Protection of Freedoms Bill

Briefing for House of Lords Grand Committee

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For further information contact

Angela Patrick, Director of Human Rights Policy

email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Protection of Freedoms Bill as an important step in reversing many of the unnecessary and disproportionate measures introduced by the previous government. However, in our Second Reading briefing we also identified a number of problems with several provisions, including a lack of detail (e.g. clauses 29-36) , improper reliance on Henry VIII clauses (e.g. clauses 39-53), or a failure to provide sufficient safeguards against abuse (e.g. clauses 58-62).

3. More generally, we are concerned that many of the measures reveal a piecemeal approach to problems in areas where more fundamental, root-and-branch reform has long been overdue, e.g. the creation of additional Commissioners in areas related to privacy issues and the requirement of prior judicial authorisation for the use of certain surveillance powers under the Regulation of Investigatory Powers Act 2000.

4. Some of the problems we have identified with the Bill have already been considered (i.e. the provisions on DNA retention). We propose a few amendments in this briefing designed to meet some specific concerns, or to provide opportunity for debate on wider problems which the Bill fails to tackle. These follow the order identified for debate on 8 November 2011.

Clauses 29-36 – Regulation of CCTV and other surveillance camera technology

1. Clauses 29 to 36 implement the Coalition government's 2010 promise to 'further regulate CCTV'.[1] In particular, Clause 29 requires the Secretary of State to prepare a code of practice governing the use of surveillance cameras, otherwise known as CCTV cameras.[2] It sets out certain broad areas that the code must address (e.g. the development or use of CCTV (clause 29(2)(a)), and others that it may address (including access to, or disclosure of, information obtained via CCTV (clause 29(3)(h)). However, the code need not be comprehensive (i.e. it 'need not contain provision about every type of surveillance camera system' (clause 29(4)(a)). We are not aware that any draft code has yet been published so it is accordingly impossible at the current time to assess the likely impact of its provisions.

2. At this stage, the Code will not extend to the use of CCTV by private companies and individuals, which account for a substantial number of CCTV cameras in the UK. Public authorities are at least required to comply with article 8 of the European Convention,[3] and will be required to have regard to the code when carrying out their functions (clause 33(1)). The strength of this requirement remains uncertain, though: courts will be able to 'take account' of any failure by a public authority to have regard to the code when 'determining any question' in civil or criminal proceedings (clause 33(4). However, clause 33(2) also provides that:

> A failure on the part of any person to act in accordance with any provision of the surveillance camera code does not of itself make that person liable to criminal or civil proceedings.

3. Clause 34 requires the establishment of a Surveillance Camera Commissioner to review the operation of the Code and encourage compliance with it. As with the establishment of the Commissioner for the Retention and Use of Biometric Material, any move to strengthen independent oversight of CCTV usage is something to be encouraged. However, we question whether the creation of yet another Commissioner in the field of surveillance and data-gathering is necessarily the best way to provide this oversight. Plainly, the extent of CCTV usage in the UK is significant and therefore oversight will inevitably require a certain level of resources. But the existing oversight framework of surveillance under the Regulation of Investigatory Powers Act is already highly fragmentary and lacking in coherence. We strongly

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[1] *The Coalition: Our Programme for Government* (Cabinet Office, May 2010), p11.

[2] We use the term CCTV generically. As the Royal Academy of Engineering noted in 2007, 'the term CCTV is now for the most part a misleading label. Modern surveillance systems are no longer 'closed-circuit', and increasing numbers of surveillance systems use networked, digital cameras rather than CCTV. The continued use of the term is an indicator of a general lack of awareness of the nature of contemporary surveillance, and disguises the kinds of purposes, dangers and possibilities of current technologies' (*Dilemmas of Privacy and Surveillance: Challenges of Technological Change* (March 2007), p33).

[3] See section 6 of the Human Rights Act 1998.

doubt that further fragmentation of oversight arrangements is desirable. Although we can see the case for a Surveillance Camera Commissioner to be appointed as an interim step, we believe that the most effective way forward in the medium and long-term is for the establishment of a more coherent scheme of independent authorisation and oversight of surveillance as part of a comprehensive overhaul of RIPA itself.

4. In conclusion, although we welcome the Coalition government's intention to further regulate the use of CCTV, we doubt whether these clauses will deliver the stringent regulation of CCTV that is so plainly needed in order to check the growth of public surveillance.

Amendment 7 set out below, proposes an independent review of the existing law on surveillance, focusing on the operation of the Regulation of Investigatory Powers Act 2000. This review would include the scope of that Act's application to CCTV, and the need for further regulation.

Clauses 37-38 – Safeguards for certain surveillance under RIPA

Amendments 1 – 6

Page 27, line 8, leave out "relevant"

Page 28, line 17, leave out "by a relevant person"

Page 28, line 41, leave out from relevant to "prescribed" in line 7 on page 29.

Page 29, line 40, leave out "relevant"

Page 30, line 33, leave out "by a relevant person"

Page 31, line 44, leave out from relevant to "prescribed" in line 4 on page 32.

Amendment 7 (New Clause)

( ) After Clause 38 insert the following new clause

Independent review of surveillance under RIPA

(1) Within 6 months of Royal Assent, the Secretary of State shall appoint an Independent Reviewer to be known as the Independent Surveillance Reviewer;

(2) Within 12 months of his appointment, the Independent Surveillance Reviewer must lay a report of the findings of his review before both Houses of Parliament.

(3) This review shall consider:

(a) The operation of the Regulation of Investigatory Powers Act 2000; including:

(i) The impact of sections 37 and 38 of this Act;

(ii) The role for judicial authorisation; and

(iii) The operation of section 17 of the Regulation of Investigatory Powers Act 2000

(b) Any recommendations for changes to law, practice or policy; and

(c) Any other such matter that the independent reviewer considers relevant to the operation, use and regulation of surveillance in the United Kingdom.

Effect

The effect of Amendments 1 – 6 is to extend the provision in Clauses 37 and 38 for judicial authorisation for obtaining and disclosing communications data or the use of covert human intelligence sources to all persons seeking such authorisation.

Amendment 7 would require the Government to appoint an independent person to conduct a review of the operation of the Regulation of Investigatory Powers Act 2000 within 6 months of Royal Assent. The reviewer would then be required to report to Parliament within 12 months of his or her appointment, on RIPA, and the wider law, policy and practice of surveillance in the UK, including any recommendations for reform.

Briefing

1. Our very limited proposed amendments to Clauses 37 - 38 are designed to illustrate the limitations of this part of the Bill.

2. We very much welcome the proposed introduction of prior judicial authorisation for local authorities using surveillance powers under RIPA. However, it raises the much more fundamental question of why prior judicial authorisation is not more widely used throughout RIPA. For instance, directed surveillance by police can be authorised by a police superintendent without judicial authorisation. Intrusive surveillance by police normally requires prior authorisation from a surveillance commissioner (a judicial office) but intrusive surveillance by the intelligence services is authorised by the Home Secretary. Similarly, interception of communications – arguably the most intrusive form of surveillance of all – is not subject to prior judicial authorisation but a warrant by the Home Secretary.[4]

3. In JUSTICE's view, this patchwork of different authorisation schemes is inefficient and fails to provide sufficient safeguards against unnecessary and disproportionate use of surveillance powers.

4. In our recent report, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* we propose that a far more principled, coherent and streamlined procedure would be to introduce prior judicial authorisation for interception of communications, all instances of intrusive surveillance, and all most forms of directed surveillance.[5] Whereas magistrates would be

[4] This does not include the various forms of interception that do not require a warrant under Part 1 of RIPA, (.e.g. monitoring of phone calls from prisons) none of which require judicial authorisation either.

[5] JUSTICE, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* November 2011 http://www.justice.org.uk/resources.php/305/freedom-from-suspicion. A summary of conclusions and recommendations is available at pages 154 – 161.

sufficient to authorise the use of surveillance powers by local authorities and other regulatory public bodies, security concerns could be dealt with by having the more serious forms of surveillance authorised by a Crown Court or a Divisional Court judge. Prior judicial authorisation of search warrants has been established practice for several centuries. Police are therefore already extremely familiar with the process of obtaining a warrant from a judge.

5. We see no reason why the same procedure could not be adapted to require judges to issue surveillance warrants as well. As the European Court of Human Rights has held:

> The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.[6]

6. And, as the Court noted in a separate case:

> It is, to say the least, astonishing that [the] task [of authorising interceptions] should be assigned to an official of the Post Office's legal department, who is a member of the executive, without supervision by an independent judge.[7]

7. As with other kinds of oversight mechanisms, introducing prior judicial authorisation for most forms of surveillance would also reduce the need for the *ex post facto* independent oversight provided by the current Surveillance Commissioners, the Interception of Communications Commissioner and the Intelligence Services Commissioner.

8. While we recognise that in some circumstances speedy action by police and law-enforcement agencies might justify surveillance without prior judicial authorisation but subject to subsequent review, this should be the exception to a normative default which assumes that interference with individual liberty and the right to respect for private life in the wider public interest will only be authorised by an appropriate, independent judicial authority.

9. Amendments 1 - 6 are drafted – within the realistic confines of this Bill – to extend the proposed mechanism for judicial oversight across two relatively narrow parts of the surveillance framework. They would do nothing to add clarity to the obtaining of interception warrants or the service of encryption key notices, for example.

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[6] *Rotaru v Romania* (2000) 8 BHRC 43 at para 59.

[7] *Kopp v Switzerland* (1999) 27 EHRR 91 at para 74.

10. The scheme proposed in Clause 37 – 38 does little to address the confused scheme for authorisation which is outlined in RIPA. The mechanism is far from the traditional approach to prior judicial authorisation. Traditionally, administrators or officials seeking to use compulsory powers subject to judicial oversight, would make an application for permission to do so, during which the Court would take a merits decision on whether the use of the relevant power was justified according to statutory or other criteria (for example, applications for a warrant). Here, the Bill proposes to maintain the existing, complicated system for administrative authorisation, but proposes to add an additional layer of review before the surveillance takes effect. The initial authorisation will remain an administrative decision, but will not come into effect until approval from a magistrate. The magistrate will apply, in effect, an ordinary judicial review standard (examining whether there are reasonable grounds for the original decision maker's view).

11. While we consider that as a first step, the proposed judicial authorisation process should be extended to all public authorities and persons authorised under RIPA to obtain communications data, conduct direct surveillance or use covert human intelligence sources, the mechanism in the Bill is far from ideal. The Bill proposes to interpose an additional layer of bureaucracy into an authorisation scheme which is already far too complex. A far simpler approach would be to provide for authorities to apply direct to the High Court for authorisation for the use of surveillance powers.

12. Unfortunately, the scope of this Bill and the time for debate is limited. The need for reform of RIPA goes far further than the need for additional judicial oversight. The Act is confused and confusing and the need for wholesale review is clear. In 1970, JUSTICE pointed out that the protection of privacy was being overtaken by the development of new technology.[8] It has become clear that despite being barely ten years' old, RIPA has failed to keep pace with new developments. New technologies are being developed which increasingly supplement traditional means of surveillance and which are not clearly governed by the mechanisms in RIPA.[9]

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[8] *Privacy and the Law* (JUSTICE, 1970), para 85.

[9] For example, in October 2011, the Guardian reported on the purchase and use by the Metropolitan Police Service of new technology designed to block mobile phone use over a defined geographical area. It was reported that this technology could also be used to intercept communications data and to track individual's movements. See Guardian, *Met police using surveillance to monitor mobile phones,* 30 October 2011. http://www.guardian.co.uk/uk/2011/oct/30/metropolitan-police-mobile-phone-surveillance

13. In *Freedom from Suspicion,* we identify a range of necessary reforms, including revised definitions to ensure greater transparency and protection for individual privacy; enhanced prior judicial oversight; improvements to after-the-event scrutiny to consolidate review under the Chief Surveillance Commissioner and the lifting of the ban on intercept evidence. In our view, the case for reform is clear:

- Currently less than 0.5% of decisions under RIPA are subject to prior judicial oversight. In all other cases, authorization is given either by the Secretary of State or by a senior administrative officer within the body who wants to snoop. The Government now considers that it is common sense for a local authority to ask a magistrate for permission to act. Why shouldn't this judicial common sense apply to decisions by HMRC or the Charities Commission or any of the many other bodies making active use of RIPA? Judicial authorisation should be required for most uses of surveillance.

- Currently three separate statutory Commissioners exist to provide oversight of the exercise of surveillance powers. However, each of these oversight commissioners appear to rely heavily on "dip-sampling", and it seems highly doubtful that they examine more than a small fraction of the authorisations that are actually made. We recommend consolidating existing powers of oversight with a single commissioner.

- The Investigatory Powers Tribunal ("IPT") has only ever upheld 10 complaints out of 1,100 considered over the past decade. The success rate before the IPT, by contrast, is a mere 0.9%. Either public bodies get their surveillance decisions miraculously right in 99.1% of cases, or the IPT is simply inadequate as a mechanism for investigating claims of abuse. By providing for prior judicial authorisation, we consider that the role of both the commissioner and the tribunal could be simplified. We make specific recommendations for increasing the transparency and effectiveness of the IPT, including by increasing its investigative capacities and its ability to test evidence and arguments.

14. *Freedom from Suspicion* outlines a number of blunders and absurdities that have arisen as a result of the complexity of RIPA, including:

- Planting a surveillance device in someone's house may be authorised by a politician or a judge depending entirely on whether the agency responsible is an intelligence body (eg MI5) or a law enforcement one (eg the police).

- A misinterpretation of RIPA – also held by the Home Office - led the Met to believe that it was not a criminal offence to hack into a voicemail message after it had been listened to once.

- Under RIPA, the same mobile-phone conversation between two terror suspects may be admissible or inadmissible in a criminal case depending on whether it was recorded via a hidden microphone or digitally via the phone company.

- In 2009, during the trial of three men convicted of a terrorist plot to attack transatlantic aircraft, evidence included e-mails sent between the UK and Pakistan obtained by the US agencies from Yahoo in California. Similar intercepts obtained by GCHQ in the UK (which no doubt existed) could never be produced as evidence of an offence, as a result of the ban on intercept evidence in RIPA.[10]

15. Nothing in the Protection of Freedoms Bill would have prevented any of these problems. During a recent debate on phone hacking, Lord Phillips of Sudbury asked the Minister for the Government's response to the recommendations in *Freedom from Suspicion.* The Minister, Lord Henley, said

    "We will always keep the operation of RIPA 2000 under review."[11]

16. Unfortunately, the Minister did not indicate what form this ongoing review would take and how the public or Parliamentarians could contribute to its progress. He did indicate that no further consideration of RIPA would be forthcoming until Lord Leveson had concluded his inquiry on the conduct of the press and the future of press regulation. RIPA played a minor but crucial part in the phone hacking scandal. The flaws in the legislation extend far beyond the interpretation of the offences within it.

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[10] See *Freedom from Suspicion,* paras 8-9, 10, 139.

[11] HL Deb, 6 Dec 2011, Col 613 – 614.

17. Surveillance is a necessary activity that, used proportionately, may save lives. By its nature, the covert character of surveillance will often mean that the individual subject to scrutiny may never find out the extent or justification for his surveillance. The potential for legal challenge is limited. In light of its potential impact on individual privacy, the framework for State authorised surveillance must be clear, accessible and incorporate appropriate safeguards for individual privacy. Against this background, the need for legal certainty is paramount. RIPA, as it stands, is not fit for purpose.

18. We welcome the Minister's commitment to a rolling review. Amendment 7 would require the appointment of an independent person conduct a time-limited and focused review with associated recommendations to reform. This would allow Parliament to take an informed decision on the need for change beyond the limited safeguards proposed in Clauses 37-38.

Clauses 39-53 – Protection of property from disproportionate enforcement action

Amendment 8

Leave out Clause 41.

Effect

This amendment would remove the power to modify existing powers of entry by secondary legislation. It would leave in place the power to repeal or to introduce new safeguards.

Briefing

1. Although we very much welcome the Bill's attempt to stem the tide of unnecessary legislation and curtail the growth of disproportionate search powers, we are concerned at the method adopted and question whether it might not be used to perversely expand the scope of search powers in current legislation.[12]

2. Clauses 39 to 53 are effectively an extended series of Henry VIII clauses that enable ministers to repeal powers of entry and add safeguards but also to make 'modifications' (clause 40) and, in particular, to 'rewrite' powers of entry 'with or without modifications' (clause 41). We note that clause 41(3) seeks to limit the *vires* of the rewriting power to those situations where the changes in question 'provide a greater level of protection than any safeguards applicable immediately before the changes'. However, it is unclear how this assessment is to be made and, more importantly, who it is to be made by: the minister rewriting the provision, or the court assessing whether the rewriting was valid? As a rule we think it is constitutionally undesirable to rely on such broadly-worded provisions that enable the executive to rewrite laws enacted by Parliament, no matter how desirable the purpose may seem. We note also the recent warning given by the Lord Chief Justice, Lord Judge against reliance on such clauses:[13]

3. Both the JCHR and the House of Lords Constitution Committee share our concern for the proposals in the Bill to be subject to abuse for a purpose entirely at odds with the government's intention to use this Bill to extend protection for individual liberty. As the Constitution Committee recently reported:

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[12] See also JCHR Report, Chapter 5.

[13] Lord Judge CJ, Mansion House Speech, 13 July 2010, p6.

> As the subject of classic common law authority on liberty and the rule of law, powers of entry have a very special place in British constitutional history. Reflected and reinforced today by Article 8 of the European Convention on Human Rights…, *Entick v Carrington* […] still stands for the constitutional inviolability of home or premises other than with the owner's consent or through the proper exercise of a clearly defined legal power.
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> The restriction in clause 41(3) in terms of safeguarding is welcome. But it cannot obscure the fact that clause 41 includes a wide-ranging Henry VIII power to rewrite primary legislation by ministerial order. We are concerned that, as currently drafted, clause 41 does not strike an appropriate constitutional balance between the executive and Parliament.[14]

4. In the alternative, we support the amendments proposed by the JCHR which would ensure that Clause 41(3) is amended to make clear that modifications must be limited to changes designed to increase protection for individual privacy and respect for the home and that no modification may create new powers of entry or extend those existing powers.[15]

[14] Twentieth Report of 2010-12, *Protection of Freedoms Bill,* HL 215, paras 4 and 11. See also JCHR Report, paras 111 – 122.

[15] Eighteenth Report of Session 2010-12, *Legislative Scrutiny: Protection of Freedoms Bill,* HL 195/HC 1490, para 119.

Clause 57 – Permanent reduction of maximum period of detention to 14 days

Amendment 9

Leave out Clause 58

Effect

This would remove the proposed emergency power to extend pre-charge detention to 28 days by order during the dissolution of Parliament.

Briefing

1. We welcome the provision in clauses 57 to repeal the 28 day maximum established under the Terrorism Act 2000 as an important step in rolling back the disproportionate counter-terrorism measures of the past decade. Plainly, other steps still need to be taken. Nonetheless, the reduction to 14 days at least demonstrates a shift towards a UK counter-terrorism policy that is rational, evidence-based and governed by respect for fundamental rights.

2. Alongside this Bill, the government has published proposals in the form of two draft Bills, the Detention of Terrorism Suspects (Temporary Extension) Bills, which would be introduced in Parliament in an emergency to extend pre-charge detention to 28 days. A Joint Committee appointed to scrutinise these draft Bills reported that it did not consider that emergency legislation of this kind would be appropriate, in light of the impact of Parliamentary debate on the due process rights of any suspects likely to be arrested in connection with the emergency which triggered the proposal for extension. Instead, the Committee recommended the creation of an order-making power, with associated safeguards, for the Secretary of State to extend the period of detention without prior parliamentary approval.[16] In our evidence to the Joint Committee's inquiry, we expressed our scepticism over the necessity for the proposed emergency legislation and our concern about its potential impact on the right of individuals in custody, or under suspicion, to liberty and on future criminal proceedings and the right to a fair hearing as guaranteed by the common law and Articles 5 and 6 ECHR.[17]

[16] Draft Detention of Terrorist Suspects (Temporary Extension) Bills, HL Paper 161/HC 893

[17] Justice, Written Evidence, April 2011. http://www.justice.org.uk/resources.php/264/draft-detention-of-terrorist-suspects-temporary-extension-bills

3. During Report Stage in the House of Commons, the Bill was amended to introduce a limited Order making power for the Secretary of State to extend pre-charge detention without prior parliamentary approval during periods when Parliament is dissolved.[18]

4. We share the concern expressed by the JCHR that no clear case has been made for the planned contingency of an essential extension of pre-charge detention to 28 days.[19] It is particularly compelling that although Lord Macdonald accepted that in very exceptional circumstances, a longer period of detention might be justified, he considered that no such exceptional circumstance had arisen as yet to justify detention for that period.[20] As we said in our evidence to the Joint Committee on the draft Bills:

5. We believe extending the maximum period of pre-charge detention in terrorism cases is unlikely ever to be an appropriate response to a public emergency, even one involving a serious threat of terrorism.[21]

6. With this in mind, we consider that the emergency power proposed in clause 58 is unnecessary and poses a significant risk of the right to liberty (as guaranteed by the common law and Articles 5 ECHR).

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[18] Clause 58,

[19] JCHR Report, paras 125 – 132.

[20] JCHR Report, para 129.

[21] Justice, Written Evidence, April 2011, para 3.

Clauses 59 – 63 – Stop and search powers

Amendment 10 – Replacement powers to stop and search in specified locations

Clause 60, page 46, line 29 insert –

(1A) The senior police officer who gives an authorisation under subsection 1 must apply to a judge for an order confirming the authorisation as soon as reasonably practicable.

(1B) An authorisation ceases to have effect at the end of the period of 48 hours beginning with the time when it is given unless it has been confirmed by a judge before the end of that period.

(1C) A judge may confirm an authorisation made by a senior police officer under subsection 1 if, and only if, the judge is satisfied that it is necessary and proportionate to do so.

(1D) When confirming an authorisation under subsection 1C, the judge may:

(a) substitute an earlier date or time for the specified date or time;

(b) substitute a more restricted area or place for the specified area or place;

(c) cancel an authorisation with effect from a time identified by the judge.

(1E) An authorisation ceasing to have effect by virtue of subsection 1B does not affect the lawfulness of anything done in reliance on it before the end of the period concerned.

(1F) In this section 'judge' means –

(d) In relation to England and Wales, a High Court judge
(e) In relation to Scotland, a judge of the Court of Session
(f) In relation to Northern Ireland, a High Court judge

Consequential amendment:

Page 135, line 17, omit paragraphs 7 and 8

Effect

The existing requirement under Schedule 6B that authorisations for the use of stop and search powers under clause 60 will lapse unless confirmed by the Secretary of State is replaced by a requirement that the authorisation will lapse unless confirmed by a High Court judge.

Briefing

1. In January 2010, the European Court of Human Rights in *Gillan and Quinton v United Kingdom* held that the stop and search power under section 44 breached the right to privacy under article 8 because of its lack of safeguards against arbitrariness.[22] In particular, it noted the 'breadth of the discretion conferred on the individual police officer' and the lack of any requirement on the senior police officer authorising the use of the stop and search power to make 'any assessment of the proportionality of the measure'.[23] Nor did the weak temporal and geographical limitations provided by sections 44(4) and 46(2) offer 'any real check on the authorising power of the executive'.[24] The availability of judicial review was also not an effective safeguard. As the Court noted:[25]

> in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.

In light of the Court's ruling, the Coalition government directed police not to carry out pedestrian searches under section 44(2). It now seeks to implement the Court's ruling, repealing the previous stop-and-search scheme under sections 44 to 47 of the 2000 Act, (clause 58) and implementing a new scheme under 43B (inserted by clause 60).

2. In our submission to the Home Office review of counter-terrorism powers in August 2010, we made clear that we did not oppose the use of stop and search without reasonable suspicion in every circumstance. Indeed, it seemed to us that the original intention behind the section 44 power was a legitimate one: to enable blanket searches to be carried out in a specified area for a limited period where there was some real and immediate risk justifying the use of the power, e.g. a cordon around St Paul's Cathedral as a response to a bomb threat. As the Court held in *Gillan*, however, the safeguards in sections 44-46 proved wholly inadequate. We therefore recommended the following safeguards:

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[22] (2010) EHRR 45.

[23] Paras 80-83.

[24] Ibid.

[25] Para 86.

(a) raise the threshold for authorisations (e.g. no longer 'expedient' but based on a 'real and immediate risk');

(b) restrict significantly the duration and area of authorisations (e.g. lasting no more than 24 hours, not greater than 1 square mile, etc); and

(c) replace the current model of police authorisations with a system of prior judicial authorisation, preferably by way of *ex parte* application to a Crown Court judge (although there should remain provision for emergency authorisation by a senior police officer in circumstances where there is not sufficient time to apply to the court).

3. The Home Office review subsequently recommended 'significant changes' to 'bring the power into compliance with ECHR rights':[26]

> i. The test for authorisation should be where a senior police officer reasonably suspects that an act of terrorism will take place. An authorisation should only be made where the powers are considered "necessary", (rather than the current requirement of merely "expedient") to prevent such an act;
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> ii. The maximum period of an authorisation should be reduced from the current maximum of 28 days to 14 days;
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> iii. It should be made clear in primary legislation that the authorisation may only last for as long as is necessary and may only cover a geographical area as wide as necessary to address the threat. The duration of the authorisation and the extent of the police force area that is covered by it must be justified by the need to prevent a suspected act of terrorism;
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> iv. The purposes for which the search may be conducted should be narrowed to looking for evidence that the individual is a terrorist or that the vehicle is being used for purposes of terrorism rather than for articles which may be used in connection with terrorism;
>
> v. The Secretary of State should be able to narrow the geographical extent of the authorisation (as well being able to shorten the period or to cancel or refuse to confirm it as at present); and

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[26] *Review of Counter-Terrorism and Security Powers*, January 2011, p18.

vi. Robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power.

4. The proposed power to conduct searches of pedestrians and vehicles under clause 43B is broadly similar in its outline to that under section 44, but has been more tightly drawn. Consistent with the recommendations of the Home Office's Counter-Terrorism Review, authorisation requires a senior police officer to both 'reasonably suspect that an act of terrorism will take place' *and* that 'the authorisation is necessary to prevent the act' In addition, the area authorised must be 'no greater than is necessary to prevent such an act' and the duration must similarly be 'no longer than is necessary' (clause 43B(1)). These requirements of necessity and proportionality are significant improvements over the previous section 44 power in terms of its compatibility with article 8 ECHR. The purposes for which searches may be carried out has also been slightly narrowed, consistent with the Review's recommendation.

5. Paragraph 6 of Schedule 5 further limits the maximum period for an authorisation under clause 43B to 14 days. Authorisations must also be confirmed by the Secretary of State within 48 hours of their making or lapse (paragraph 7(2) of schedule 5). Both the Secretary of State or another senior police officer may make further restrictions on the time and scope of an authorisation (paragraphs 7(4) and 9). As recommended, clause 61 also requires the Secretary of State to establish a Code of Practice concerning the exercise of the stop and search powers under sections 43 to 43B.

6. However, although we consider that the safeguards in clause 43B represent a genuine improvement over those in section 44, they are not in themselves enough to ensure its compatibility with article 8 ECHR. In particular, it is important to note that the Court in *Gillan and Quinton* expressed grave concerns about 'the breadth of the discretion conferred on the individual police officer',[27] which gave rise to 'a clear risk of arbitrariness in the grant of such a broad discretion to the police officer'.[28] It concluded that 'in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised'.[29] Since clause 43B does not impose any requirement for the officer exercising search powers to have reasonable suspicion (clause 43B(5)), it is all the more important for these risks of arbitrariness to be offset by safeguards that restrict its use only to circumstances where it is necessary and proportionate. In other words, the less constraints there are upon the discretion of the individual police officer

[27] N1 above, para 83.

[28] Ibid, para 85.

[29] Ibid, para 86.

exercising search powers, the more important the need for stringent checks on the ability to authorise such searches.

7. As it is, although the authorisation process in clause 43B has been improved, judicial review remains the only means by which the police authorisation can be challenged. However, the Court in *Gillan* expressed serious concern at the adequacy of judicial review:[30]

> Although the exercise of the powers of authorisation and confirmation is subject to judicial review, the width of the statutory powers is such that applicants face formidable obstacles in showing that any authorisation and confirmation are *ultra vires* or an abuse of power

Moreover, although the exercise of stop and search powers was subject to the more general oversight of the independent reviewer of terrorism legislation, the Court noted that the independent reviewer had 'no right to cancel or alter authorisations'.[31] For JUSTICE, this demonstrates the importance of having police authorisations subject to independent and impartial review *before* stop and search powers are exercised.

8. We therefore recommend that clause 43B be amended to require police authorisations to be approved by a High Court judge. Just as the police are normally required to seek a warrant from a judge before conducting a search of private premises, the police should be required to seek judicial approval before authorising the use of stop and search powers without reasonable suspicion within a particular area for a particular time. In those cases where there is not sufficient time for police to apply *ex parte* to a judge for approval, we recommend that police have the power to make emergency authorisations without prior judicial approval, but that such authorisations must be confirmed by a judge within 48 hours. We note that this is very similar to the model provided by paragraph 7(2) of Schedule 5 as currently drafted, under which any authorisation by police must be confirmed by the Secretary of State within 48 hours or lapse. Given that the Coalition government has already accepted the desirability of having police authorisations confirmed by a separate body, we think the case for that confirmation being made by a judge rather than a government minister is overwhelming.

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[30] Ibid, para 80.

[31] Ibid, para 82.

Repeal of the offence of use of threatening, abusive or insulting words or behaviour

Amendment 2 – new clause

Repeal of offence of use of threatening, abusive or insulting words or behaviour

Omit section 5 of the Public Order Act 1986.

Effect

Section 5 of the Public Order Act 1986 provides that it is an offence to use threatening, abusive or insulting words or behaviour within the hearing of someone *likely* to be caused harassment, alarm or distress. This clause would abolish the offence. The offence of *intentionally* causing another person harassment, alarm or distress would still remain under section 4A of the Act.

Briefing[32]

1. Freedom of expression is arguably 'the primary right in a democracy', without which 'an effective rule of law is not possible'.[33] In England and Wales its importance has been long recognised by the common law:[34]

> The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done… .

2. In particular, it is a fundamental aspect of the right of freedom of expression that it includes not merely the expression of ideas or sentiments that we agree with or approve of. If the right to freedom of expression is to mean anything, it must also extend to forms of expression that others find offensive or insulting , including ideas that 'offend, shock or disturb'.[35] This aspect of freedom of expression is especially important in the context of protests and demonstrations

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[32] This briefing is based on JUSTICE's response to the previous government's consultation on section 5 of the 1986 Act in September 2009.

[33] Lord Steyn in *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at p297. Case-law quotations and references in the 'General remarks' section of this document are taken from R Clayton and H Tomlinson, The Law of Human Rights (2nd ed), OUP, 2009.

[34] *Bonnard v Perryman* [1891] 2 Ch 269 at p284.

[35] See e.g. the decisions of the European Court of Human Rights in *Lehideux and Isornia v France* (2000) 30 EHRR 665, para 55; *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1.

and other circumstances where the expression is political – for expression of political ideas enjoy particularly strong protection under article 10 of the European Convention on Human Rights.[36]

3. For these reasons, JUSTICE has long been concerned about the scope and use of section 5 of the Public Order Act 1986, in particular its use by police as a basis for arresting people otherwise engaged in lawful and peaceful protests. In particular, there is no requirement on the prosecution under section 5 to prove either that:

   - the alleged offender *intended* to cause 'harassment, alarm or distress'; or

   - any person was actually caused 'harassment, alarm or distress' by hearing the words.

   It is especially problematic when the alleged victim of the offence is the arresting officer, as exemplified in the well-known case of the Oxford student who was arrested by a police officer for asking if his horse was gay.[37]

4. Our starting point is that there is no right, either in English law or in the law of the ECHR, not to be offended. While there is clearly a public interest in the criminal law protecting members of the public from being threatened or harassed by others, merely causing offence (or being likely to do so) through words or conduct in a public place should not, without more, constitute a criminal offence. However the making of threats and harassment are already well-covered by other parts of the criminal law, in particular the offence under section 4A of the 1986 Act of using threatening, abusive or insulting words *with the intention of causing* another person alarm, distress or distress.[38]

5. More generally, public words and conduct which some members of society would have been offended by in previous centuries (and indeed, which a minority of people with less progressive social views are probably still offended by) has been responsible for important social and political reforms: the assertion of racial and gender equality; gay pride marches; etc. It is essential for the progress of our society that we do not now attempt to ossify public views by censoring debate on matters of current public controversy.

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[36] See e.g. *Thorgeison v Iceland* (1992) 14 EHRR 843, para 62.

[37] See also e.g. *Southard v DPP* [2006] EWHC 3449 (Admin).

[38] See also e.g. section 16 of the Offences Against the Person Act 1861, section 127 of the Communications Act 2003, section 2 of the Criminal Damage Act 1971 or the Protection from Harassment Act 1997.