests were for terrorism offences, or how many of those arrested were successfully prosecuted for a terrorism offence.¹⁶⁷

Lord Carlile told Human Rights Watch in July 2009 that to his knowledge “no one has ever been successfully prosecuted” for a terrorism offence following a section 44 stop and search, adding that “no useful intelligence has ever been obtained.”¹⁶⁸

In addition, while the power is prescribed by law in the Terrorism Act 2000, the European Court of Human Rights (ECtHR) clearly stated in the *Gillan* case in March 2006 that its exercise created a “clear risk of arbitrariness” due to the wide discretion that officers have as to its use; the lack of clear guidance previously discussed; and the inadequacy of oversight mechanisms established to regulate its exercise.¹⁶⁹

In relation to oversight, it is notable that when the UK Law Lords (now Supreme Court) upheld the lawfulness of the section 44 power in the *Gillan* case in March 2006, it gave significant weight to the safeguards against its misuse.¹⁷⁰

As discussed in the section on safeguards above, while impressive on paper, in practice they are ineffective particularly since it is clear that the Home Office does not seriously scrutinize authorization requests, let alone refuse them; that rolling authorizations are common; and that it is extremely difficult for a member of the public to determine whether they have been lawfully stopped, since the geographic and temporal scope of police authorizations are secret (including now in London).

It is also unclear that the power is necessary to protect the public from terrorism. A senior officer needs only to be satisfied that its use is “expedient” in order to prevent terrorism—a significantly lower standard than it being “necessary.” And hundreds of thousands of searches have failed to result in successful prosecutions of terrorists, suggesting that no one has been found in possession of terrorism articles during a section 44 search.¹⁷¹ The

¹⁶⁷ Home Office, “Terrorism Act Quarterly update,” February 25, 2010, p.15.

¹⁶⁸ Human Rights Watch interview with Lord Carlile, Independent Reviewer of Terrorism Legislation, London, July 6, 2009.

¹⁶⁹ European Court of Human Rights, *Gillan & Quinton v. The United Kingdom*, Judgment of January 12, 2010, para. 85.

¹⁷⁰ House of Lords Judicial Committee (Law Lords), *R. (on the application of Gillan and another) v. Commissioner of Police for the Metropolis and another*, ([2006] UKHL 12), March 8, 2006, <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jdo60308/gillan-1.htm> [accessed March 30, 2010], para. 14. See also, speech of Lord Hope, para. 55.

¹⁷¹ Terrorism Act 2000, Section 44(3).

government has not shown that exercise of the power has disrupted terrorist plots, or made it harder for terrorists to operate in the capital, as senior BTP and MPS officers have asserted to Human Rights Watch.

However, even if the power were indeed shown to have some benefit for this purpose, Human Rights Watch does not believe—based on evidence that it has viewed and the power’s counter-productive effect—that stopping and searching around a quarter of million people each year who are not linked to terrorism is proportionate to that purpose.

Right to Privacy

Privacy is an important human right, encompassing a person’s ability to go about their lawful activity without interference from the state.

In his leading judgment in the *Gillan* case, Lord Bingham expressed doubt as to “whether an ordinary superficial search of the person can be said to show a lack of respect for private life.”

The European Court of Human Rights, which considered the *Gillan* case on appeal from the Law Lords, took a different view from the Britain’s highest court. Concluding that the right to a private life was indeed engaged, it pointed to the coercive nature of searches under section 44. It rejected an analogy with airport style searches, noting that unlike section 44 searches, airport searches are voluntarily submitted to, since a person can opt not to travel rather than submit to a search of his or her person and possessions.

Human Rights Watch agrees with the ECtHR, and does not share Lord Bingham’s assessment, which appears to ignore the extent to which searches can be intrusive, the history of stop and search powers in the United Kingdom, and the fact that the search requires no reasonable suspicion—something that the person being searched is made aware of before the search commences. It is Human Rights Watch’s assessment that the power risks arbitrary use, and its use is neither legitimate, nor necessary—and consequently assesses the measure to breach the right to privacy under human rights law.

This is consistent with the ECtHR, which in January 2010 found that the exercise of the power in the *Gillan* case amounted to a violation of Article 8 of the European Convention (Right to Privacy). In reaching its assessment, it relied on an analysis of whether the exercise of the power was “in accordance of the law,” referring to its well-established jurisprudence that the law must be sufficiently clear and precise to allow an individual to regulate his or her

conduct.¹⁷² It held that the discretion afforded to police officers under the power gave rise to clear risk of arbitrariness.¹⁷³

The Court concluded that “powers of the authorization and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.” It deemed the finding of a violation amounted to “just satisfaction” and did not award damages, although it did award costs.

The then-UK government appealed in April to the Grand Chamber of the Court against the judgment.¹⁷⁴ The Court rejected the appeal in June 2010.¹⁷⁵

Freedom of Assembly

The right to peaceful protest (part of the right to freedom of assembly and association under human rights law) is a hallmark of a democratic society.

While Human Rights Watch has not examined the impact of section 44 on the right to protest, or its use against peaceful protestors, an inquiry by the UK Parliamentary Joint Human Rights Committee found evidence that counterterrorism powers were used against peaceful protestors, and called for guidance on the use of the section 44 stop and search power to “be amended to make clear that counter-terrorism powers should not be used against peaceful protestors.”¹⁷⁶

Having found a violation in relation to one article of the Convention, the ECtHR in *Gillan* did not reach a conclusion as to whether section 44 violated the right to freedom of assembly (or expression), as the appellants had alleged. This is a common practice for the Court when deciding cases. But it did note “there is a risk that such a widely framed power could be misused against demonstrators and protestors.”¹⁷⁷

¹⁷² European Court of Human Rights, *Gillan & Quinton v. The United Kingdom*, Judgment of January 12, 2010, para. 76 (citing *S. and Marper v. the United Kingdom*).

¹⁷³ *Ibid.*, para. 85.

¹⁷⁴ “UPDATE: UK government appeals European Court ruling on Section 44,” *British Journal of Photography*, April 13, 2010, <http://www.bjp-online.com/public/showPage.html?page=874193> [accessed May 20, 2010].

¹⁷⁵ Ian Dunt, “Govt stop-and-search appeal rejected,” *Politics.co.uk*, June 30, 2010, [http://www.politics.co.uk/news/legal-and-constitutional/govt-stop-and-search-appeal-rejected-\\$21381052.htm](http://www.politics.co.uk/news/legal-and-constitutional/govt-stop-and-search-appeal-rejected-$21381052.htm) [accessed June 30, 2010].

¹⁷⁶ Joint Committee on Human Rights, “Demonstrating respect for rights?,” March 2009.

¹⁷⁷ European Court of Human Rights, *Gillan & Quinton v. The United Kingdom*, Judgment of January 12, 2010, para. 85

The use of section 44 powers against peaceful protestors would almost certainly amount to a violation of the right to freedom of assembly, given that exercise of the section power (as opposed to its existence) is arguably not prescribed by law, and that its use is neither legitimate, nor necessary.

Right to Liberty

Since an individual stop is typically short—a matter of minutes, rather than hours or days—it may seem strange to consider stop and search in the context of the right to liberty. That was the view of the Law Lords in the *Gillan* case, when Lord Bingham in his leading judgments concluded the duration of the stop meant that it did not meet the criteria for deprivation of liberty under human rights law, even though in other respects it might meet the definition.¹⁷⁸

The ECtHR did not reach a definitive conclusion on whether the right to liberty was engaged in the *Gillan* case, but did emphasize the coercive element of the stop, stating that it was “indicative of a deprivation of liberty within the meaning of article 5(1).”¹⁷⁹ Human Rights Watch shares that assessment.

Once it is determined that a section 44 stop and search can amount to a deprivation of liberty, the question arises as to whether the deprivation is lawful. As noted above, the right to liberty is a qualified right, although the limitations on it are narrower and the safeguards stronger than for other qualified rights. The European Convention on Human Rights enumerates that the right to liberty can be restricted following conviction for a criminal offence; following lawful arrest; for immigration purposes; and for some public health reasons.¹⁸⁰ But in each case, the decision can be challenged in Court.

An essential element of the lawfulness of any detention is the absence of arbitrariness.¹⁸¹ In the *Gillan* case, the Law Lords concluded that even if a section 44 stop amounted to a deprivation of liberty, such stops are carried out in accordance with the law, and would therefore be a permissible restriction on liberty.¹⁸² However, Lord Brown did acknowledge that “to stop and search those regarded as presenting no conceivable threat whatever”

¹⁷⁸ *R. (on the application of Gillan and another)* ([2006] UKHL 12), para. 25.

¹⁷⁹ European Court of Human Rights, *Gillan & Quinton v. The United Kingdom*, Judgment of January 12, 2010, para. 57

¹⁸⁰ ECHR, article 5(1).

¹⁸¹ ICCPR, article 9(1), European Court of Human Rights, *Enhorn v. Sweden*, Judgment of 25 January 2005; European Court of Human Rights, *Chahal v. United Kingdom*, Judgment of 15 November 1996.

¹⁸² *R. (on the application of Gillan and another)* ([2006] UKHL 12), paras. 26, 31-35.

would mean that the power was “being exercised arbitrarily.”¹⁸³ While the ECtHR did not consider whether exercise of the power amounted to an arbitrary deprivation of liberty, it did identify a “clear risk of arbitrariness” when considering the right to privacy.

In Human Rights Watch’s assessment, the lack of a requirement of reasonable suspicion, and of clear and consistent guidance to officers about whom to stop, leads to a significant risk of the kind of arbitrariness that Lord Brown identified, especially when considering how few stops lead to arrests on terrorism or other charges. It is therefore highly likely that at least some section 44 stops amount to an unlawful deprivation of liberty under human rights law.

Prohibition of Discrimination

Human rights law prohibits discrimination on the basis of race, ethnicity, religion, among others grounds.¹⁸⁴ Discrimination occurs when there is an unjustified difference in treatment based on a particular characteristic such as race, ethnicity, or religion. Once the difference in treatment is shown, the burden of proof is on the state to show that the difference in treatment is justified. Conducting stops and searches on the basis of a person’s race, ethnicity or religion would amount to unlawful discrimination under human rights law.

(Discrimination is also prohibited in domestic law under the Race Relations Act 1976, as amended, although that Act contains a national security exception, making discrimination by public authorities, including the police, lawful for the purpose of safeguarding national security, where it is shown to be justified.¹⁸⁵ International human rights law does not permit such blanket exemptions for merely raising issues of national security to permit discrimination.¹⁸⁶)

The absence of a requirement of reasonable suspicion greatly increases the likelihood of profiling. According to a prominent British criminologist who has researched another UK stop and search power that does not require suspicion, “wherever officers have the broadest discretion is where you find the greatest disproportionality and discrimination.”¹⁸⁷

¹⁸³ *Ibid*, para. 92.

¹⁸⁴ ICCPR article 26, ECHR article 14.

¹⁸⁵ Race Relations Act, Section 42. See Daniel Moeckli, “Stop and Search under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis,” *Modern Law Review*, 2007, Vol. 70, No. 4.

¹⁸⁶ European Court of Human Rights, *Smith and Grady v. United Kingdom*, Judgment of September 27, 1999.

¹⁸⁷ Vikram Dodd, “Black People 27 times more likely to be stopped,” *The Guardian*, April 21, 2003, <http://www.guardian.co.uk/society/2003/apr/21/equality.politics> [accessed May 21, 2010]. Cited in Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, May 2009.

Disproportion has not formed a major part of the critique of section 44 in the UK, in part because the evidence is less stark when compared to other stop and search powers. Mike Franklin, an IPCC Commissioner, who leads on stop and search, and Azad Ali, the lead on stop and search with the Muslim Safety Forum, both expressed the view that focusing on disproportionality in the context of section 44 was not the most effective way to tackle concerns over its misuse it.¹⁸⁸

Nonetheless, as the statistical analysis above indicates, there is evidence of disproportion in the use of section 44 stop and search. Human Rights Watch's analysis suggests that blacks are overrepresented in stops by forces outside London, and may be overrepresented in stops by the MPS, and possibly by the BTP outside London. South Asians are overrepresented in the use of section 44 powers in forces outside London and by the MPS, and possibly overrepresented in stops by the BTP, especially outside London—a conclusion shared by the National Association of Muslim Police (who support the existence of the power) who told Human Rights Watch in a statement that “stops have disproportionately targeted Asians.”¹⁸⁹

The European Commission for Racism and Intolerance took a similar view in a March 2010 report on the UK. The report noted “with concern” that section 44 stops “have disproportionately affected members of the Black and minority ethnic communities,” citing UK Ministry of Justice statistics.¹⁹⁰ The ECRI report reiterates an earlier recommendation (from its General Policy Recommendation No. 8 on “Combating Racism while Fighting Terrorism,” that UK authorities “ensure that anti-terrorism legislation is implemented in a manner that does not discriminate...”¹⁹¹ And as noted above, the UK Equality and Human Rights Commission has expressed concern that the exercise of the power in practice might amount to “unlawful racial discrimination.”¹⁹²

¹⁸⁸ Human Rights Watch interview with Mike Franklin and Nicholas Long; Human Rights Watch interview with Azad Ali.

¹⁸⁹ Email to Human Rights Watch from Zaheer Ahmad, President, National Association of Muslim Police, September 2, 2009.

¹⁹⁰ European Commission against Racism and Intolerance, “ECRI Report on the United Kingdom,” March 2, 2010, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf [accessed March 25, 2010].

¹⁹¹ ECRI Report on the United Kingdom, March 2, 2010. See also General Policy Recommendation No. 8, http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N8/recommendation_N%C2%Bo_8_eng.pdf [accessed March 26, 2010].

¹⁹² Equality and Human Rights Commission, “Submission on the United Kingdom's sixth periodic report under the International Covenant on Civil and Political Rights,” June 2008.

While the *Gillan* case did not concern members of minority communities, the ECtHR noted in its judgment the potential for discriminatory use against ethnic minorities arising from the wide discretion afforded to officers by the powers.¹⁹³

Several Law Lords addressed the issue in the *Gillan* case, although neither of the applicants in the case were members of ethnic minority communities, with Lord Brown saying that stops of a higher proportion of Asians might actually be evidence of the power being used lawfully as opposed to arbitrarily, and Lord Hope stating that even if it were shown that a disproportionate number of Asians were stopped it would not inevitably amount to discrimination.¹⁹⁴

Lord Brown's argument seems to rest on the faulty assumption that stops of Asians are likely to be well founded, whereas those of other ethnic groups are likely not to be.

Meanwhile when it comes to Lord Hope's argument, it is true that evidence of disproportion does not conclusively prove discrimination in the use of stop and search powers. But when there is evidence of disproportionate treatment, authorities must justify the practices that result in this treatment. When one factors in the absence of a requirement of reasonable suspicion, the lack of clear guidance to officers about whom to stop, and the consequent dangers of profiling, there is a clear risk of discrimination in the exercise of the power, in a way that would breach the UK's obligations under human rights law.

¹⁹³ European Court of Human Rights, *Gillan & Quinton v. The United Kingdom*, Judgment of January 12, 2010, para. 85.

¹⁹⁴ *R. (on the application of Gillan and another)* ([2006] UKHL 12), paras. 47 (Lord Steyn), 92 (Lord Brown).

V. Counterproductive Impact

My confidence in the police is at an all time low, I don't trust them and because of the powers they now have I trust them less.

—Ahmed, interviewed by the Muslim Safety Forum (2010).

It is a well-established principle that policing must take place with public consent in order to prevent and detect crime, especially since research has shown that tip-offs from the public are the most important source of information for solving crime.¹⁹⁵

According to David Bayley, a leading criminologist: “Studies have found that the critical ingredient in solving crimes is whether the public—victims and witnesses—provide information to the police that helps identify the suspect.... Studies show that unless the public can specifically identify suspects to the police, the chances that a crime will be solved fall to about 10 percent.”¹⁹⁶

Parliament acknowledged the exercise of the section 44 power could harm community relations with police when it made community impact assessments a required part of the authorization process for section 44.

The potential negative impact of stop and search might seem relatively minor compared, for example, to the impact of the controversial power to detain terrorism suspects without charge for up to 28 days. There are three reasons why this is not the case: first, the power requires no reasonable suspicion, which as previously detailed, greatly increases the risk of unjust stops; second, hundreds of thousands of people have been stopped in recent years; and third, the power is perceived as targeting Muslims, which in turn risks alienating communities whose cooperation is vital to counter the terrorist threat.

Human Rights Watch research shows that section 44 powers are having a negative impact on confidence in the police in general—as Lord Carlile said when he declared that section 44 was “causing a loss of confidence in the police, especially in London.” According to Mike Franklin, a Commissioner with the IPCC: “Stop and search is not the most serious issue the

¹⁹⁵ The concept was first articulated by Sir Robert Peel who, as UK home secretary, founded the first modern police force in London in the 19th century.

¹⁹⁶ David Bayley, *Police for the Future* (Oxford: Oxford University Press, 1994), pp. 7-8 (citations omitted). Bayley is Distinguished Professor in the School of Criminal Justice, State University of New York at Albany.

Commission deals with, but it is the most important in terms of the impact on public perception of the police.”¹⁹⁷

Human Rights Watch research finds that this perception is particularly damaged within Muslim communities, although it is difficult to assess the extent to which section 44 disproportionately impacts Muslims without monitoring the religion of those stopped.¹⁹⁸

Azad Ali from the Muslim Safety Forum told Human Rights Watch the power was “not being used for what it was designed for. It has created disengagement with police.”¹⁹⁹ Abu Sufian, Chair of the Tower Hamlets Stop and Search Monitoring Group (a London borough where more than a third of residents are Muslim) told Human Rights Watch there was a “lot of concern” in the community about section 44.²⁰⁰

Meanwhile Akeela Ahmed, who runs a charity that works with young British Muslims, said there was a “sense of victimization among young Muslims about stop and search [and] a feeling that people are being stopped because of their appearance.”²⁰¹ Her organization, Muslim Youth Helpline, produced a video in 2008 about the impact of section 44 and other counterterrorism policies on young Muslims.²⁰² It demonstrated the perception among some young Muslims that they are stopped solely because of their religion. In the words of one young Muslim man in the video:

We are getting stopped because of Islam and because I’m a Muslim. Not for any other reason. So we are being stopped because of our religion. How does it feel? You know what it is. In the beginning it felt a bit bad, but you know because you get it done so regularly now, yeah, it gets [to be] part of your life so we are used to it now.²⁰³

¹⁹⁷ Human Rights Watch interview with Mike Franklin and Nicholas Long.

¹⁹⁸ Human Rights Watch interview with Alex Carlile QC, Independent Reviewer of Terrorism Legislation, London, July 6, 2009.

¹⁹⁹ Human Rights Watch interview with Azad Ali, Muslim Safety Forum, August 25, 2009.

²⁰⁰ Human Rights Watch interview with Chris Roffey, and Abu Sufian, August 14, 2009. According to the national census, 36.4 of the population of Tower Hamlets are Muslim, making it the London borough with the highest proportion of Muslims.

²⁰¹ Human Rights Watch interview with Akeela Ahmed, Chief Executive, Muslim Youth Helpline, August 10, 2009

²⁰² Muslim Youth Helpline, video: “Campaign: Section 44 (Reelhood Trilogy),” (undated) <http://www.muslimyouth.net/campaigns?id=1&art=62> [accessed June 2, 2010].

²⁰³ Muslim Youth Helpline video on section 44 (time: 00.40-00.58).

“My confidence in the police is at an all time low, I don’t trust them and because of the powers they now have I trust them less,” Ahmed, a young person interviewed by the Muslim Safety Forum, was quoted as saying.²⁰⁴

Recognition that section 44 stop and search is counterproductive because it has undermined confidence in the police, particularly in London and among Muslims, has been a major factor driving calls for its reform. It also risks undermining efforts to prevent radicalization and recruitment central to countering the home-grown threat from terrorism.

Since the July 2005 attacks in London—a series of coordinated suicide attacks on the capital’s transport system that killed 52 people and injured around 700—preventing radicalization and recruitment (known as the “Prevent” Agenda) has been at the heart of the UK’s counter-terrorism strategy.²⁰⁵ Key objectives of the agenda include “challeng[ing] the ideology behind violent extremism” and “address[ing] the grievances which ideologues are exploiting.”²⁰⁶

Counterterrorism powers that violate human rights may deliver short-term benefits in disrupting terrorist networks. But they also make it harder successfully to challenge the ideology behind violent extremism and to address the grievances that facilitate radicalization and recruitment to terrorism.²⁰⁷

²⁰⁴ Basia Spalek, University of Birmingham, “Counter-terrorism policing and section 44 profiling,” in *Ethnic Profiling: The Use of ‘Race’ in UK Law Enforcement*, The Runnymede Trust, February 2010.

²⁰⁵ The strategy was first developed in 2003. Its current iteration known as CONTEST II dates from 2009. “The UK Government’s Strategy for Countering International Terrorism,” March 2009, <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/contest/contest-strategy/contest-strategy-2009?view=Binary> [accessed June 2, 2010].

²⁰⁶ *Ibid.*, p. 82.

²⁰⁷ See for example, Demos, “Bringing it Home: Community-based approaches to counter-terrorism,” December 2006, <http://www.demos.co.uk/files/Bringing%20it%20Home%20-%20web.pdf> [accessed June 2, 2010] and Joseph Rowntree Reform Trust, “The Rules of the Game: Terrorism, Community and Human Rights,” <http://www.jrrt.org.uk/index.php?page=publication&showpublication=8> [accessed June 2, 2010].

VI. Reform of Section 44 Stop and Search

We might need to be a little more discerning about how we use it. Recently we've been using it as a blanket power.

—Metropolitan Police Commissioner Sir Paul Stephenson, commenting as the MPS announced a new approach to its use of section 44 stop and search (May 2010).

Section 44 stop and search has been the subject of reform aimed at reducing its misuse. Most of these reforms have been initiated by individual police forces rather than the government.

In its July 2009 assessment of the UK's compliance with the ICCPR, the United Nations Human Rights Committee recommended that the government review section 44 stop and search. The UK government responded by pointing to the major review of the guidance announced in October 2007.²⁰⁸ The outcome of that review was the updated National Police Improvement Agency guidance issued in November 2008 (analyzed above). This coincided with a decrease in the use of the power by some forces.

During the first quarter of 2009—the first following the introduction of the revised guidance—the BTP conducted 11,905 stops compared with 16,185 stops during the same period the year before. Other forces in England and Wales (apart from the Ministry of Defence Police), conducted 2,357 stops, compared with 3,230. However, the number of stops carried out by the MPS rose to 47,670—up from 36,435 stops the year before.²⁰⁹

Metropolitan Police “Tactical Use Review”

In May 2009, the MPS presented the Metropolitan Police Authority with a report that set out a revised approach to its use of section 44 stop and search.²¹⁰ “We might need to be a little more discerning about how we use it. Recently we've been using it as a blanket power,”

²⁰⁸ United Nations Human Rights Committee, “Concluding observations: United Kingdom of Great Britain and Northern Ireland,” July 30, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/433/42/PDF/Go843342.pdf?OpenElement> [accessed May 24, 2010], para. 29; Annex to Letter from (then) Home Secretary Jacqui Smith sent to Human Rights Watch in response to a letter about reviews of the UK's human rights record by the UN Human Rights Council and UN Human Rights Committee, October 23, 2008 [on file with Human Rights Watch].

²⁰⁹ Home Office, “Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches, Great Britain 2008/09,” Table A1, p. 49.

²¹⁰ MPS, “Report to MPA: Section 44 Terrorism Act 2000 - tactical use review,” May 7, 2009, <http://www.mpa.gov.uk/committees/sop/2009/090507/10/> [accessed May 24, 2010].

Metropolitan Police Commissioner Sir Paul Stephenson commented as the new approach was announced.²¹¹

According to Simon O'Brien, then-lead Commander on stop and search at the Metropolitan Police's Territorial Policing Headquarters, the key factor in deciding to conduct the review was the need "to maintain public confidence."²¹² Prior to the review, he added, use of section 44 by the MPS "could have been seen as disproportionate not only in minority communities but also in general population."²¹³ Detective Chief Superintendent Mike McDonagh, who led the review for the MPS, indicated that criticisms expressed by Lord Carlile, the Police Authority and civil society groups had been significant factors in the decision.²¹⁴

The tactical use review began in January 2009, and carried out consultation with the London Community Stop and Search Monitoring Network, Liberty, the Muslim Safety Forum, and other London forces.

The MPS's report to the MPA on the review noted "the power is seen as controversial and has the potential to have a negative impact, particularly on minority communities."²¹⁵

The new approach is aimed at limiting the use of section 44 powers to locations and times where its use is deemed to be most appropriate. It involves a "three-layered approach."²¹⁶ Level one refers to sites of an "iconic nature and/or key strategic importance" will be subject to a section 44 authorization. Level two envisions the possibility of the power being used "through a specific tasking or directive." The review states that "it is expected that this will be used sparingly unless there is a significant change in threat." Level three covers all other situations, when officers are expected to rely on section 43 where they see "behaviour, circumstances or has further grounds to raise their suspicion that a person may be engaging in a terrorist related offence."

²¹¹ Justin Davenport, "Met chief halts 'blanket' use of stop and search," *Evening Standard*, May 7, 2009, <http://www.thisislondon.co.uk/standard/article-23686878-met-chief-halts-blanket-use-of-stop-and-search.do> [accessed May 24, 2010].

²¹² Human Rights Watch interview with Commander Simon O'Brien, Metropolitan Police Service, London, October 6, 2009. The Territorial Policing headquarters oversees regular policing across London's 32 boroughs.

²¹³ Human Rights Watch interview with Commander Simon O'Brien, Metropolitan Police Service, London, October 6, 2009.

²¹⁴ Human Rights Watch interview Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

²¹⁵ Report to MPA: Section 44 Terrorism Act 2000 - tactical use review, para. 13.

²¹⁶ Report to MPA: Section 44 Terrorism Act 2000 - tactical use review, para. 14.

Four boroughs (Tower Hamlets, Southwark, Brent and Newham) piloted the new approach in Spring 2009. It was deemed successful, and significantly reduced the number of stops. A co-chair of the Stop and Search community monitoring network, Chris Roffey, cautiously welcomed the new approach: “Hopefully if the reduction in the use of section 44 gets to be known in the community, then there will be a benefit. But [you] still need to look at the quality of stops.”²¹⁷

The new approach was rolled out across London in September and October 2009. Its first and most obvious result is a significant fall in the geographic scope of section 44 authorization for London. Although the precise area covered by the current authorization is secret, Human Rights Watch understands that outside central London, the authorizations cover very small areas of the outer boroughs. According to an MPS document seen by Human Rights Watch, it amounts to around 10 percent of London’s geographic areas. Human Rights Watch understands that the majority of the use of power is now concentrated in three locations: the “government security zone” in central London, Heathrow airport, and City airport.

The result has been a fall in the number of stops under section 44 carried out by the MPS. This is based on official Home Office data, referred to previously, on the second, third and fourth quarters of 2009, and unconfirmed data from the MPS for the first quarter of 2010 seen by Human Rights Watch. In the first quarter of 2009, the MPS carried out more than 47,000 stops, whereas unconfirmed estimates from the MPS from the first quarter of 2010 indicate around 14,000 stops.²¹⁸

Part of the reduction in the latter half of 2009 may be explained by the fact that from July 2009 to January 2010 the threat level was reduced from “severe” to “substantial.”²¹⁹ That is significant because it is acknowledged within the MPS that numbers could rise again if the threat level were to increase generally or in a particular location, such as before the 2012 Summer Olympics in London.²²⁰

²¹⁷ Human Rights Watch interview with Chris Roffey, Co-Chair, Stop and Search Community Monitoring Network, and Abu Sufian, Chair of Tower Hamlets Monitoring Group, London, August 14, 2009.

²¹⁸ Home Office, “Statistical Bulletin: Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops & searches, Great Britain 2008/09,” Table A1, p. 49; Unofficial data for Q1 2010 obtained from Metropolitan Police Service.

²¹⁹ “Timeline: UK terrorism threat levels explained,” BBC News, January 22, 2010, <http://news.bbc.co.uk/1/hi/uk/8476299.stm> [accessed May 24, 2010]. The level was raised again to “severe” on January 22, 2010.

²²⁰ Human Rights Watch interview with Commander Simon O’Brien, Metropolitan Police Service, London, October 6, 2009; Human Rights Watch interview with Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

Given that part of the revised approach envisions greater reliance of section 43 of the Terrorism Act, it is interesting that there was a *decline* in number of section 43 stops following introduction of tactical use change. From October 2008 to March 2009 there were 1,191 section 43 stops, while from April 2009 to September 2009 there were 704 stops.²²¹

British Transport Police

The British Transport Police has also sought to reform its use of the power. Around half of its section 44 stops are carried out by specially trained counterterrorism officers in the context of pre-planned operations.²²² These officers are trained in behavioural analysis techniques developed by the force, which involve seeking to identify non-standard patterns of conduct.

Human Rights Watch observed such an operation at St. Pancras station in November 2009, in which a portable x-ray machine was used to scan bags (the idea being to avoid the need for hand-searches, which are deemed more intrusive).

Like the MPS, the BTP has narrowed its area authorization. It no longer covers Scotland, where the force faced criticism for a large number of stops carried out following the failed attack on Glasgow airport in August 2007. The authorization was further reduced in the second half of 2009.²²³ As of February 2010, it covered London and parts of the railway mainline to the Midlands and North of England.²²⁴

Senior BTP officers explained to Human Rights Watch that the railway network and London underground are vulnerable to attack (as evidenced by prior attacks in London, Madrid and elsewhere) and difficult to secure.

As noted above, the numbers of section 44 stops carried out by the BTP have fallen significantly, although in absolute terms they remain high, with more than 50,000 stops in the year to June 2009, the last 12 month period for which data is available. As with the MPS, there is a risk that stops could rise again, including in the run-up to the Olympics.²²⁵

²²¹ Home Office, Terrorism Act Quarterly Update, February 25, 2010, Table 2.3.

²²² Human Rights Watch interview with Philip Trendall, Superintendent, Counter Terrorism Support Unit, and Robert Noddings, Chief Inspector, British Transport Police, London, February 10, 2010.

²²³ Human Rights Watch interview with Alan Pacey, Assistant Chief Constable, British Transport Police, London, November 13, 2009.

²²⁴ Human Rights Watch interview with Philip Trendall, Superintendent, Counter Terrorism Support Unit, and Robert Noddings, Chief Inspector, British Transport Police, London, February 10, 2010.

²²⁵ Adam Fresco and Fiona Hamilton, "Unlawful anti-terror powers planned for use at 2012 Games," *The Times* (London), February 8, 2010, http://www.timesonline.co.uk/tol/sport/olympics/london_2012/article7018467.ece [accessed May 24, 2010].

Hampshire Police

Hampshire Police took a bold step in April 2009, when its chief constable announced the force would suspend all use of section 44 stop and search.²²⁶ The decision followed data showing that the force had carried out almost 3,500 stops in the year to April 2008, compared to 580 in the same 12-month period a year earlier, without leading to any terrorism arrests.²²⁷ Hampshire Police's Assistant Chief Constable David Pryde was reported as saying that the force would suspend its use "until such time as the perceived threat is raised to the highest level."²²⁸

Other forces have yet to amend their approach, although Human Rights Watch understands that Association of Chief Police Officers (ACPO) is considering a national policy on section 44 that would mirror the approach of the MPS.²²⁹

Prospects for Reform Under the New Government

Both the Conservatives and the Liberal Democrats—the two parties in the new coalition government—pledged to review section 44 prior to the elections. The then-Liberal Democrat Home Affairs spokesman Chris Huhne said in April 2010 that "[t]his law is in urgent need of a very big clarification."²³⁰ Chris Grayling, the then-Conservative Home Affairs spokesman, went further, saying the same month that "the Conservatives will end the abuse of stop-and-search as part of a full review of all Labour's counter-terrorism laws."²³¹

The coalition agreement between the two parties states that the government "will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion" and "introduce safeguards against the misuse of anti-terrorism legislation."²³² A centerpiece of the new government's approach is "a great repeal bill,"

²²⁶ Sandra Lavelle, "Hampshire police suspends use of stop and search powers," *The Guardian*, July 15, 2009, <http://www.guardian.co.uk/uk/2009/jul/15/hampshire-suspends-stop-search-powers> [accessed May 24, 2010].

²²⁷ Home Office, "Police Powers and Procedures England and Wales 2007/08," April 30, 2009 <http://rds.homeoffice.gov.uk/rds/pdfs09/hosb1809.pdf> [accessed May 24, 2010], table 2.03.

²²⁸ Sandra Lavelle, "Hampshire police suspends use of stop and search powers," *The Guardian*, July 15, 2009.

²²⁹ Human Rights Watch interview with Detective Chief Superintendent Mike McDonagh, Metropolitan Police Service, London, April 21, 2010.

²³⁰ "Lib Dems issue photographers' rights pledge," *Amateur Photographer*, April 20, 2010, http://www.amateurphotographer.co.uk/news/Lib_Dems_issue_photographers_rights_pledge_update_news_297081.html [accessed May 24, 2010].

²³¹ "Conservatives tell photographers: We will end stop and search 'abuse,'" *Amateur Photographer*, April 15, 2010, http://www.amateurphotographer.co.uk/news/conservatives_tell_photographers_we_will_end_stop_and_search_abuse_update_news_296966.html [accessed May 24, 2010].

²³² UK Government, "The Coalition: our programme for government," May 2010, http://www.direct.gov.uk/en/Nl1/Newsroom/DG_187877 [accessed May 24, 2010], p.11.

announced in its legislative program (known as the Queen’s Speech) on May 25, 2010. While the bill will include “safeguards the misuse of anti-terrorism legislation, it is unclear at this writing section 44 will be included. Security Minister Baroness Neville-Jones confirmed on June 10 the government’s intention to carry out a review of counterterrorism legislation, “including the operation of the Section 44 stop and search provisions.”²³³

²³³ Written Ministerial Statement, Minister of State for Security, Baroness Neville-Jones, Home Department: Stop-and-Search Authorisation, June 10, 2010, <http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/100610.htm#d2e358> [accessed June 10, 2010].

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