

Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

Title:	Review of the Operation of Schedule 7: A Public consultation
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1. Background: The Equality and Human Rights Commission

The Equality and Human Rights Commission ('the Commission') is a statutory body established under the Equality Act 2006, which took over the responsibilities of the Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission. It is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act. It also gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.

Its statutory remit indicates its interest in the issues raised by the review of the operation of Schedule 7:

- First, the Commission is under a general duty, contained in s. 3 of the EA 2006, to conduct its functions with a view to encouraging and supporting the development of a society in which (among other goals) human rights and equality are respected and protected;
- Second, pursuant to s. 9 of the EA 2006, the Commission has various duties in relation to the promotion of human rights, including in particular those rights protected under the Human Rights Act 1998 ('the HRA').

2. Introduction to our response

The Commission has strong expertise in the issues posed by the use of a wide range of stop and search powers, including:

- having worked extensively on consultation responses and parliamentary briefings on s.44 of the Terrorism Act;
- engaged in research and enforcement work relating to police forces' use of s.1 PACE (including producing the report 'Stop and Think: A critical review of the use of stop and search powers in

England and Wales' in 2010) and forging two s.23 agreements with specific forces to ensure a change of practice and compliance with legal obligations; and

- conducting extensive research and enforcement work on the use of the stop and search power pursuant to s.60 of the Criminal Justice and Public Order Act 1994.

In addition, the Commission also commissioned independent research¹ on 'The Impact of Counter-Terrorism Measures on Muslim Communities', which we published in Spring 2011 and which examines the impact of Schedule 7 in some detail. Apart from our legal concerns about the nature of Schedule 7 and its potential to violate human rights and equality laws, the research showed that stop and searches continue to be one of the most intractable problems facing the Black and Asian communities in Britain today.

The Commission recognises the importance of stop and search powers as a tool for crime prevention. We acknowledge that Schedule 7 forms a part of the UK's counter-terrorism strategy put in place in order to protect individuals in ports and airports and on key modes of transport that have been utilised by terrorists in the past. However, we would also point to the potential of these powers for violating human rights. It is therefore essential that they are used appropriately and proportionately and exercised fairly and in a non-discriminatory manner. What we identified through the counter-terrorism research exercise was the need to understand the impact of counter-terrorism laws, policies and practices, as counter-terrorism measures may be counterproductive, especially if they fail to protect human rights, discriminate, increase repression, or stigmatise and alienate certain groups.

Further issues specific to disability, some of which relate to findings from our recent inquiry into disability related harassment titled 'Hidden in Plain Sight', are also referred to in the 'Summary' section below.

¹ EHRC Research Report 72. This research was undertaken by Tufyal Choudhury and Helen Fenwick at Durham University.

3. Summary

The following are the submissions of the Equality and Human Rights Commission in response to the Government's public consultation on the operation of the Terrorism Act 2000 Schedule 7 launched in September 2012.²

1. For the reasons set out below, the Commission's responses are, in summary, as follows:
 - 1.1 Permitting individuals to be stopped and detained and subject to potentially highly intrusive questions about their political and religious beliefs and activities, as well as those of others in their community and family, without any prior suspicion required or other limitations on the exercise of the power, is unlawful. It is a breach of the requirement that such an interference be "*prescribed by law*" / "*in accordance with the law*" pursuant to European Convention of Human Rights ("the ECHR") Arts 5 and/or 8.
 - 1.2 The power to stop and examine without prior suspicion leads to a large number of individuals being subject to Schedule 7 powers each year. A significantly disproportionate number of those individuals are from particular racial, and, we believe, religious communities. Unless the power to examine without prior suspicion is justified (the burden of proof being upon the public authorities exercising the power) it is unlawful pursuant to the Equality Act 2010. We have not seen evidence suggesting that the extraordinary powers contained in Schedule 7 are justified. If such evidence has not been gathered and analysed, it is, furthermore, a breach of the public sector equalities duties of those who exercise Schedule 7 powers.
 - 1.3 Schedule 7 powers can only be lawfully used to determine if the particular individual being examined themselves appear to be concerned in the commission, preparation or instigation of acts of terrorism. We are concerned that the powers are being used to ask questions whose primary purpose is not to make that determination,

² We gratefully acknowledge the assistance of Dan Squires, Counsel at Matrix Chambers, in the preparation of this submission.

but to gather information generally about the terrorist threat facing the UK or to obtain intelligence about activities within certain Mosques or student organisations. That is unlawful and the limits of the powers to question should be made clear to Examining Officers in the applicable Code of Practice and to those who are examined.

- 1.4 We consider that the power contained in Schedule 7 not merely to search individuals or to compel them to provide documents, but to ask intrusive and highly personal questions following which individuals can be prosecuted if they do not answer, is not justified. It is an extraordinarily invasive power triggered only by the fact that an individual is passing through a port. We know of no similar power and have not seen evidence that it is necessary. That is so, in particular, given that if the power is used where it is most likely to be useful (namely in relation to those about whom there is some prior suspicion of involvement in terrorism) we consider that its use will be a breach of ECHR Art 6(1).
- 1.5 We consider that statements made by individuals during Schedule 7 stops cannot lawfully be relied upon in a prosecution, in Control Order/Terrorism Prevention and Investigation Measures (“TPIM”) proceedings nor in asset freezing proceedings. To do so would be a breach of European Convention of Human Rights Article 6(1) and should not be permitted. That should be made clear in the Terrorism Act 2000.
- 1.6 We consider that in light of increased reports of cases of excessive force deployed with disabled individuals subject to either stop and search or arrest, for example with the high profile Jody Macintyre student protester case investigated by the IPCC, that due regard be given in the review of Schedule 7 to the appropriate approach and manner in which disabled people are treated.
- 1.7 Similarly, increased reports of disabled people being subject to stop and search generally for not complying with ‘expected’ behaviour need to be reviewed and addressed. The recent high public profile cases of police arresting a disabled spectator at the 2012 games who judged his behaviour based on his impairment to be suspicious (his

impairment meant he was unable to control some of his facial muscles) and the case of the disabled man ‘tasered’ by police on initial assumption that his white stick was a sword, evidence the need to determine how criminal profiling is established and what ‘norms’ are applied.

- 1.8 The Commission's recent inquiry into disability related harassment, ‘Hidden in Plain Sight’ found failings in the provision of special measures³ to help disabled or intimidated *witnesses* give their best evidence in court across England, Scotland and Wales. There were also significant gaps in provision of support services, not just at the reporting stage but throughout and beyond the process of accessing justice. The final recommendation from the inquiry in this regard is:

‘Requirements for special measures should be identified and implemented at the police investigation stage, and appropriate reasonable adjustments should be provided throughout investigation and prosecution.’

- 1.9 One important element of ‘special measures’ that can be provided is an intermediary. The role of an intermediary is to facilitate two-way communication between the vulnerable individual and other participants in the legal process, and to ensure that their communication is as complete, accurate and coherent as possible. While intermediaries appointed to support vulnerable witnesses are registered and subject to a stringent selection, training and accreditation process, and quality assurance, regulation and monitoring procedures, intermediaries for defendants are neither registered nor regulated⁴. We would urge this consultation to consider whether the timely and appropriate use of intermediaries is being applied in the Schedule 7 stop and search process.

³ ‘Special measures’ are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Special measures apply to prosecution and defence witnesses, but not to the defendant.

⁴ <http://www.prisonreformtrust.org.uk/uploads/documents/courtreport.pdf>

1.10 The systemic failure to apply training for officers to recognise and respond accordingly to specific impairment conditions such as learning disabilities, autism and mental health problems as recommended in the Bradley review should also be considered.

1.11 Finally, we make a number of suggestions in relation to access to legal advice and other protections as requested in the Government's Consultation document.

4. Specific concerns

(1) Is the Schedule 7 power to stop, question and detain without suspicion "prescribed by law" pursuant to ECHR Arts 5 and 8?

2. There is no requirement in questioning or detaining a person under Terrorism Act 2000 ("TA") Schedule 7 that an Examining Officer has any suspicion that the individual is or has been involved in any way in terrorism. This is, perhaps, the most controversial feature of the power. No one would dispute the legitimacy of a power to stop individuals at ports where there is some reasonable suspicion about the individual, and perhaps to search them irrespective of a particularised suspicion. The question, however, is whether, in the absence of any suspicion directed against the person, the power to stop and compel them to answer questions is lawful. We consider that it is not.
3. As Lord Brown recognised in *R(Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at [74] the power conferred on the police to stop and search individuals for articles that could be used in connection with terrorism, without prior suspicion, then set out in the TA 2000 s 44, "*radically ... departs from our traditional understanding of the limits of police power*". The Schedule 7 power is a more radical departure still. Not only can people be stopped and searched, but they can be detained for up to 9 hours and asked questions (which as indicated below are often of a highly personal nature as to their political beliefs and religious practices). They are compelled to answer by threat of criminal punishment. In our view the power to stop without suspicion contained in

Schedule 7 is not compatible with ECHR Arts 5 and 8. We also consider that the Government has yet to provide a compelling case for the necessity of a power to question without suspicion, or, as far as we are aware, to assess whether its impact on particular ethnic and religious communities can be justified. That, in itself, we consider to be unlawful, and we deal with this issue in the next section.

4. As to ECHR Arts 5 and 8, a complaint was lodged in May 2011 against the United Kingdom, on behalf of Sabure Malik, with the European Court of Human Rights (“*the ECtHR*”) in relation to a Schedule 7 stop on 23 November 2010. The case was communicated to the UK Government on 27 August 2012. The matter will be determined in due course by the ECtHR, but we would, nevertheless, urge the Government in the interim to reconsider the extent of Schedule 7 powers. We consider that the case that the powers are unlawful is more compelling than that considered in *Gillan v UK* (2010) 50 EHRR 45 and in which the ECtHR held that the powers of suspicionless search pursuant to TA 2000 s 44 were insufficiently certain to protect against arbitrary and discriminatory usage. We consider that the same applies to Schedule 7 and would urge the Government to remove the power of suspicionless examination and detention from Schedule 7.
5. The reasons we consider that Schedule 7 powers require greater certainty than section 44 powers considered in *Gillan* are:
 - 5.1 Unlike in *Gillan*, in which the ECtHR did not finally determine whether there had been a deprivation of liberty within the meaning of Article 5 in relation to stops lasting less than 30 minute [56]-[57], there can be no doubt that Schedule 7 powers can give rise to a deprivation of liberty. Mr Malik, for example, was detained for four hours at Heathrow airport and then at a police station. Had he refused to comply with the police request, or refused to answer questions put to him, he would have been liable to arrest.
 - 5.2 The exercise of Schedule 7 powers are also likely, in many cases, to be significantly more intrusive than the stop and search considered in *Gillan* and thus to be a more significant intrusion into “*private life*” within the meaning of ECHR Art 8. The ECtHR

held in *Gillan* that even a “*superficial search*” in a public place of an individual’s clothing, person or belongings, and even if nothing of a personal nature was found, “*amounts to a clear interference with the right to respect to private life*” [63]. Schedule 7 powers are far more intrusive.

- 5.3 As the ECtHR has repeatedly observed, the concept of “*private life*” as protected by Art 8(1) is a broad one. It held in *Niemietz v Germany* (1992) 16 EHRR 97 [29] that “*private life*” covers both a restrictive meaning of an “*‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle*” and a more expansive meaning covering “*to a certain degree the right to establish and develop relationships with other human beings*”. Underlying both aspects of privacy is a “*notion of personal autonomy*” (*Gillan* [61]). It is a key element of individuals’ “*private life*” and of “*personal autonomy*” that they can choose who they wish to inform about their personal and political beliefs, their religious activities, or about who are their friends and associates. Forcing individuals to reveal such information to the state, as occurs in relation to Schedule 7, is a profound interference with their autonomy and their privacy, and it requires the most compelling justification and clearly articulated limitations for it to be permitted in a democratic society.
6. Given that ECHR Arts 5 and 8 are engaged by Schedule 7 examinations, the powers to examine must be “*prescribed by law*”/ “*in accordance with the law*”. That means that the rules permitting examination must be formulated in such a way as to be sufficiently foreseeable and with sufficient precision that an individual is able “*to regulate his conduct*” pursuant to them (see *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [49]). To do so the individual “*must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*” (*ibid*). As the ECtHR made clear in *Gillan*, the requirement of legal certainty is fundamental to the rule of law and provides “*protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention*” (*Gillan* [77]). As the Court held, it is inimical to the rule of law “*for a legal*

discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise” (ibid).

7. In *Gillan* the ECtHR held that the power to stop and search contained in TA s 44 was not sufficiently circumscribed nor subject to adequate legal safeguards so as to satisfy the “*prescribed by law*” requirement. Of particular concern to the Court was the breadth of the discretion conferred on individual police officers by a power to search anyone they chose without needing a prior suspicion. The ECtHR held, having noted that the independent reviewer of terrorism legislation had no power to cancel or alter an authorisation to conduct searches, as follows:

83 Of still further concern is the breadth of the discretion conferred on the individual police officer. The officer is obliged, in carrying out the search, to comply with the terms of the [applicable Code of Practice]. However, the Code governs essentially the mode in which the stop and search is carried out, rather than providing any restriction on the officer’s decision to stop and search. That decision is, as the House of Lords made clear, one based exclusively on the “hunch” or “professional intuition” of the officer concerned. Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned is stopped for the purpose of searching for such articles, the police officer does not even have to have grounds for suspecting the presence of such articles.

...

85 In the Court’s view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration, as the judgments of Lord

Hope, Lord Scott and Lord Brown recognised. The available statistics show that black and Asian persons are disproportionately affected by the powers, although the independent reviewer has also noted, in his most recent report, that there has also been a practice of stopping and searching white people purely to produce greater racial balance in the statistics. There is, furthermore, a risk that such a widely framed power could be misused against demonstrators and protestors in breach of art.10 and/or 11 of the Convention.

8. We set out above the significantly greater interference with individuals' rights of the powers conferred by TA Schedule 7, as compared to those conferred by s 44. As a consequence the requirements that the powers be "*prescribed by law*" / "*in accordance with the law*" pursuant to ECHR Arts 5 and 8 are all the more stringent and the circumstances of their use must be all the more certain and constrained. That is not, however, the case. The powers conferred by Schedule 7 are even less certain or limited in their scope than those found to be unlawful pursuant to section 44.
9. The purpose of the power to stop under Schedule 7 is significantly broader than that of s 44. Pursuant to Schedule 7 the Examining Officer can stop anyone and can search them or ask questions provided only that the purpose is to determine whether they "*appear*" to be a person concerned in the "*concerned in the commission, preparation or instigation of acts of terrorism*" (TA Schedule 7 para 2(1) and s 40(1)(b)). Unlike s 44, which, at least, permits only a prescribed interference for a limited purpose (i.e. a search for articles which could be used in connection with terrorism), Schedule 7 permits far more intrusive, far less circumscribed and potentially far longer invasions of privacy. As indicated, those stopped pursuant to Schedule 7 can be compelled to provide information of a wide ranging and obviously personal nature about their political beliefs and religious practices, or about their relationships with others, provided only that it is regarded by the Examining Officer as relevant to the statutory purpose. Detention can last for up to 9 hours. Otherwise neither the Act nor the applicable "*Code of Practice: Examining Officers under the Terrorism Act 2000*" ("the Code of Practice") circumscribe the exercise of the power, indicate when and how it will be used or against

whom. That gives rise to the same “*clear risk of arbitrariness*” and “*risks of discriminatory use*” identified by the ECtHR in *Gillan* and we consider that the power is thus insufficiently certain for the purposes of ECHR Arts 5 and 8.

10. The only possible distinction between TA Schedule 7 and section 44, and which might be said to justify suspicionless detention and questioning in the case of the former, is that Schedule 7 applies only at ports or border areas in relation to those reasonably believed to be entering or leaving the UK (Sched 7 para 2(2)). The ECtHR has held that random searches of clearly demarcated areas for limited periods and for limited purposes (for example a well publicised power to stop and search for weapons in the old centre of Amsterdam during randomly selected 12 hours periods: see *Colon v Netherlands* (2012) 55 EHRR SE5) can be sufficiently circumscribed as to be prescribed by law. That is, however, quite different to Schedule 7. Firstly, the power goes beyond searches and involves compulsory questioning. Secondly, an individual may be able to avoid a particular area such as the centre of Amsterdam and presence there can be regarded as voluntary. The same does not apply to a power that applies to all ports (any more than it did to the power to search pursuant to TA s 44 anywhere in Greater London). Anyone who wishes to travel abroad must go through a port. It cannot be said that in choosing to do so a person thereby voluntarily subjects themselves to up to 9 hours detention and to be compelled to answer highly intrusive questions. A power of that nature (as opposed to a power, for example, to search the bags of those travelling) cannot, in our view, lawfully be left to an entirely unfettered discretion of Examining Officers.
11. We therefore invite the Government to consider inserting a reasonable suspicion requirement into Schedule 7. It is required, we suggest, by the ECHR, and, as we indicate in the next section, the breadth of the current power breaches the Equality Act 2010.
12. If, contrary to the above, it is decided not to insert a reasonable suspicion requirement into Schedule 7, we would suggest, at a minimum, amending the power in the following ways.

12.1 Firstly, there should be no power to detain and question for more than 1 hour unless the Examining Officer can articulate some form of suspicion that the person s/he is questioning is or has been involved in terrorism-related activity. If after 30 minutes of answering questions, the Examining Officer still has no such suspicion it is difficult to see any lawful basis to continue to detain the individual and certainly not to detain for up to 9 hours.

12.2 Secondly, and alternatively, consideration should be given to imposing a standard that may be below reasonable suspicion but nonetheless requires the Examining Officer to have some concern specific to the individual before s/he can be lawfully stopped. It could, for example, be a requirement that the officer has “*grounds genuinely to suspect that the person questioned may have been involved in terrorism related activity*”. That is a low standard. It nonetheless requires the Officer to be able to articulate some basis for genuinely suspecting the particular individual. It should significantly reduce the risk of uncertain, unpredictable, arbitrary or discriminatory usage inherent in permitting stops based, as now, simply on “*intuition*”.

(2) Discriminatory impact and necessity of suspicionless examinations

13. We also consider that permitting searches without suspicion is unlawful on the evidence which we have currently seen, for another reason. We believe that as the power is currently being exercised, it breaches the Equality Act 2010 (“EA 2010”) as it constitutes indirect discrimination on grounds of race and religion, and is, very likely, being operated in breach of the public sector equality duty (“the PSED”).
14. One of the risks of permitting suspicionless searches is that officers will use the power to target members of particular minority groups. While the Schedule 7 Code of Practice page 8 instructs officers not to use the powers to question and detain in a discriminatory manner, as the ECtHR observed in *Gillan* at [85] there is a significant risk of arbitrary and discriminatory usage where powers are overly broad and leave an unfettered discretion to officers. Powers to stop/question without any

suspicion requirement are particularly open to abuse (whether because they are deliberately misused by officers who have some animus against a particular religious or ethnic group, or, much more likely, where officers rely on stereotypes to decide who to question). The risk of members of certain communities being targeted is a particular risk where the powers are being used to combat terrorism post 9/11. If the perpetrators of terrorism are perceived to be associated with particular religious groups or those of particular ethnic or national origins, the risk is that the police will disproportionately target individuals believed to be members of those groups when they have powers to stop without requiring suspicion. Even if a tiny percentage of UK Muslims may have sympathies for, let alone be members of, Al Qaida, there is a risk that those believed to be Muslim will be stopped in significantly larger numbers on the basis that they may be terrorists (even if it is just because they are more likely to travel to particular parts of the world).

15. As indicated below, the evidence suggests that the powers are, indeed, being used disproportionately against certain ethnic and religious groups. If individuals are being targeted, in whole or in part, because of their ethnic origins or religion that is obviously undesirable in itself. It may, furthermore, be counterproductive in terms of tackling terrorism. If Schedule 7 powers are perceived in particular communities to be used in a discriminatory and unfair manner (and evidence clearly suggests that they are so perceived), that could lead to resentment and a lack of cooperation with the police in circumstances in which the affected communities may be precisely those who could provide the most valuable assistance if they worked with the police.

Evidence of impact

16. The evidence of discriminatory impact is both statistical and anecdotal. In terms of numbers, in the year to 31 March 2011 there were 85,423 Schedule 7 examinations of which 73,909 involved people and 11,514 of unaccompanied freight (see *The Terrorism Acts in 2011*, Report of Independent Reviewer, David Anderson QC (June 2012) [9.14]). Of those examined for less than 1 hour, 46% were white, 8% black, 26% Asian and 16% other (ibid [9.21]). Of those examined for more than 1 hour the figures were 14% white, 15% black, 45% Asian and 20% other (ibid), and the figures for those detained were: 8% white, 21% black, 45% Asian and

21% other (ibid). If one consider that nearly 88% of the general population of England and Wales is white, 6% Asian or Asian British and 3% Black or Black British, there are clearly significantly higher proportions of non-whites than whites being examined and an even greater disproportion when one considers the numbers detained.⁵ While non-whites make up 12% of the population of England and Wales, they make up 87% of those detained pursuant to Schedule 7 (and with a further 5% of those detained being of mixed race or with their race not stated). Even if non-white people make up a larger percentage of those travelling through ports than they do in the general population, that figure will not come close to the 87% of those who are detained pursuant to Schedule 7 who are non-white. The figures may be even starker if the religion (or perceived religion) of those examined was considered, but at present that data has not been published and may not have been gathered.

17. Also of concern is the qualitative evidence of the experience of those who are subject to Schedule 7 powers. As mentioned above, a report has been commissioned by the Equality and Human Rights Commission from Tufyal Choudhury and Helen Fenwick of Durham University on 'The Impact of Counter-Terrorism Measures on Muslim Communities.' The report sets out the findings of a small scale in-depth qualitative study examining the experiences of counter-terrorism laws, policies and practices through case studies of four local communities across Britain: Birmingham, Leicester, East London and Glasgow. The study examined a range of counter-terrorism measures including Schedule 7.
18. The report, with emphasis added, states in its Executive Summary at p vi that:

Muslims in this study had strong perceptions of the impact of counter-terrorism measures on their lives, particularly when those measures seemed to target people on the basis of religion, rather than any form of immediate threat or suspicion. There was widespread concern about the use of Schedule 7 of the Terrorism Act, stop and search, without suspicion at airports, as it affected a

⁵ Office for National Statistics, Population Estimates by Ethnic Group 2002 – 2009, May 2011.
<http://www.ons.gov.uk/ons/rel/peeg/population-estimates-by-ethnic-group--experimental--current-estimates/statistical-bulletin-population-estimates-by-ethnic-group-mid-2009.pdf>

cross section of the Muslim population and involved questioning individuals about their religious beliefs and practices.

It continues at p vii:

Stops at airports under Schedule 7 ... are having some of the most significant negative impacts across Muslim communities ... for some Muslims, these stops have become a routine part of their travel experience, whereas non-Muslim focus group participants had no experience of Schedule 7 stops.

19. Of particular concern to those who took part in the study was the perception that individuals were stopped because of their religion, and that was borne out by the nature of the questions they were asked (p (vii)):

The perception that Schedule 7 stops are based on religious profiling was reinforced by the questions posed to passengers. Individuals report being asked the number of times a day they pray, the names of mosques they attend, their understanding of the term jihad, their knowledge of Muslim community groups and organisations. Such questions intensified anger about Schedule 7 stops. The interviews suggested that this power is silently eroding Muslim communities' trust and confidence in policing. Although government officials and police officers are aware of the impact it is having, Schedule 7 was not part of the government's recent review of counter-terrorism and security powers. The evidence from this research suggests there should be a review of the use of Schedule 7, and continued publication of data on the actual number of stops and examinations.

20. The questions routinely asked about religious affiliation and beliefs are also reflected in the account given by police officers to the researchers. The report states at p 24: *"Interviews with police officers suggest that screening questions asked by port officers include asking individuals which mosque they attend, the number of times a day they pray and whether they know the whereabouts of Osama bin Laden"*. Individuals were also asked questions about community organisations of which they are members and about others who attend the same Mosque or institution (p 25):

There is a ... group of individuals who face questioning which suggests that they, or an organisation or institution with which they are connected or affiliated, have been under surveillance. Here, the interest may not be in the individual directly but a particular mosque, community organisation or student Islamic society that the individual is associated with. Some mosques also feel that their congregations are the targets of Schedule 7 stops. The impact of Schedule 7 stops on individuals in this group is perhaps more profound:

'People definitely think they are being targeted because they are from a particular Muslim background. As a result of that it is definitely having a knock-on effect; it is definitely affecting a lot of people. People feel they are being targeted, that they are the victims of what is going on... close to one hundred of our congregation have been stopped, including imams and mosque committee members.' (Mosque official)

21. The report found that the experience of Muslims and non-Muslims of Schedule 7 examinations was markedly different (p 22):

Non-Muslim participants in the focus groups did not recall any experiences of Schedule 7 stop at ports or airport. By contrast, the indications from Muslim participants across the focus groups and interviews with community groups and practitioners in the case study areas were that Schedule 7 stops at airports are perceived to have a widespread negative impact on Muslim communities. Interviews with those working in Muslim communities suggest that the prominence of this issue reflects the profile of those stopped. As Schedule 7 stops involve airline passengers, it has a greater impact on businessmen and professionals. In several areas, the stops have involved imams and those working in local community organisations, including those working with the police. Furthermore, when one person is stopped, it impacts on those travelling with them. Focus group participants suggest that for some Muslims, stops have become a routine part of their travel experience

22. The report concluded in relation to Schedule 7 as follows (pp 28-29):

Muslims in this study are supportive of a wide range of the measures that have been introduced at airports in response to the threat from international terrorism, where it is clear that they are treated in the same way as other passengers and are not subjected to discrimination on the basis of their religion. There is concern about the violation of norms of privacy and modesty that arise from the use of body scanners; however, the research did not pick up any examples of individual adverse experiences in relation to the use of scanners.

By contrast, where Muslim participants feel that the state is using its powers to target them because of their religious identity, this becomes a source of intense resentment and anger. Schedule 7 stops fall into this category. The interviews suggest that this power is silently eroding Muslim communities' trust and confidence in policing. It was raised as an issue in focus groups and interviews across all four case study areas. Many individuals were particularly outraged by the nature of the screening questions posed which intensified a feeling of religious profiling. Police forces are increasingly aware of the impact it is having and there are efforts in some areas to address concerns; however, so far most seem to concentrate on explaining rather than changing the use of this power. Evidence suggests there is a need for greater transparency and accountability around its use, and that data on the precise scale of the use of Schedule 7 is needed.

23. These findings and the disproportionate number of examinations of members of particular ethnic or religious communities are, no doubt, of concern to those responsible for counter-terrorism policy. They also have legal consequences.

Legal framework

24. The EA 2010 section 19 provides:

19 Indirect discrimination

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
- (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
 - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
 - (c) *it puts, or would put, B at that disadvantage, and*
 - (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*
- (3) *The relevant protected characteristics are—*
- ... race;*
 - religion or belief;*

EA 2010 s 29(6) provides:

A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

25. If Examining Officers are exercising Schedule 7 powers in a way that is discriminatory they are acting in breach of EA 2010 s 29(6). Are they discriminating pursuant to EA 2010 s 19?
26. In our view it is clear that Examining Officers are applying some kind of provision, criterion or practice in deciding who to examine, detain and question pursuant to Schedule 7 which places members of certain racial (and probably religious) groups at a particular disadvantage within the meaning of EA 2010 s 19(2)(a)-(c). While we do not know the basis on which Officers decide to exercise Schedule 7 powers (if indeed that is recorded) the figures speak for themselves. Nearly 20,000 individuals whose race was described as Asian were subject to Schedule 7 examination last year and more than 1000 examined for over an hour. The expected figure, if it reflected the numbers of Asians in the

population as a whole, would have been approximately 4,000 and 140 respectively. Clearly there is some practice being applied by Examining Officers which leads to Asians being disproportionately subjected to Schedule 7 powers. We do not suggest that it is surprising that that is occurring or that it will be solved by seeking to tackle prejudices of individual officers. According Examining Officers a power to stop and question, without a requirement of particular suspicion, in order to enable them to determine whether an individual appears to be involved in terrorism, in a post 9-11 world, will inevitably, we suggest, be disproportionately applied to members of particular religious and ethnic groups believed to be associated with terrorism.

27. The fact that members of particular religious and ethnic groups are disproportionately questioned and detained does not, of course, in itself, mean that the practice of examining pursuant to Schedule 7 constitutes unlawful discrimination. If the public authority responsible can show that the practice is a “*proportionate means of achieving a legitimate aim*” pursuant to EA 2010 s 19(2)(d), it will be lawful. As David Anderson QC observes in his 2012 report at [9.25], the numbers examined and detained under Schedule 7 may reflect the terrorist threat. He notes that the proportions detained under Schedule 7 who are black and Asian approximately reflects the proportion of those who were arrested and charged nationally with terrorism-related offences between 2005-2011. That, however, is not the end of the analysis as far as discrimination is concerned.
28. The question is whether a power which leads to some 20,000 individuals of Asian ethnic origin being stopped and required to answer questions at airports, and more than 1,000 being questioned for more than 1 hour, is a proportionate way of combating terrorism. That requires knowing the efficacy of suspicionless questioning. If suspicionless questioning leads to a large and disproportionate number of individuals from certain ethnic groups being stopped, questioned and detained, but achieves little in terms of combating terrorism, it will constitute unlawful discrimination. The fact that the proportion of Asians stopped reflects the proportion of the national figures of those charged with terrorism offences, is not dispositive of the question of discrimination if Schedule 7 examinations

are not an effective way to respond to terrorism. It is also important to note that it is not simply the power to stop and examine that must be justified, but the power to do so without prior suspicion. If the power to stop those against whom there is a prior suspicion is a proportionate means of tackling terrorism, but not suspicionless examinations, the latter aspect of the power would be unlawful. It is also necessary that the power to question, and not merely the power to search, be justified given the particular intrusion of being compelled to provide personal information.

29. Pursuant to EA 2010 s 19(2)(d) the burden is on the public authorities exercising Schedule 7 powers to prove justification. We do not know what, if any, efforts have been made to ascertain the value of the power to examine individuals without any identifiable suspicion (and, as indicated below, if that has not been analysed, it is, in itself, a breach of the PSED). In assessing the potential justification of Schedule 7 stops it is important to distinguish between lawful and unlawful uses of Schedule 7 powers. As we indicate below, we are concerned that Schedule 7 may be routinely used to assist in building up an intelligence picture or gather information about the terrorist threat faced by the UK. The only lawful use of Schedule 7 powers is to determine whether the person being examined does or does not appear to be concerned in the commission, preparation or instigation of acts of terrorism. If Examining Officers are asking questions whose primary purpose is to determine whether other individuals are involved in terrorism or to ascertain whether particular Mosques are the focus of radicalisation, they are acting unlawfully and any utility of such questioning cannot be taken into account in assessing whether Schedule 7 powers are justified. Even where questions are lawfully asked, but where the useful intelligence gathered is entirely the incidental by-product of the examination, that too cannot, of itself, justify the underlying power. What must be justified is a power to ask questions to determine if the individual stopped is concerned in terrorism.
30. In determining whether the disparate impact of Schedule 7 powers on particular ethnic or religious groups is justified, it is, therefore, necessary to know how many of the approximately 74,000 individuals examined in the year ending 31 March 2011, and in relation to whom there was no

prior suspicion, turned out to be concerned in terrorism. It would be unsurprising if that number was extremely low if indeed it was greater than zero. As David Anderson QC observes in his 2012 report at [9.46] *“despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind.”* For a person to be arrested following a suspicionless stop, it would require there to be an individual about whom the Examining Officer had not received prior intelligence giving rise to a reasonable suspicion, and who aroused no reasonable suspicion in relation to the manner in which he or she behaved at the airport, being selected at random or by reference to generic risk factors, and it transpiring that they were, fortuitously, a person involved in terrorism and were then arrested or subject to further and useful monitoring.

31. The numbers of such occurrences should be recorded and disclosed (and we can see no reason why this could not be done without revealing any details that would compromise national security). If the numbers are very low, it will not justify the disproportionate burden on members of certain religious and ethnic groups to which the Schedule 7 powers gives rise. The exercise of the power will be a breach of EA 2010.

Public sector equality duty

32. Should a claim be brought under the EA 2010 in relation to the use of Schedule 7 powers, it will be for the public authority concerned to prove that suspicionless searches lead to sufficient positive benefits that they can be justified. It is not, however, lawful for public authorities to await a challenge before gathering data and considering that issue. There is a duty to consider, irrespective of any legal challenge, whether Schedule 7 operates in a discriminatory manner pursuant to the public authorities' PSED.
33. The PSED is set out in EA 2010 s 149 which provides:
 - (1) *A public authority must, in the exercise of its functions, have due regard to the need to—*

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

34. Pursuant to the PSED any public authority concerned with the exercise of Schedule 7 powers has an obligation to consider whether the powers are being used in an unlawfully discriminatory manner, and, if so, to have due regard to the need to eliminate the discrimination. That requires gathering evidence as to the impact of Schedule 7 powers, not only on those of particular racial origins but also on members of particular religious groups. Gathering accurate evidence on that matter is not straightforward. For Examining Officers to request such information during the course of a Schedule 7 examination may simply exacerbate the problems identified above of the perception that individuals are being targeted because of their religion or ethnic group. It may be that a sample

of those examined pursuant to Schedule 7 should be identified and contacted after the event by a third party who could give them the opportunity to provide information anonymously. In any event, it is clear that pursuant to the PSED such information needs to be gathered.

35. Information also needs to be gathered and analysed, as described above, on the efficacy of genuinely suspicionless Schedule 7 examinations. If that has not occurred, and if no assessment has been made as to whether the benefits of permitting Schedule 7 examinations of those about whom there is no prior suspicion outweigh the discriminatory impact, the public authorities responsible for exercising Schedule 7 powers will be acting in breach of their PSED. We have seen no data or analysis which seeks to examine these questions. Unless such an exercise has been comprehensively undertaken, and a conclusion reached that conferring the powers to stop and question without prior suspicion are necessary, the powers should be removed. If the power is not to be removed, a collection and detailed examination of evidence is urgently required and should be published. If nothing else that may assist to assure those within Muslim communities who feel that the power is an unfair and disproportionate intrusion in their lives, that it is continuing because it has been found, on careful analysis of the evidence, to play an important role in the fight against terrorism.

(3) Improper use of Schedule 7 powers

36. Another concern, to which we allude above, is the use of Schedule 7 powers for improper purposes. TA Schedule 7 para 2(1) provides that “*An examining officer may question a person ... for the purpose of determining whether he appears to be a person falling within section 40(1)(b).*” A person falling within TA s 40(1)(b) is a person who “*is or has been concerned in the commission, preparation or instigation of acts of terrorism.*” Ascertaining whether a person appears to be someone concerned in terrorism is the only purpose for which Schedule 7 powers can be used. The Code of Practice page 9 sets out the limits of Schedule 7 powers and makes clear that they “*must not be used to stop and question persons for any other purpose.*”

37. It appears from David Anderson QC's June 2012 report, as well as the evidence obtained by Choudhury and Fenwick, that individuals may be being asked questions in a Schedule 7 examination for the purpose of gathering general information about the threat of terrorism to the UK or to gather evidence about other individuals in a community or the Mosque they attend etc. Evidence of the collateral purpose for which questions are asked is as follows:

37.1 David Anderson QC writes at [9.48]:

*Schedule 7 examinations have been useful in yielding **intelligence about the terrorist threat**. Sometimes words spoken in interview, though not themselves admissible as evidence, may start a train of enquiry that leads to a prosecution. Of great importance, however, is intelligence of a more indirect kind – which may come from intelligence-led stops or from stops on the basis of risk factors. Schedule 7 examinations are perhaps most prized by the police and security services for their ability to contribute to a —rich picture of the terrorist threat to the United Kingdom and UK interests abroad. In 2010/11 as in previous years, a significant proportion of examinations result in the production of an intelligence report. The intelligence services have left me in no doubt as to the importance of this rich picture, or as to the significance of Schedule 7 in putting it together. I have seen for myself the manner in which information gleaned from Schedule 7 examinations and searches can be used to build up a picture of travel patterns, or the location of centres of violent extremism in other countries.*

David Anderson QC also notes that a senior counter-terrorism officer described an important “by-product” of Schedule 7 stops as being the recruiting of informants [9.51]. He concluded at [9.53]:

It is important however that the considerable attractions of Schedule 7 by-products (including both contributions to the intelligence —big picture and opportunities to recruit an informant) should not distract ports officers from the fact that the power may only be used with the genuine intention

of determining whether someone appears to be or to have been concerned in the commission, preparation or instigation of acts of terrorism.

- 37.2 The research conducted by Choudhury and Fenwick on Schedule 7 examinations also suggests that obtaining evidence of the “*rich picture*” of terrorist activity may be the purpose of some questions that are asked of those examined. As noted above, questions are asked of individuals where “*the interest may not be in the individual directly but about a particular Mosque, community organisations or student Islamic society*” and where the primary purpose of the questions appear to be the gathering of evidence about those organisations and not the making of an assessment about the examined individual. We are also aware, anecdotally, of questions being asked about the activities and whereabouts of individuals’ acquaintances and family members whose primary purpose again would appear to be to gather information about those individuals and not to determine if the person being questioned is concerned in the commission of terrorist acts. If Parliament wishes to accord a power to Examining Officers to ask questions about an individuals’ friends, family or about others who attend the same Mosque of student organisation, and whose purpose is to gather intelligence giving a “*rich picture*” of the threat facing the UK, that power needs to be expressly conferred by statute.
38. Schedule 7 is patently coercive in the way it is deployed. It imposes punitive restrictions and controls on the liberty and rights of those who are forced to subject to it. The fact that the power is used to engage in broad evidence-gathering exercises through questioning that stretches far beyond the legislative purpose of the power, further adds to its corrosive impact on the individual's human rights.
39. However desirable it may be to ask questions whose primary purpose is to build up a rich picture of the terrorist threat to the UK or to find out what individuals within a particular Mosque or student organisation have

been saying, it is not lawful pursuant to Schedule 7 to ask questions for that purpose. Questions can only be asked to ascertain if the person being examined appears to be involved in terrorism. If that is not the dominant purpose of any question a person is compelled to answer, the question is unlawful (see *R v ILEA ex p Westminster Council* [1986] 1 WLR 28). That will be so even if the stop was otherwise lawful and other, permissible, questions were also asked.

40. We draw this to your attention for two reasons. Firstly, as indicated above, any assessment of the justification for Schedule 7 powers cannot take account of the benefits of intelligence that is obtained when the power is unlawfully used.
41. Secondly, given the risk that the Schedule 7 power is being routinely misused for general intelligence gathering purposes, and given the resentment to which such probing about community members and institutions can give rise, we suggest that the Code of Practice be amended to make clear the limits of the statutory power. Examining Officer should be told, expressly, that they must not ask questions whose purpose is to gather information about individuals or institutions other than to make an assessment about the individual being questioned. That ought, also, we suggest, to be made clear in the “*Tact 1: Notice of Examination Form*” handed to individuals when they are examined. While the form states that “*the purpose of the questioning is to enable [the examining officer] to determine whether you appear to be ... a person ... concerned in the commission, preparation or instigation of acts of terrorism*” it does not inform those examined that that is the only purpose and limit of the power to question. The individual examined should be told that they may not be questioned for any purpose other than to make a determination about their activities. Given that many people are questioned without a solicitor present, they ought to know that they may lawfully decline to answer questions that are not being asked for the statutory purpose.

(4) Compelled questioning

42. The power to compel people to answer questions, backed by the threat of criminal punishment and up to 51 weeks imprisonment, is an

extraordinary power. The provision of Schedule 7 is exceptional, as far as we understand, and we are aware of no similar powers. It is quite different to the other instances in which the courts have considered compulsory powers to answer questions. In particular:

42.1 Schedule 7 does not apply only to individuals who have become company directors or involve themselves in financial dealings and can be required to provide information in relation to the affairs of company (see, for example, *Saunders v UK* (1997) 23 EHRR 313) or those involved in the storing of clinical waste (see, for example, *R. v Hertfordshire CC Ex p. Green Environmental Industries Ltd* [2000] 2 A.C. 412). Such individuals can be regarded as having chosen to operate in particular areas of professional life and can be excepted, in certain limited circumstances, to answer questions under compulsion, in relation to their professional activities. Schedule 7 by contrast applies to anyone who chooses to travel to or from the UK, and questions are not restricted to the individual's professional activities.

42.2 Nor are there any restrictions on the questions that can be asked save that the purpose must be to ascertain whether the individual appears to be someone concerned in terrorism. As indicated above, that can lead to searching and highly personal questions being asked about religious beliefs and practices, and the activities of family members and acquaintances. Schedule 7 thus also operates quite differently from the TA s 44 powers considered in *Gillan* or the powers considered in *Colon*. The power to require people to provide intimate details about themselves, and be liable to criminal punishment if they refuse, is quite different, and much more intrusive, than a power to stop and search.

43. It is inconceivable that it would be regarded as justifiable for the police to be empowered to stop anyone in the street they chose, without the requirement of prior suspicion, and to be able to compel them to answer questions about their religious and political beliefs and practices or those of acquaintances. We consider that such an intrusive power is not justified simply because a person happens to be travelling through a port. People may legitimately be stopped and have their person and luggage

searched at an airport, and indeed expect that to occur. It cannot be said that by choosing to leave or enter the UK they are voluntarily consenting to up to 9 hours detention and compelled to provide highly personal information to Examining Officers without any prior acts that give rise to a suspicion of wrongdoing.

44. That is especially important when one bears in mind that the experience of being stopped and examined pursuant to Schedule 7 falls disproportionately on those of particular communities. Many outside those communities have no experience of Schedule 7 stops at all. We do wonder whether the Government would be so sanguine about the use of the power if a much wider cross-section of the population were routinely subject to Schedule 7 examinations. In *A v SSHD* [2005] 2 AC 68 at [46] Lord Bingham quoted from the well-known judgment of Jackson J in the Supreme Court in *Railway Express Agency Inc v New York* (1949) 336 US 106 , 112-113 (emphasis added):

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

If a “larger number”, and more representative cross-section of society, were routinely stopped and required to answer intrusive questions pursuant to Schedule 7, would such powers be regarded as acceptable? We think not.

45. We would invite the Government, therefore, to consider removing the compulsion to answer questions contained in Schedule 7. We consider it to give rise to a degree of intrusion quite different from a requirement to submit to a search of person or property or even to provide documents, and the fact that the power can be applied to anyone, without suspicion,

who happens to be passing through a port makes it quite different, for example, from the power to question company directors about their financial activities. We do not consider such an extraordinary power to be justified.

46. There is a further reason to remove the requirement to answer questions under compulsion in Schedule 7. In the significant majority of cases in which the power to compel questions is likely to provide useful information, we consider that will be unlawful. We assume that in most instances in which useful information is obtained from a Schedule 7 examination, the Examining Officer (either prior to the stop or during the examination) will have a reasonable suspicion that the person was concerned in terrorism. That is supported by David Anderson QC's observation, noted above, that he has not been able to identify any cases of a Schedule 7 examination leading to an arrest and conviction of an individual where there was not prior intelligence [9.46]. Nor is it surprising that where useful intelligence is garnered it is likely to be in cases in which a prior suspicion existed. The problem, however, is that where the Examining Officer has grounds to suspect that an individual is involved in terrorism compelling them to answer questions, even if that evidence is not relied upon in a subsequent trial, is likely to be a breach of ECHR Art 6.
47. In *Shannon v UK* (2006) 42 EHRR 31 the ECtHR considered a claim brought by an individual who was prosecuted for failing to answer questions put to him by financial investigators under provisions applicable in Northern Ireland. The UK Government, relying on *R. v Hertfordshire CC Ex p. Green Environmental Industries Ltd* [2000] 2 A.C. 412, argued that there was nothing objectionable about requiring the provision of answers or information where that occurs in an extra-judicial inquiry and where the answers provided are not relied upon in a trial [27]. The Government argued that although Mr Shannon had been charged with false accounting and conspiracy to defraud at the time he refused to answer the investigators' questions, because the charges were subsequently dropped and no compelled evidence was used against him in any criminal proceedings, there could be no breach of Art 6.

48. That argument was not accepted. The ECtHR held that the prosecution for refusing to answer questions constituted a breach of ECHR Art 6(1). It held as follows at [38] in relation to the circumstances in which it was and was not lawful to compel individuals to answer questions:

If the requirement to attend an interview had been put on a person in respect of whom there was no suspicion and no intention to bring proceedings, the use of the coercive powers [to compel the answering of questions]... might well have been compatible with the right not to incriminate oneself, in the same way as a statutory requirement to give information on public health grounds. The applicant, however, was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged.

The Court also reiterated at [38] its conclusion in the earlier case of *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12, which had involved compelled questioning in the context of terrorist offending, that “*the security context [of Northern Ireland]... could not justify a provision which “extinguishes the very essence of the ... right to silence and ... right not to incriminate [oneself]”.*

49. It is notable that the ECtHR in *Shannon* considered that even if there was no suspicion or intention to bring a prosecution, coercive powers to require answers to questions “*might*”, rather than would, be lawful. Where a person is suspected of criminal activity, pursuant to the Court’s analysis, they cannot be required to answer questions with the threat of criminal proceedings if they do not do so. It is a breach of ECHR Art 6, and that is so whether or not the answers to the questions are subsequently relied upon in a criminal trial (and even if, as in *Shannon*, there is no subsequent criminal trial at all).

50. Two points flow from this. Firstly, we suggest that it should be stated in the statute and made clear to Examining Officers in the Code of Practice that they cannot compel a person who they suspect of involvement in terrorism to answer questions. They must cease questioning pursuant to Schedule 7 if they form the suspicion of criminal activity. The person can be arrested and questioned with the protection provided by the criminal process but cannot be compelled to answer questions pursuant to Schedule 7. Secondly, if it is the case that compelled questioning almost never provides useful intelligence where there are no prior grounds to suspect a person of involvement in terrorism, that provides a further basis for removing the compulsion requirement. If the requirement is unlawful when used in relation to those reasonably suspected of involvement in terrorism, and provides little useful intelligence in relation to those not so suspected, it is difficult to see any reason for retaining it.

(5) The use of information obtained from a Schedule 7 interview

51. Given the compulsory nature of a Schedule 7 interview, it is unlikely that the product of the interview would be admitted in criminal proceedings. We understand, however, that information individuals provide is routinely used against them if they are involved in Control Order/TPIMS or financial sanctions proceedings. While such proceedings do not lead to a conviction, it is widely accepted that the regimes represent an extraordinary interference with individuals' rights and freedoms and ought to be accompanied by a high level of procedural protection (see for example *SSHD v MB* [2008] 1 AC 440 at [24] per Lord Bingham).
52. In *R (CC) v Commissioner of Police of the Metropolis* [2012] 1 WLR 1913 the High Court considered a challenge to a Schedule 7 stop. The Secretary of State for the Home Department had already decided to impose a Control Order on CC before he arrived in the UK, and the purpose of the Schedule 7 stop was to gather evidence for use in the Control Order proceedings. The stop was not being used to enable the Examining Officer to determine, as the TA requires, whether CC appeared to be someone concerned in terrorism. Indeed the evidence presented at trial was that the Examining Officers were simply provided with a list of questions and were obtaining information on behalf of the Security Service without knowing why they were asking the specific questions. Collins J held that

the stop and questioning was unlawful as it was not being used for the purpose set out in the TA.

53. We suggest that it should be made clear in the Code of Practice that Schedule 7 powers should not be used where the dominant purpose is to gather evidence for the Security Services or others to use in legal proceedings, and not so that the Examining Officer can determine for him or herself whether a person appears to be concerned in terrorism. The Security Services have no power to stop and question individuals. They should not be permitted, without statutory intervention, to exercise that power indirectly by feeding questions to an Examining Officer in order to use answers given in Control Order proceedings.
54. In *CC Collins J* did not determine the wider question of whether the product of a Schedule 7 stop should ever be used in Control Order/TPIM proceedings. We suggest that compelling individuals to provide information and then using it to take coercive measures against them is unfair and in breach of ECHR Art 6. That should be recognised in statute and there should be an express statutory prohibition to protect individuals against being forced to provide information to the police which can then be used to impose Control Order/TPIM or some other restrictive regime upon them. It might be said that such a prohibition is not necessary as individuals can ask that evidence obtained by Schedule 7 be excluded from any subsequent proceedings against them. It may, however, be too late as the individual may have found themselves subject to restrictive measures for many months before court proceedings. A more straightforward solution would be to make clear that individuals cannot be placed in a position in which they can be forced to provide information which can then be used against them. That is required by Article 6(1) and, indeed, if individuals were told that that was the position they may be more cooperative in providing information.

(6) Access to legal advice / other protections

55. TA Schedule 8 applies to those detained pursuant to Schedule 7. TA Schedule 8 paragraph 7 provides that “*a person detained under Schedule 7 or section 41 at a police station in England, Wales or Northern Ireland*”

shall be entitled, if he so requests, to consult a solicitor as soon as is reasonably practicable, privately and at any time” (emphasis added).

56. Until relatively recently those detained were informed verbally and in writing that while they had a right to legal advice “*consultation with a solicitor will not be at Public Expense*” (emphasis in original). That was incorrect. Had individuals consulted a lawyer it would have been publicly funded. Criminal Defence Service (General) (No.2) Regulations 2001 r 4 (k), (as amended by Defence Service (General) (No. 2) (Amendment) Regulations 2002 (S.I. 2002 No. 712) reg.6 (with effect from 8 April 2002)) states “*the [Legal Services] Commission shall fund such advice and assistance, including advocacy assistance, as it considers appropriate in relation to any individual who... is detained under Schedule 7 to the Terrorism Act 2000.*” (emphasis added). We understand that it is now acknowledged that legal advice should be available at public expense (depending on means). That does not, however, appear in the text of the Code of Practice that remains online and it should be checked whether the correct position is being accurately communicated by officers when individuals are detained.
57. It is the case that an individual **may** have access to a lawyer when detained at a port or airport, only after being questioned for an hour, however it comes only from the Code of Practice, is at the examining officer's discretion and is not a statutory right. It remains the case that pursuant to the TA, only those detained “*at a police station*” are **entitled** to legal advice. There is, however, no obligation upon Examining Officers to take individuals to a police station even if (for example at Heathrow) there is a station readily available nearby. It is difficult to see why individuals should not be entitled to legal advice wherever they are detained. As Collins J observed in *R (CC) v Commissioner of Police of the Metropolis* [2012] 1 WLR 1913 at [36]:
- It is not clear to me why the 2000 Act limits the right to detention in a police station since, as this case shows, detention frequently will not be at a police station. It may, I suppose, have something to do with the knowledge that there are many ports in the country at which the powers can be exercisable. Some are remote and there*

may be unacceptable delays and difficulties if legal advice is sought save at a police station.

58. As indicated below, it may be that in an urgent case unacceptable delays in obtaining legal advice could be a basis for refusing to permit consultation (or at least not awaiting the arrival of a lawyer before questioning begins). If, however, there would be no such problem it is difficult to see why an individual should not be entitled to consult with a lawyer irrespective of where he or she is detained. One of the areas which the Government has indicated it is considering amending Schedule 7 is to give individuals the same rights to consult a lawyer whether or not detained at a police station (see the Home Office's, Review of the Operation of Schedule 7 p 5). We consider that Schedule 7 should be amended to accord such a right. The Examining Officer should not have the power to determine whether an individual is able to consult a lawyer by deciding not to take a person to a police station. For the reasons set out below, the right to access to a lawyer provides important protection to anyone detained pursuant to Schedule 7, and it should, we consider, be accorded irrespective of where they are detained.
59. It is also the case that those questioned under Schedule 7, but not formally "*detained*", are not entitled to legal advice or accorded other rights. Again it is questionable whether that is justifiable. An individual being questioned cannot, in reality, leave as they are committing a criminal offence if they refuse to answer questions. It is not clear, therefore, why they should be entitled to a lawyer if they wish to consult one only when formally detained. A potential solution is, as the Home Office suggest, that all persons questioned for more than one hour should be automatically detained so that they have the right to legal representation (see the Home Office's, Review of the Operation of Schedule 7 p 8). The EHRC would support that suggestion but would suggest that 30 minutes should suffice. Beyond that period of compulsory questioning one is no longer dealing merely with a brief initial screening interview and if an individual wishes to consult a lawyer they should be able to do so.

60. A further difficulty is that if an individual requests a lawyer, there is no obligation on the Examining Officers to await the lawyer's arrival before starting to question. One can see that there may be cases in which there is an urgent need to ask questions or some other reason why an individual should not be permitted to consult a lawyer immediately (grounds for delaying access to a lawyer are set out in TA Schedule 8 paragraph 8). Where, however, there are no grounds of urgency or other imperative reasons for limiting access to a lawyer, it is difficult to see why questioning should not await the arrival of a lawyer if one has been called and is on route. Given that any refusal to answer questions is a criminal offence, it renders the right to consult a lawyer (one of the few rights specifically accorded by the TA to those detained) empty if questioning can begin while the lawyer is not present. It may be that where an individual chooses to await the arrival of a lawyer, the calculation of any time limits for detention should not include the time at which questioning could not commence because a lawyer was not yet present. Where, however, an individual is prepared to accept a potentially longer period in detention because he or she wished to await a lawyer, and there is no overwhelming urgency, we consider that there is no good reason for refusing to delay questioning until the lawyer has arrived.
61. Finally in relation to access to a lawyer it has been suggested that the right to a lawyer makes little difference. Collins J observed in *CC* at [39]:
- It is incidentally difficult to see what contribution a solicitor could usefully make since there is an obligation to answer questions put and to submit to searches and the taking of samples can occur in the circumstances set out. A solicitor could perhaps act as an observer to ensure proper procedure, but beyond that he would have nothing to do.*

We would respectfully question whether that observation is correct. As indicated above, Examining Officers are permitted to ask questions only for the purpose of determining whether someone “*appears to be a person ... [who] is or has been concerned in the commission, preparation or instigation of acts of terrorism*”. That means, for example, Examining Officers may not ask questions to obtain information about family members or others in a community which are not intended to determine

if people being questioned are themselves concerned in terrorism. It also means that Examining Officers are not permitted to ask questions purely to obtain information for a third party (as occurred in *CC* itself). Without the aid of a lawyer a person is unlikely to know that Examining Officers are not acting lawfully in those circumstances.

62. A similar difficulty to access to a lawyer being accorded only in a police station applies to other protections set out in TA Schedule 8. For example only a person detained in a police station has a right to request that anyone is informed of their detention (Sched 8 para 6) and there is no obligation to audio record an interview unless a person is detained at a police station (Sched 8 paras 3(1)(a) and (b) and Audio Recording of Interviews under the Terrorism Act 2000 Code of Practice paras 3.1 and 3.4). Again, unless there is some reason why, in a particular case, it is impractical to record an interview or inform others of a detention, it is difficult to see why it should not be required in every case irrespective of where a person is detained if that is something which the detained person requests.

(7) Other matters

63. A number of further possible changes to TA Schedule 7 are set out in the Home Office's Consultation Document at [16]. Our comments on them are as follows.

(a) Reducing the maximum length of period of examination

64. We would support a reduction of the maximum period of examination to 3 hours. At present only 0.66% of examinations last more than 3 hours. If an Examining Officer has not been able to determine after 3 hours whether an individual appears to be concerned in terrorism, we would be very surprised if further questioning will enable him or her to do so. A power to detain and compel questions to be answered without any prior suspicion is, as we set out above, an extraordinary power. It certainly should not be permitted for 9 hours.

(b) Requiring a supervising officer to review at regular intervals whether the examination or detention needs to be continued and (c) requiring examining officers to be trained and accredited to use Schedule 7 powers.

65. It is very difficult for us to see why these should not be requirements as the Government proposes and we would support their introduction.

(d) Giving individuals examined at ports the same rights to publically funded legal advice as those transferred to police stations.

66. This has been dealt with above and again we would support the Government's proposal.

(e) Amending the basis for undertaking strip searches to require suspicion and a supervising officer's authority.

67. It is very difficult for us to see why these should not be requirements. It is inconceivable that undertaking a strip search without any particular suspicion about an individual would not be a breach of ECHR Art 8 and we would support the Government's suggestion.

(f) Repealing the power to take intimate DNA samples from persons detained during a Schedule 7 examination.

68. The Home Office's position is that "*The power to take intimate samples could be removed without compromising the operational effectiveness of Schedule 7.*" In those circumstances the power is not "*necessary*" within the meaning of ECHR Art 8. We would support its removal.