

**POLICING TERRORIST RISK: STOP AND SEARCH
UNDER THE TERRORISM ACT 2000, SECTION 44**

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

This thesis examines the role, use and impact of stop and search under the Terrorism Act 2000, section 44 by combining doctrinal and empirical methods, drawing upon close legal analysis of the relevant legislation, jurisprudence and secondary sources intertwined with data from forty-two semi-structured interviews, carried out with police officers, community representatives and stakeholders. Section 44 is judged against the framework principles of accountability, adherence to human rights and to the Government's self-set goals as set in CONTEST.¹ Section 44 is depicted as a vital tool to disrupt and prevent acts of terrorism, as evidenced by its widespread use – there were 197,008 section 44 stops carried out in 2008/09.² Concerns have, however, been voiced since its inception that section 44 is being over-used and that it is being used inconsistently. Alongside issues raised around its deployment, the legality of the power, in terms of adherence to the ECHR, has been questioned. In January 2010 the European Court of Human Rights ruled that the routine use of section 44 violates the right to privacy under Article 8.³

This thesis first sets out the theoretical framework, research questions and methodology. It then considers the historical development of the power to stop and search, in terms of 'normal' and 'counter-terrorist' policing, identifying trends that highlight areas of perennial concern in relation to stop and search. The focus then turns to section 44 itself. The two stage authorisation process is examined by reference to the primary legislative sources and data from the fieldwork and critiqued against the framework principles before recommendations are proposed for ways in which the power could be modified so that it adheres to the principles. The deployment of the power is then detailed and critiqued before recommendations for improving its adherence to the framework principles are suggested. The final substantive chapter looks at the impact of section 44 upon communities and groups. This draws upon secondary literature and statistics as well as the fieldwork data. The chapter concludes by highlighting the weaknesses in the current system and recommending changes. The final chapter concludes by summarising the findings in relation to each research question and assessing whether the new power under TACT section 47A, implemented recently by the Government as an alternative to section 44, addresses the various concerns that section 44 raised.

¹ Home Office, *CONTEST: the United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009).

² Ministry of Justice 'Statistics on Race and the Criminal Justice System - 2008/09' (Ministry of Justice, London 2010) table 3.06a.

³ *Gillan v United Kingdom* (2010) 50 EHRR 45 app.no.4158/05.

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- Burnley Borough Improvement Act 1871
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- Civil Authorities (Special Powers) Act (NI) 1928
- Civil Authorities (Special Powers) Act (NI) 1933
- Conservation of Seals Act 1970
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- Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)
- Convention on Simplified Extradition Procedure between the Member States of the EU (1995)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
- Convention on the Physical Protection of Nuclear Materials (1980).
- Convention on the Prevention and Punishments of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973)
- Convention Relating to Extradition between Member States of the EU (1996)
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- European Convention on Extradition (1957)
- European Convention on Human Rights (1950)
- European Convention on the Suppression of Terrorism (1977)
- Geneva Conventions (1949) and Additional Protocols I and II (1977)
- Hague Conventions (1899 & 1907)
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Abbreviations

ACLU	American Civil Liberties Union
BASS	Behaviour Assessment Screening System
BTP	British Transport Police
CDRP	Crime and Disorder Reduction Partnership
CIA	Community Impact Assessment
CNI	Critical National Infrastructure
CTED	Counter-Terrorism Committee Executive Directorate
CTITF	United Nations Counter-Terrorism Implementation Task Force
DPA	Data Protection Act 1998
DQT	Data Quality Team
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EPA	Northern Ireland (Emergency Provisions) Act 1973, 1987
EUMC	European Monitoring Centre on Racism and Xenophobia
HAC	Home Affairs Committee
IAG	Independent Advisory Groups
IPCC	Independent Police Complaints Commission
IRA	Irish Republican Army
MPA	Metropolitan Police Authority
MPS	Metropolitan Police Service
NJU	National Joint Unit
NPIA	National Police Authority
NPT	Neighbourhood policing teams
PA	Police Authority
PCSB	Police and Community Safety Board
PND	Police National Database
PTA	Prevention of Terrorism (Temporary Provisions) Act 1974, 1976 / Prevention of Terrorism Act 1984, 1989, 2005
RCCP	Royal Commission for Criminal Procedure
RIPA	Regulation of Investigatory Powers Act 2000
ROI	Republic of Ireland
RUC	Royal Ulster Constabulary
SCR	UN Security Council Resolution

Section 95 Statistics	Statistics on Race and the Criminal Justice System, produced under the Criminal Justice Act 1991, section 95
SOCPA	Serious Organised Crime and Police Act 2005
SPA	Civil Authorities (Special Powers) Act (NI) 1922, 1928, 1933
Special Rapporteur	Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Chapter 1) Introduction

The Terrorism Act 2000 (TACT) was introduced by the Government in December 1999. Despite the receding threat from domestic terrorism, following the signing of the Good Friday Agreement 1998, Irish terrorism remained high on the agenda, the danger being underlined by the Omagh bombing in August 1998. The Prime Minister, speaking to the UN General Assembly in September 1998, declared that '[t]he fight against terrorism has taken on a new urgency',¹ while the consultation paper introducing the bill stated there was a continuing 'clear and present terrorist threat to the UK'.² The refusal to view the Good Friday Agreement as marking an end to the terrorist threat revealed a realism that recognised the long history of terrorism, both domestically and internationally.³ In addition, there was specific recognition that the growing threat from international terrorism meant that, even were there a lasting peace in Northern Ireland, counter-terrorist legislation would continue to be required.⁴ An important factor prompting the new legislation was the desire to cancel the derogation under Article 15 ECHR, which had been in place since 1988.⁵

TACT was, in sharp contrast to most of its predecessors, a considered piece of legislation which to a substantial degree built upon Lord Lloyd's 'Inquiry into Legislation Against Terrorism'.⁶ It was to be a permanent piece of legislation that would 'modernise and

¹ Home Office, *Legislation Against Terrorism* (Cm 4178, 1998) [2].

² *Ibid.*

³ Domestic examples include Irish Nationalist movements such as elements of the Fenians (see Kee, R, *The Green Flag: a History of Irish Nationalism* (Weidenfeld and Nicolson, London 1972)), Guy Fawkes, the Scottish and Cornish National Liberation Armies. Internationally terrorism can be traced back at least to the 1st century AD with the Sicarii (see Richardson, L, *What terrorists want: understanding the terrorist threat* (John Murray, London 2006) Chapter 2) through the French state Terror (Schama, S, *Citizens: a chronicle of the French revolution* (Viking, London 1989)) and the Russian anarchists (Avrich, P, *The Russian anarchists* (Princeton University Press, Princeton, N.J. 1967)) to the various 20th and 21st century terrorist movements (see Jones, S and Libiki, M, *How Terrorist Groups End: Lessons for Countering al Qaeda* (RAND, Santa Monica 2008)).

⁴ Home Office, 'Legislation Against Terrorism' [6].

⁵ The derogation followed the ECtHR's ruling in *Brogan v United Kingdom* (1988) 11 E.H.R.R. 117 app.no. 11209/84 that pre-charge detention of four days violated Article 5(3). The only aspect of TACT that may require a derogation (although the issue has not been litigated to date) is Schedule 8, paragraph 9, whereby a detainee may be permitted access to a solicitor only in the sight and hearing of a qualified officer (this would in all likelihood violate article 6, see: *Brennan v United Kingdom* (2002) 34 EHRR 18, app.no.39846/98). Note that a derogation was lodged in relation to the Anti-terrorism, Crime and Security Act, Part IV, but removed following the amendment of the law subsequent to the House of Lords' ruling in *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁶ (Cm 3420, 1996).

streamline' existing legislation.⁷ Implicitly this was to be *the* counter-terrorist legislation, providing all the tools necessary for the security services to protect the country. The argument that permanent special powers are required to counter terrorism is in keeping with the, albeit subsequent, UN Resolution 1373, discussed below, and with the approach of the European Court of Human Rights (ECtHR), which has implicitly accepted the need for emergency laws.⁸ Despite the acknowledgement of the dangers of international terrorism there can be no doubt that the counter-terrorist landscape changed utterly with the attacks of 9/11. In addition to the reversion to knee-jerk legislation in the form of the Anti-Terrorism, Crime and Security Act 2001, passed through Parliament in mere weeks, the exercise of the powers granted under TACT increased exponentially.⁹ In the subsequent years there have been more terrorist attacks, including on London in July 2005, more counter-terrorist legislation and a further increase in the use of counter-terrorist powers by the police and executive.¹⁰

This thesis looks at the power to stop and search under TACT, sections 44-7. 'Section 44' will be used as shorthand to refer to the whole of the authorisation process and the exercise of the power except when the contrary is indicated. This thesis argues that the ill-conceived drafting ensures scant oversight or accountability over section 44, which provides the police with the extraordinary power to stop and search without reasonable suspicion. This indulgence has been aggravated by excessive deference by the courts when considering the exercise of the power.¹¹ It is, however, possible, if not probable, that without the changing counter-terrorist landscape post 9/11 there would be relatively little interest in section 44, for it has been the exercise of the power that has highlighted and aggravated the failings in its legal base and drawn attention in recent years. Excluding port and border controls, section 44 is the most common site of interaction, in terms of counter-terrorism, between the police and community. Ports and border controls are accepted conditions of travel, and thus avoidable if one chooses not to travel, in contrast to section 44 where people are going about their daily business. A substantial part of the criticism surrounding this power centres on its allegedly disproportionate usage, where it has been cited as an example of the creation of a 'suspect community' and, while these allegations are contested, there is obvious potential for

⁷ Home Office, 'Legislation Against Terrorism'.

⁸ See, e.g. *Klass v Germany* (1979-80) 2 E.H.R.R. 214 app.no.5029/71; *Ireland v United Kingdom* (1978) 2 EHRR 25 app.no.5310/71.

⁹ Constitutional Committee, *Fast-track legislation: constitutional implications and safeguards* (HL 2009, 116-I) [77-80].

¹⁰ The Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Justice and Security (Northern Ireland) Act 2007 and the Counter-Terrorism Act 2008.

¹¹ See Chapter 4.

damaging police-community relations, whether arising from actual or perceived disproportionality.¹²

1.1) Central thesis

The core thesis of this research is that:

The power to stop and search must be governed by clearly defined proportionate legislation and be authorised and exercised in accordance with human rights, which provide for accountability, both legal and democratic. Section 44 of the Terrorism Act 2000, as a counter-terrorist power, must additionally be of proven efficiency and effectiveness in contributing to CONTEST, the Government's counter-terrorist strategy. Failure to adhere to these standards will result in legal action against the police and undermine the general counter-terrorist strategy and the community's faith in, and cooperation with, the police, both key to successful counter-terrorism, with a consequential detrimental effect on other counter-terrorist powers and operations.

The following sections will unpick and develop the following key concepts which form the ethical framework of this research: human rights, accountability, and effective and efficient adherence to CONTEST; explaining why and how they are to be applied in this research. The subsequent section sets forth the claims to originality in the research. This is followed by a discussion of 'terrorism', including its definition and the relevant international obligations which pertain to the United Kingdom. Discussion of the 'new terrorism' leads into an analysis of the interface between key approaches in counter-terrorism and risk theories and how these in turn interact with the framing concepts of human rights, accountability and adherence to CONTEST. This introduction concludes with the research questions for this thesis.

This thesis takes the date of 10 February 2011 as its cut-off point. Given the rapid changes in this area a cut-off date had to be chosen, and the day before the introduction of the Protection of Freedoms Bill seemed apt. The concluding chapter does, however, discuss the forthcoming 'new' power under TACT, section 47A and that proposed in the Protection of Freedoms Bill.

1.1.1) Human rights

The positing of human rights as a normative principle relevant to this thesis is relatively uncontentious contemporarily, subject to the discussion below regarding the 'new

¹² Home Affairs Committee, *Terrorism and Community Relations* (HC 2004-05, 165-I) [152-3].

terrorism'.¹³ In this research 'human rights' is used as shorthand for the rights governed by the European Convention on Human Rights (ECHR). Their appropriateness as a norm within legal research is underpinned by the Human Rights Act 1998, which makes it unlawful for any public authority, including the police, to act in a manner incompatible with a Convention right, unless their actions are compelled by primary legislation.¹⁴ Although the Government may legislate in a manner which is incompatible with Convention rights, whether subsequent to a derogation under Article 15 or simply by enacting incompatible legislation which will prompt a section 4 declaration of incompatibility, the limitations on these practices underline the normative position of human rights.¹⁵ The appropriateness of human rights as one of the principles framing counter-terrorist legislation is underlined by government: 'CONTEST is based on principles that reflect our core values...we will continue to regard the protection of human rights as central to our counter-terrorism work'.¹⁶ Of the ECHR articles, six are relevant to this research: Articles 5, 6, 8, 10, 11 and 14. All of these articles, their jurisprudence, and (potential) application to the authorisation and/or exercise of section 44 are discussed in detail in Chapters 4-6.

In addition to the substantive rights which section 44 engages, there are a number of pervasive issues raised regarding implementation. The requirement that legislation be clearly defined is encompassed within the requirement that a measure be 'prescribed by law', which coincides with the common law principle of legality and the 'rule of law'.¹⁷ To be 'prescribed by law' the law governing the measure must be adequately accessible and formulated in a manner that is sufficiently foreseeable.¹⁸ The requirement of foreseeability does not mean that persons must be able to foresee the future actions of the police with such precision that they can carry out criminal activities and avoid police action, rather it must be

¹³ Also, c.f. Minogue, K, 'The History of the idea of Human Rights' in W Laquer and B Rubin (eds) *The Human Rights Reader* (Temple University Press, Philadelphia 1979) 11-5; Ministry of Justice 'Rights and Responsibilities: Developing our Constitutional Framework' (HMSO, London 2009); Clayton, R, 'The Human Rights Act Six Years on: Where are we now?' (2007) 11 EHRLR 11, 11-2; Lord Hoffman, 'The Universality of Human Rights' (2009) 125 LQR 416 (although the criticism therein focussed on the ECtHR rather than the concept of human rights itself). Also see the historical criticism, e.g.: Waldron, J (ed), *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, London 1987).

¹⁴ Human Rights Act 1998, section 6.

¹⁵ In *R v A* [2002] 1 AC 45(HL), [44] Lord Steyn stated: '[a] declaration of incompatibility is a measure of last resort'. On derogation under Article 15, see: *Lawless v Ireland (No. 3)* (1979-80) 1 EHRR 15 (Series A, No. 3) app.no.332/57; the '*The Greek Case*' [1969] 12 YB ECHR.

¹⁶ Home Office, 'CONTEST' [0.18].

¹⁷ *R v Secretary of State for the Home Department, ex. p. Simms* [2000] 2 A.C. 115.

¹⁸ *Malone v United Kingdom* (1985) 7 EHRR app.no.8691/79.

clear under what circumstances the police are empowered to resort to the exercise of the relevant measure.¹⁹

The principle of proportionality is a central tenet of human rights jurisprudence.²⁰ It is also a principle of public law.²¹ Within this research the test applied in relation to human rights will be used. It requires the courts to inquire “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”²²

To be proportionate all three limbs must be satisfied. The availability and effectiveness of safeguards can assist in determining that a measure is proportionate.²³ If a right is extinguished by the exercise of the measure it will almost certainly be deemed to be disproportionate.²⁴ In addition, the arbitrary exercise of a measure will be considered disproportionate.²⁵ Finally, the nature and extent of the interference with the human right in question and the objective of that interference may be ‘balanced’ against each other.²⁶ In relation to the authorisation the first limb is unlikely to be problematic – the objective of countering terrorism has been deemed sufficiently important to justify limiting various fundamental rights.²⁷ Equally the assertion that stop and search is rationally connected to countering terrorism is likely to be accepted without much dissent, however, the final limb may prove problematic, particularly where the maximum geographical and temporal limits are used for the authorisation. In relation to its exercise, the major problems occur in relation to the third limb, particularly given the absence of any requirement of reasonable

¹⁹ Ibid.

²⁰ It was held as the correct test, as opposed to ‘Wednesbury unreasonableness’, in *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26. Note that it also has application in relation to EU law (Sullivan, R, ‘Police Reform Act 2002: a radical interpretation’ [2002] Crim.LR 468).

²¹ *R (on the application of Daly) v Secretary of State for the Home Department*. See also *de Freitas v Ministry of Agriculture* [1999] 1 AC 69; Hickman, T, ‘The substance and structure of proportionality’ [2008] PL 694.

²² *de Freitas v Ministry of Agriculture*, 80.

²³ *Klass v Germany*.

²⁴ *Rees v United Kingdom* (1987) 9 EHRR 56 app.no.9532/81.

²⁵ *W v United Kingdom* (1988) 10 EHRR 29 app.no.9749/82.

²⁶ *Campbell v United Kingdom* (1993) 15 EHRR 137 app.no.13590/88. See also: Waldron, J, ‘Security and Liberty: The Image of Balance’ (2003) 11 Journal of Political Philosophy 191.

²⁷ E.g. *Lawless v Ireland (No. 3)* (Article 5); *R v DPP (Ex p. Kebeline)* [2000] 2 AC 326 (Article 6); *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin) (Article 10).

suspicion, although depending on where the power is exercised there may be difficulties with the second limb as well.

1.1.2) Accountability

Accountability may be located within the human rights framework, accountability to the courts being ensured by ECHR, Articles 5 and 6 as well as references in the preamble to 'democracy' and 'a democratic society'. The reference to 'democracy' and 'democratic society', neither of which is defined, emphasises that while accountability forms part of the ECHR it also goes beyond its remit as an integral element of the democratic process. This broad scope and the fact that community accountability, which is part of a broadly defined democratic accountability not necessarily encompassed by the ECHR, is a specific focus of this research, warrant viewing accountability as an additional normative principle, rather than subsuming it within human rights. The Government again provides confirmation of the appropriateness of this aspect of the normative framework, albeit relating to a narrower terminology than that adopted here, as CONTEST includes 'accountable government' as one of the core values espoused by the strategy.²⁸

Accountability has been described as a 'chameleon' term whose meaning varies widely.²⁹ However, at its most basic it is the principle that public authorities and institutions must be answerable to the public for their actions and omissions. As Kleinig notes, one can say either: 'that [the police] should be answerable (held to account) for what they do, or that they are able to answer for what they do.'³⁰ The latter, whereby the police 'give an account',³¹ is normative and is intrinsically tied to the concept of 'policing by consent': if the police are not accountable, they forfeit consent and thus legitimacy.³² The former, structural, form of accountability includes the mechanisms by which the police are held to account.³³ Both will be considered in the following Chapters.

There are multiple layers of accountability relevant to section 44, the police being accountable to the law and to the tri-partite structure of Chief Constable, Home Secretary

²⁸ Home Office, 'CONTEST'.

²⁹ Newburn, T (ed), *Handbook of Policing* (Willan, Cullompton 2003)605.

³⁰ Kleinig, J, *The Ethics of Policing* (CUP, Cambridge 1996) 210.

³¹ Ericson, R, 'The News Media and Account Ability' in P Stenning (ed) *Accountability for Criminal Justice: Selected Essays* (U Toronto Press, Toronto 1994).

³² Kleinig, *The Ethics of Policing* Chapter 11.

³³ Also termed 'professional' and 'organisational' accountability.

and Police Authority (PA).³⁴ There are aspects of democratic and local accountability within the tripartite structure in terms of the Home Secretary and the members of the police authorities (the party political members representing national accountability, while independent members signify local accountability). There is bureaucratic accountability, in the requirement of adherence to various targets in the centrally set Nationally Policing Plans,³⁵ and in relation to the monitoring of a wide range of incidents which are either mandated by what Ericson and Haggerty term 'external communication rules', such as Freedom of Information requests, or specified by the police themselves to preventively monitor potential sites of liability and accountability, notably in relation to this thesis, stop and search forms.³⁶ In addition, there is national accountability in relation to the independent reviewer of terrorism legislation, who presents an annual review to Parliament and in relation to the statistics on race and the criminal justice system, which include statistics on the use of section 44.³⁷ The public nature of these reports implies a degree of local and community accountability in addition to parliamentary accountability. Community accountability in this research focuses on the lines of communication between the police and the community, encompassing some of the structures for local accountability in terms of the police authorities but also going beyond that, including, for instance Neighbourhood Policing Teams and Independent Advisory Groups.

1.1.3) CONTEST

The final normative principle against which section 44 is to be judged is its efficiency and effectiveness in implementing the relevant aspects of the CONTEST strategy. This utilitarian approach coincides with the 'new public management' focus on cost-effectiveness and the achievement of set targets.³⁸ It draws in broad brush strokes the key principles and objectives of its four strands, highlighting the major areas for focus or development and is useful at the higher levels of the policing hierarchy for composing strategy but of considerably less utility in terms of tactical deployment or for front-line officers. The fact

³⁴ Lustgarten, L, *The governance of police* (Sweet & Maxwell, London 1986) Chapter 6. See also: Neyroud, P and Beckley, A, *Policing, Ethics and Human Rights* (Willan, Devon 2001), 96-123.

³⁵ Police Reform Act 2002, section 1. Note this was due for repeal under the Police and Justice Act 2006, Schedule 15, although this reform appears to have been outpaced by the new proposals under the Police Reform and Social Responsibility Bill 2010/11.

³⁶ Ericson, R and Haggerty, K, *Policing the Risk Society* (Clarendon Press, Oxford 1997) 428-429.

³⁷ Originally pursuant to TACT, section 126; now pursuant to the Terrorism Act 2006, section 36(1).

³⁸ For more on 'new public management', also termed 'new managerialism' see, e.g. Crawford, A, *The Local Governance of Crime* (OUP, Oxford 1997) 181-3; Hughes, G, *The Politics of Crime and Community* (Palgrave, Basingstoke 2007) 57-63.

that the Metropolitan Police Service (MPS) widely used section 44 prior to the advent of CONTEST underlines its role as a strategic rather than operational document.

CONTEST is divided into four work-streams:³⁹

- *Pursue*: to stop terrorist attacks;
- *Prevent*: to stop people becoming terrorists or supporting violent extremism;
- *Protect*: to strengthen the protection against terrorist attack; and
- *Prepare*: where an attack cannot be stopped, to mitigate its impact.

Section 44 engages three of these streams. Its objectives, discussed in Chapter 4, correspond to aspects of both 'Pursue' and 'Protect'. There are substantial overlaps between the two streams. CONTEST reveals 'Pursue' to be more geared towards apprehension and prosecution or restrictions through non-prosecution actions such as control orders whereas 'Protect' focuses on target hardening and safeguarding, in particular of critical national infrastructure (CNI), crowded places, transport systems and borders.⁴⁰ In addition, it is vital that in its operation section 44 does not counteract the imperatives of 'Prevent'.

1.2) Originality

This research will contribute to the existing body of literature surrounding stop and search and counter-terrorist legislation by addressing the highly contested but under-researched power under section 44. The in-depth analysis, which adds to the existing doctrinal research on section 44, is bolstered by the holistic approach adopted which considers the historical antecedents, thereby situating the present power in its socio-political and historical context, and assesses not only the impact of the power on the community but also its objectives for the police. Alongside these doctrinal inquiries is the qualitative field-work. There has been no published empirical work carried out in relation to section 44. The qualitative aspects of this thesis enables conclusions to be drawn as to section 44's actual usage, impact and the implementation of the related strands of CONTEST.

1.3) 'Terrorism'

The previous section outlining the normative principles for this thesis adopted a fiction in presenting human rights, accountability and adherence to CONTEST as uncontested norms. There are internal tensions between the three and an increasing body of literature that argues that human rights ought to be 'balanced' against security in the face of the 'new terrorism'.⁴¹ The use of the term 'balancing' in relation to human rights produces much confusion: it is

³⁹ Home Office, 'CONTEST'.

⁴⁰ Ibid [0.23-0.48].

⁴¹ See, for example, Posner, R and Vermeule, A, *Terror in the balance* (OUP, Oxford 2007).

legitimate to talk of ‘balancing’ conflicted rights against each other, such as one person’s right to free speech against another’s right to privacy. However, the common usage in relation to terrorism presumes, incorrectly, that there are scales with security on one side and human rights on the other whereby an increase on one side is offset by a decrease on the other. Human rights cannot be ‘balanced’ in this sense;⁴² they represent the bare minimum which must be respected, subject to the right to derogate⁴³ and limitations contained within the articles.⁴⁴ Before assessing the internal tensions between the posited norms it is necessary to analyse the concept of terrorism. This section does so: it begins with a survey of the relevant international obligations, then considers the definition of terrorism, and concludes with a discussion of the ‘new terrorism’, including an analysis of the tensions and criticisms relating to the normative principles and a discussion of risk theory which is closely intertwined with CONTEST.

1.3.1) International obligations

This research focuses on domestic counter-terrorist law, which must be viewed in light of the UK’s international obligations relating to counter-terrorism. There are three major sources of such international obligations: the Council of Europe, the EU and the UN.⁴⁵

To proceed in reverse order, pre-9/11 the international community, particularly the UN, took an inductive approach to terrorism, whereby specific instances form the basis of the general rule. This avoided the need to define terrorism. Instead the UN passed resolutions banning certain forms of conduct which are associated with terrorism, such as hijacking⁴⁶ and hostage taking,⁴⁷ as well as introducing Conventions aimed at making terrorist operations more difficult, such as the suppression of the financing of terrorism⁴⁸ and the protection of nuclear materials.⁴⁹ The UN General Assembly and Security Council also passed a number

⁴² Waldron ‘Security and Liberty: The Image of Balance’.

⁴³ ECHR, Article 15.

⁴⁴ E.g. the sub-paragraphs of Article 5(1).

⁴⁵ Terrorism is excluded from the jurisdiction of the International Criminal Court (Rome Statute of the International Criminal Court (1998) 2187 UNTS 90).

⁴⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963).

⁴⁷ International Convention Against the Taking of Hostages (1979).

⁴⁸ Convention for the Suppression of the Financing of Terrorism (1999).

⁴⁹ Convention on the Physical Protection of Nuclear Materials (1980). The other relevant conventions are: the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) and its 1988 supplementary Protocol, the Convention on the Prevention and Punishments of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), the Protocol for the Suppression of Unlawful Attacks Against the Safety of Fixed Platforms Located on the Continental Shelf (1988), the Convention on

of resolutions relating to terrorism, which were for the most part declaratory.⁵⁰ Since 9/11 the UN has taken a more deductive approach, imposing obligations through a number of Security Council Resolutions (SCR). Although there is still no international definition of 'terrorism' reference is made to 'terrorism' rather than specific actions which are deemed terroristic.⁵¹ The first such resolution was SCR 1373 (2001), passed in the wake of 9/11, which obliges member States to prevent and suppress the financing of terrorism,⁵² refrain from providing any support, active or passive, to entities or persons involved in terrorist attacks,⁵³ and calls upon States to intensify and accelerate the sharing of operational information and increase cooperation in relation to counter-terrorism.⁵⁴ SCR 1456 (2003) reiterated the calls for implementation, noting that all measures to combat terrorism must comply with the State's international obligations, with particular reference to human rights, refugee and humanitarian law.⁵⁵ SCR 1624 (2005) required States to ensure the legal prohibition of incitement to terrorism.⁵⁶ A number of additional resolutions, conventions and protocols have been passed which address specific terrorist threats, supplement previous resolutions, or call for increased cooperation in the field of counter-terrorism.⁵⁷

SCR 1373 created the Counter-Terrorism Committee to monitor member States' implementation of their obligations under the Resolution and to strengthen their counter-terrorism capacity. This was bolstered by the Counter-Terrorism Committee Executive Directorate (CTED), established by SCR 1535 (2004). In order to monitor compliance with the human rights aspects of the resolutions and conventions, the Commission on Human

the Marking of Plastic Explosives for the Purpose of Detection (1991), and the International Convention for the Suppression of Terrorist Bombings (1997).

⁵⁰ E.g. S/RES/1267 (1999), S/RES/1189 (1998), A/RES/54/164 (2000), A/RES/52/165 (1997), and UN General Assembly Resolution 3034 (XXVII) (1972).

⁵¹ Although see Saul, B, *Defining Terrorism in International Law* (OUP, Oxford 2006); Young, R, 'Defining Terrorism: the Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 23 *Boston College International & Comparative Law Review* 23, who contends that a definition is possible by abstracting from the common elements and themes present in the UN Resolutions, conventions, treaties and protocols.

⁵² Article 1. Implemented through various legislation, including Anti-Terrorism Crime and Security Act 2001, Part IV.

⁵³ Article 2.

⁵⁴ Article 3.

⁵⁵ Article 6.

⁵⁶ Implemented by TACT, sections 59-61 (inciting terrorism overseas); Terrorism Act 2006, section 1.

⁵⁷ SEC RES 1456 (2003), SEC/RES 1540 (2004), SEC/RES 1566 (2004) and SEC/RES 1617 (2005). The International Convention for the Suppression of Acts of Nuclear Terrorism (2005), amendments to the Convention on the Physical Protection of Nuclear Material, a Protocol to the Marine Convention (2005), and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms (2005).

Rights appointed a 'Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (Special Rapporteur) for a period of three years, extended by a further three years in 2007.⁵⁸ This was supplemented in 2008 by the creation of a working group within the CTED to deal with issues raised in relation to human rights by counter-terrorism.⁵⁹ It is worth noting the report by the Working Group on Protecting Human Rights While Countering Terrorism United Nations Counter-Terrorism Implementation Task Force (CTITF) 'Basic human rights reference guide: the stopping and searching of persons'.⁶⁰ This guide highlights the need for proportionate, non-discriminatory stop and search practices and cited the *Gillan (ECtHR)* case. It is particularly relevant to this thesis and is cited, where relevant, in Chapters 4-7. The specific aspects of these resolutions, conventions and protocols, as well as the work of the Special Rapporteur, will be highlighted where relevant in the subsequent chapters. Overall, these resolutions make relatively little impact on the UK as its counter-terrorist legislation was already extensive and, for the most part, already adhered to the minimal requirements laid down. The Special Rapporteur has, however, criticised elements of the UK legislation.⁶¹

The EU's⁶² counter-terrorism policy dates back to the early 1970s with the formation of the European Political Cooperation.⁶³ In 1976 the Terrorism, Radicalism, Extremism, and political Violence (TREVI) Group was established, serving operational needs and providing a forum for discussion and interchange of intelligence. Its legal base remained opaque until the Maastricht Treaty when it was brought within the third pillar of Justice and Home Affairs.⁶⁴ Maastricht specifically recognised the threat of terrorism as 'a matter of common interest', calling for cooperation between the State's police, customs officials and Europol,

⁵⁸ Commission of Human Rights Resolution 2005/80. Human Rights Council decisions 2006/102 and 6/28. There appears to have been no further extension (see: <http://www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm> <accessed 24th May 2011>).

⁵⁹ SEC/RES 1805.

⁶⁰ (UN, New York 2010).

⁶¹ Schenin, M, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (A/HRC/4/26/Add.1, 2007); Schenin, M, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (E/CN.4/2006/98, 2006); Schenin 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism'; Schenin 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism'.

⁶² The term the 'EU' is used throughout for simplicity's sake, although the discussion spans the EEC/EC/EU periods.

⁶³ Bures, O, 'EU Counterterrorism Policy: A Paper Tiger?' (2006) 18 *Terrorism and Political Violence* 57, 58.

⁶⁴ *Ibid*, 58-9.

itself established under Maastricht.⁶⁵ In addition to TREVI, the 1979 Dublin Agreement aimed to ensure the uniform application of the Council of Europe's European Convention on the Suppression of Terrorism (1977) by applying it without reservations, even though it had not been ratified by all members of the EEC.⁶⁶ TREVI was supplemented by the work of the Police Working Group on Terrorism, established in 1979, which includes the 'Club of Berne' countries: all EU states plus Norway and Switzerland.⁶⁷ Two other major innovations pre-9/11 were the Convention on Simplified Extradition Procedure between the Member States of the EU (1995) and the Convention Relating to Extradition between Member States of the EU (1996), which supplemented and aimed to improve earlier conventions.⁶⁸ Although TREVI was viewed as a success, being by the late 1980s 'a more effective forum than Interpol in matters relating to the security of databank and information exchanges on international terrorism',⁶⁹ overall these approaches suffered from delays in ratification and a lack of implementation.⁷⁰

On the 21st September 2001 the European Council published its 'Plan of Action', outlining the EU's policy to combat terrorism. The present governing document is the EU Counter-terrorism Strategy, adopted by the European Council in 2005.⁷¹ It adopts a similar approach to CONTEST, with four strands: 'prevent', 'protect', 'pursue' and 'respond'. The Plan of Action, which details the measures to be pursued under each strand, is reviewed every six months by the Permanent Representatives Committee. The Council has also published its Strategy for Combating Radicalisation and Recruitment to Terrorism, adopted in 2005 and bolstered by its own Action Plan. The Working Party on Terrorism, situated within the 2nd pillar, meets on a monthly basis with bi-annual meetings with Russia and the USA and annual meetings with Canada and India. Within Europol a dedicated counter-terrorism unit, SC5, was established within Europol's Organised (Serious) Crime Department, alongside supporting Programs.⁷² Outside the EU the Counter Terrorist Group, developed by the 'Club of Berne' (the EU plus Norway and Switzerland) buttresses the EU initiatives,

⁶⁵ Article K1.

⁶⁶ Lowe, V and Warbrick, C (eds), *The United Nations and Principles of International Law: essays in memory of Michael Akehurst* (Routledge, London 1999).

⁶⁷ Deflem, M, 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective' (2006) 23 *Justice Quarterly* 336, 341.

⁶⁸ The European Convention on Extradition (1957) and the European Convention on the Suppression of Terrorism (1977).

⁶⁹ Lodge, J, 'Terrorism and the European Community: towards 1992' (1989) 1 *Terrorism and Political Violence* 30, 42.

⁷⁰ Bures 'EU Counterterrorism Policy: A Paper Tiger?'

⁷¹ 14469/4/05.

⁷² The Counter Proliferation Program, Preparedness Program and Training and Education Program.

providing another interface for Member States' heads of intelligence and security services on terrorist matters.⁷³ This complements the high-level political dialogue occurring at Council, Parliament and Commission level within the EU.⁷⁴ Another innovation is the European Arrest Warrant,⁷⁵ which permits quicker, simplified extradition in relation to the offences listed in Article 2, which include terrorism.⁷⁶

It is evident from this brief review that the majority of operations at an EU level are designed to bolster cooperation and the exchange of intelligence and expertise. In terms of law, the EU, like the UN, sets a minimum standard in a number of areas, in addition to increased cooperation between Member States on issues such as extradition. However, due to limited resources, in terms of both personnel and budget, the EU relies heavily on Member States for their implementation and for secondment of experts, which causes a 'capabilities-expectations' 'gap'.⁷⁷

The Council of Europe, like the UN and the EU, had passed a number of conventions relating to terrorism prior to 9/11. The 'European Convention on the Suppression of Terrorism' (1977) takes an inductive approach adopting the crimes listed in the UN Conventions, above. It deals with extradition in relation to these actions, calling upon Member States to 'afford one another the widest measure of mutual assistance in criminal matters' relating thereto.⁷⁸ This was supplemented in 2005 by the 'Council of Europe Convention on the Prevention of Terrorism', which, again, takes an inductive approach. The Convention recognises 'the negative effects [terrorism has] on the full enjoyment of human rights, in particular the right to life',⁷⁹ while also insisting that 'all measures taken by the state to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory behaviour'.⁸⁰ It requires

⁷³ Deflem 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective', 341.

⁷⁴ European Council 'The European Union Counter-terrorism Strategy' (2005) 14469/4/05, 3.

⁷⁵ Decision 2002/584/JHA [2002] OJ L190/1.

⁷⁶ The suspect must be returned to the requesting State within 90 days, or if the suspect consents to extradition, 10 days (Article 17, Council Framework Decision 2002/584/JHA [2002] OJ L190/1). See: Mackarel, M, 'Surrendering the fugitive: the European Arrest Warrant and the United Kingdom' (2007) *Journal of Criminal Law* 362.

⁷⁷ Gregory, F, 'The EU's Response to 9/11: A Case Study of Institutional Roles and Policy Processes with Special Reference to Issues of Accountability and Human Rights' (2005) 17 *Terrorism and Political Violence* 105, 106.

⁷⁸ European Convention on the Suppression of Terrorism 1977, Article 8.

⁷⁹ Article 2.

⁸⁰ Council of Europe Parliamentary Assembly, Resolution 1271, 24 January 2002.

that recruitment, training for and incitement to terrorism be criminalised.⁸¹ In addition, the Committee of Experts on Terrorism, which in 2003 replaced the Multidisciplinary Group on International Action against Terrorism, identifies best practice, monitors implementation of the Council of Europe's Conventions and identifies gaps in international law in relation to terrorism, advising how to fill them.⁸² These activities are in addition to its role in relation to the ECHR.

1.3.2) Defining terrorism

Despite the variety of international conventions and intra-regional agreements on terrorism, the term remains problematic and there is no international definition. Before considering the definition set forth in TACT, section 1, it is necessary to consider in general terms what are the characteristics of terrorism.

These characteristics may be grouped under three headings: actors, methods and aims. The 'actors' category includes the perpetrators and their victims. Despite the rhetoric of the 'War on Terror', in particular the categorisation of some States as part of the 'axis-of-evil', and the earlier condemnation of States such as Libya for sanctioning terrorists, the issue of whether 'terrorism' may encompass State actions remains the major impediment to a definition of terrorism at the international level.⁸³ Notwithstanding pragmatic arguments that policy makers want to know about sub-state groups and such a focus avoids the conceptual difficulties in generalising between two vastly different entities, with different resources, incentives and pressures, the definition of 'terrorism' should include both sub-state and State actors.⁸⁴ Such an approach is more coherent and if the focus of the particular country or policy drive is on sub-state actors the field can be narrowed appropriately. The flip-side of this debate is the question of whether an armed struggle, short of civil war, by sub-State actors for political aims can ever be legitimate. While there is some tension within the international Conventions between the right to self-determination and the blanket condemnation of terrorism, the answer appears to be no: the ends do not justify the means.⁸⁵ However, many former terrorist groups, and indeed terrorist sponsoring States, are

⁸¹ Articles 5-7.

⁸² CODEXTER (2008) 01.

⁸³ For further discussion see the discussion of the Non-Aligned Group's proposed definition in Levitt, G, 'Is "Terrorism" Worth Defining?' (1986) 13 Ohio Northern University LR 97.

⁸⁴ Jones and Libiki, *How Terrorist Groups End: Lessons for Countering al Qa'ida* 3. Ibid 3.

⁸⁵ The unequivocal condemnation of acts of terrorism has been contained in the General Assembly Resolutions on terrorism since A/RES/34/145 (1979), although c.f. A/RES/3034(XXVII) (1972), A/RES/31/102 (1976) and A/RES/32/147 (1977) which explicitly recognise the legitimacy of national struggles for liberation.

eventually welcomed back into the fold, typically after they have decried violence as means to political ends.⁸⁶

Another issue is whether the label 'terrorist' ought to be reserved for those acting in a group. Tied to this issue is the question of repetition.⁸⁷ Resolution 1373 refers to 'entities or persons involved in terrorist acts'; the reference to an entity alongside persons seems to imply that the former includes groups and, therefore, the latter may be read as including individuals. A central justification for counter-terrorist powers is that terrorist organisations pose particular difficulties for the police due to their sophistication and ability to act in a co-ordinated and sustained manner.⁸⁸ Given the extraordinary nature of these powers, proportionality dictates that they should be used only when necessary and this is unlikely to include individuals acting alone or in 'one-off' actions.

The definition of victims is as contested as that of perpetrators. The nub of the debate centres on whether it should encompass 'civilians' and/or 'non-combatants'. A combatant is defined by the Geneva Convention as a member of the organised armed forces of a Party to a conflict or a member of a militia or volunteer corps; both must have a command structure and a fixed distinctive sign.⁸⁹ The combatant must bear arms openly where possible.⁹⁰ Therefore a definition of victims which encompasses civilians and 'non-combatants' would exclude military personnel killed while on active duty in a conflict, meaning the attack on the USS Cole was a terrorist act, but the murders of British army personnel in Northern Ireland by the Irish Republican Army (IRA) were not. This also touches on the sub/State issue as there are occasions when conventional armies deliberately target civilians.⁹¹ However, a problem arises here because the IRA, in common with most terrorist organisations, did not enjoy the protection of the Geneva Conventions which applies to the traditional mode of inter-state war rather than intra-state conflict. They may enjoy some protection under common Article 3 and Additional Protocol II, which relate to internal

⁸⁶ See Jones and Libiki, *How Terrorist Groups End: Lessons for Countering al Qaeda*.

⁸⁷ Badey, T, 'Defining international terrorism: A pragmatic approach' (1998) 10 *Terrorism and Political Violence* 90, 93-95.

⁸⁸ Walker, C, 'The legal definition of terrorism in United Kingdom law and beyond' [2007] PL 331, 347.

⁸⁹ Article 43, Geneva Convention 1st Protocol 1977; Article 4(2) the 3rd Geneva Convention 1949.

⁹⁰ Article 44(3), Geneva Convention 1st Protocol 1977.

⁹¹ Examples include the bombing of Dresden, Tokyo, Nagasaki and Hiroshima during WWII. The fire-bombing of Tokyo left 83,793 Japanese civilians dead, 40,918 injured and over one million homeless. The bombers' orders for the raid explicitly listed Japanese civilian casualties as an objective (Searle, T, "'It made a lot of sense to kill skilled workers": the firebombing of Tokyo in March 1945' (2002) 66 *The Journal of Military History* 103, 103, 115).

armed conflict, defined by the ICC as: 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.⁹² But any such claim is doubtful in this case because the combatant group must have an organised command structure and sufficient territorial control to carry out sustained and concerted military operations.⁹³ While there is no definition of 'combatant' within these provisions, 'all persons who do not take a direct part or who have ceased to take part in hostilities' are entitled to humane treatment, including freedom from violence and, specifically, terrorism.⁹⁴ This is a more coherent approach which would include on- and off-duty soldiers, and appears in line with the US definition of 'non-combatant', which includes military forces that are not on the battlefield.⁹⁵ However, difficulties remain: are the police deemed to take 'direct part' in hostilities, even those whose role clearly excludes direct engagement with the internal combatants? What of politicians who order military or police operations? Do those who supply the army or internal combatants take 'direct part'? Walzer has argued that these 'civilians' should be legitimate targets at their place of work, although this appears to go against the basic thrust of the Hague and Geneva conventions which aim to distinguish between combatants and non-combatants.⁹⁶

It would avoid many of the pitfalls if we defined 'terrorism' as using violence to advance a political agenda as a form of warfare, and including violations of the rules of war, as set forth in the Hague and Geneva Conventions.⁹⁷ Alternatively, as advocated by Schmid, terrorism could be viewed as the 'peacetime equivalent of war crimes', thus underlining moral indignation and refusing the possibility of legitimate actions under the rules of war.⁹⁸ While this approach is arguably the most conceptually consistent, in addition to the fact that many terrorist campaigns fall outside the Geneva Conventions' definition of war, it is a political impossibility, as underlined by the post-9/11 consensus in bodies such as the UN, which refuse this categorisation.⁹⁹ The targeting of civilians forms a substantial base of the moral repugnance of terrorism, and focusing on civilians 'enables us to set a clear moral

⁹² *Prosecutor v Tadic (Appeals Chamber)* [1999] 35 ILM 1028 [70].

⁹³ Moir, L, *The Law of Internal Armed Conflict* (CUP, Cambridge 2002) Chapter 3.

⁹⁴ Additional Protocol II, Article 4.

⁹⁵ Ganor, B, *The counter-terrorism puzzle: a guide for decision makers* (Transaction Publishers, London 2005) 23.

⁹⁶ Walzer, M, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn Basic Books, New York 2006) 146.

⁹⁷ Silke, A, 'Terrorism and the blind men's elephant' (1996) 8 *Terrorism and Political Violence* 12, 12.

⁹⁸ Schmid, AP, 'The response problem as a definition problem' (1992) 4 *Terrorism and Political Violence* 7, 11.

⁹⁹ For example, Security Council Resolution 1373 (2001) refers to 'terrorist acts...as serious criminal offences' (Article 2(e)).

threshold that must not be crossed'.¹⁰⁰ However, to exclude the deliberate murder of military personnel would promote a piecemeal approach whereby some attacks by a given group are deemed terroristic while others are not, again, implicitly suggesting some level of legitimacy of some of the acts. A preferable approach is to draw upon common Article 3 and Additional Protocol II and view combatants as including military on and off the battlefield while 'non-combatants' are those who do not take 'direct part' in hostilities. It should, however, be noted both that this goes towards a definition only, and that the additional Protocol II has proven 'alarmingly ineffective' in practice in limiting atrocities.¹⁰¹

The least contentious requisite element under the 'methods' category is that of actual or threatened violence.¹⁰² Civil disruption, strikes or protests are a valid method of communication within liberal democracies and do not constitute terrorism, although concerns have been raised that TACT could be used to target strikes, as discussed below. A crucial distinction between crime and terrorism is that a terrorist act is a dramatic communication; to use Brian Jenkins' phrase: 'Terrorism is theatre'.¹⁰³ This is usually included in references in legal definitions to terrorists seeking to influence or intimidate the population, or a section thereof, or the government. The act communicates different messages to different groups: a message of fear designed to intimate their declared opponents; a message of inspiration for sympathisers; and, a message aimed at impressing and converting non-committed bystanders.¹⁰⁴

Within the 'aims' category there is a consensus that the aims of the action must be political, otherwise it is 'mere criminality'. There are differences between some of the legal definitions, with, for example TACT referring to 'political, ideological or religious' causes. In common with other commentators, I would argue that any distinction between the three is ephemeral.¹⁰⁵ It is worth noting that 'political and ideological' causes may engage different constitutional or human rights than 'religious' causes, depending on the legal framework.¹⁰⁶

The preceding discussion has been based upon the premise that there is just one 'terrorism'. However, some jurisdictions, such as the USA, contrast 'domestic' with 'international

¹⁰⁰ Ganor, *The counter-terrorism puzzle: a guide for decision makers* 23.

¹⁰¹ Moir, *The Law of Internal Armed Conflict* 119-132.

¹⁰² Walker 'The legal definition of terrorism in United Kingdom law and beyond'.

¹⁰³ Jenkins, B, 'International Terrorism: A New Mode of Conflict' in D Carlton and C Schaefer (eds) *International Terrorism and World Security* (Croom Helm, London 1975) 16.

¹⁰⁴ Schmid, AP, 'Terrorism and Human Rights: A Perspective from the United Nations' (2005) 17 *Terrorism and Political Violence* 25, 26.

¹⁰⁵ Walker 'The legal definition of terrorism in United Kingdom law and beyond' 331.

¹⁰⁶ For example, the Canadian Charter of Rights and Freedoms. See: *R v Khawaja* (2010) ONCA 862.

terrorism'.¹⁰⁷ This does not fundamentally alter the characteristics, although naturally it excludes some 'domestic' terrorists and requires a transnational dimension.

Gathering the threads of the discussion together, the following is suggested as the core characteristics of terrorists: a group of sub-state or State actors who target non-combatants, defined as civilians who do not participate directly in hostilities, with actual or threatened violence to further political aims whereby the act of violence is a method of communication. It is clear that the narrow international consensus permits a vague definition of terrorism. This is deliberate, the concept of terrorism being highly subjective and politically influenced, varying not only from country to country but also from year to year within countries.¹⁰⁸ Domestically, the broad definition of terrorism provides the police with greater freedom of action which is particularly important given the emphasis on preventative strategies (discussed below under 'new terrorism'). However, an excessively broad definition will fall foul of the human rights and public law requirement that measures be prescribed by law (discussed above).¹⁰⁹

1.3.2.1) The UK's definition of 'terrorism'

The UK moved from an amalgam of inductive and deductive approaches in the Prevention of Terrorism Acts and the Emergency Provisions Acts (see Chapter 3.5), to a deductive approach with TACT, section 1.¹¹⁰ In relation to the characteristics discussed above, TACT side-steps the issues of sub/State actors and civilians/non-combatants by including no reference to either. It corresponds to the other characteristics, explicitly including the requirement of actual or threatened violence for political aims, and, by reference to the requirement of influencing the public, a section thereof, or the government, includes the communication element.

Section 1 TACT gives the following definition of terrorism:¹¹¹

- (1) In this Act "terrorism" means the use or threat of action where –
 - a. The action falls within subsection (2),
 - b. the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

¹⁰⁷ USA PATRIOT Act (2001), Title 18, section 2331(2), 2331(5).

¹⁰⁸ E.g. the UK's approach to the Libyan Islamic Fighting Group (is proscribed now under Terrorism Act 2000 (Proscribed Organisations) (Amendment) SI Order 2005/2892).

¹⁰⁹ As to the appropriateness of this, see Chapter 4.

¹¹⁰ EPA 1973, section 28(1); PTA 1974, section 9(1).

¹¹¹ As amended by the Terrorism Act 2006, section 34 and the Counter-Terrorism Act 2008, section 75(2)(a).

- c. the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause
- (2) Action falls within this subsection if it—
- a. involves serious violence against a person,
 - b. involves serious damage to property,
 - c. endangers a person’s life, other than that of the person committing the action,
 - d. creates a serious risk to the health or safety of the public or a section of the public, or
 - e. is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
- a. “action” includes action outside the United Kingdom,
 - b. a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - c. a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - d. “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

This definition, described by Lord Bingham as ‘far-reaching’,¹¹² was one of the main points of contention during the passage of the Bill through Parliament.¹¹³ The definition is narrower than that in the Prevention of Terrorism Act (PTA) 1984 in that ‘violence’, damage, destruction or the creation of risk in section 1(2) must be ‘serious’.¹¹⁴ The endangerment of a person’s life is implicitly ‘serious’.¹¹⁵ The inclusion of property damage

¹¹² *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, 333.

¹¹³ Hansard 2nd reading, HC debs 14th December 1999, vol. 341, col’s 152-234; Standing Committee D, HC debs, 18th, 20th and 25th January and 1st, 3rd and 8th February 2000; 3rd reading, HC debs 15th March 2000, vol. 345, col. 329 through vol. 346, col. 473; Commons consideration of House of Lords amendments 10th July 2000 vol. 353, col’s 627-665; 2nd reading, HL debs, 6th April 2000, vol. 611, col’s 1427-1490; Committee stage (House of Lords), 16th May 2000, vol. 613, col’s 214-278 and 23rd May 2000, vol. 613, col’s 641-664 and 674-762 and 6th June 2000, vol. 613 col’s 1044-1066 and 1076-1103; Report (HL), HL debs, 20th June 2000, vol. 614, col’s 159-224; 3rd reading, HL debs, 4th July 2000, vol. 614, col’s 1442-1459.

¹¹⁴ PTA 1974, section 9(1).

¹¹⁵ TACT, section 1(2)(c).

is sensible given the potentially severe economic effects, which may impact on national security, as almost happened when the Reinsurers refused to reinsure policies in the city of London against terrorism, forcing the Government to pass the Reinsurance (Acts of Terrorism) Act 1993.¹¹⁶ The damaged property can be of any value, anywhere in the world.¹¹⁷ It is questionable whether the destruction of a non-valuable piece of property should be termed a 'terrorist' act.

It is also narrower in respect of the 'motivation', which must be 'designed to influence the government or to intimidate the public or a section of the public', rather than merely putting the public or a section thereof 'in fear',¹¹⁸ which, as noted by Walker, could result from 'non-political hooliganism or individual acts of aggression'.¹¹⁹ 'Influence' opens the possibility of strikes or protests coming within the definition, discussed further below, with section 1(4)(d) meaning that charges of terrorism could be levelled against protesters against 'odious' foreign regimes.¹²⁰ Lord Carlile argued that 'influence' ought to be replaced with 'intimidate', commonly used in other jurisdictions,¹²¹ and advocated by Lord Lloyd in his 1996 Report.¹²² 'Intimidate' sets the bar higher, having a coercive element that ensures the section does not interfere with the rights under ECHR Articles 10 and 11. The Government rejected this, stating that the current definition did not set the bar too low and that there 'may be problems in terms of using the word 'intimidate' in relation to governments and inter-governmental organisations'.¹²³ The second part of this argument is frankly bizarre but no explanation was proffered. Given that the term is currently used in other jurisdictions, the Government's argument is weak. In relation to this aspect and the broad category of property damage, there is a heavy reliance on the CPS to 'be sensible'.

Overall, the TACT, section 1 definition is considerably broader than its predecessors. First, the scope has been expanded to include threats as well as acts.¹²⁴ This assists the police in pre-empting terrorist attacks. Second, the explicit reference to health risks and damage to

¹¹⁶ For more, see Stallworthy, M, 'The Reinsurance (Acts of Terrorism) Act 1993' (1993) 12 *International Banking and Financial Law* 21.

¹¹⁷ Section 4(b).

¹¹⁸ EPA 1973, section 28(1).

¹¹⁹ Walker 'The legal definition of terrorism in United Kingdom law and beyond', 339.

¹²⁰ HC debs, Standing Committee D, 18th February 2000, pt 7, page 2 (Lidington).

¹²¹ Lord Carlile, *The definition of terrorism* (Cm 7052, 2007) [58-9].

¹²² Lord Lloyd, *Inquiry into Legislation against Terrorism* (Command 3420, 1996). Lord Goodhart also criticised the use of 'influence' (Hansard, 4/7/00, 1443).

¹²³ Secretary of State for the Home Department, *The Government Reply to the Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation: The Definition of Terrorism* (Cm 7058, 2007) [1].

¹²⁴ TACT, section 1(1).

electronic systems arguably expands on the previous definition of ‘use of violence’.¹²⁵ This is a necessary response to technological advances and corresponding threats. Third, section 1(3) makes it a terrorist offence to use or threaten any action within section 1(2) which involves the use of firearms or explosives, whether or not section 1(b) is engaged. It was justified during the passage of the Bill as enabling the police to tackle assassinations ‘in which the terrorist’s motive might be less to put the public in fear, or to influence the Government, than to “take out” the individual’.¹²⁶ This justification leaves a gap, as assassination which does not use firearms or explosives, such as plutonium poisoning, is not covered by the section. Moreover, if assassination were the concern then section 1(3) should have been limited to the use or threat of any action within section 1(2)(a) and (c). The use of the term ‘intimidate’ instead of ‘influence’ in section 1(1)(b) would have avoided this problem and the needless broadening of the definition by removing the link with motivations.

It is arguable that the expansion from political causes to political, religious and ideological causes also broadens the definition, although any distinction between the three is ephemeral.¹²⁷ Nonetheless, the broad nature of these words in conjunction with the low threshold of ‘influence’ in section 1(1)(b) opens the possibility of the powers being used inappropriately. For example, Walker has warned that the inclusion of religious causes might blur into personal or family disputes.¹²⁸ Of particular concern during the passage of the bill was the potential inclusion of industrial disputes, boycotts or protests, although the reference to ‘actions’ would appear to exclude strikes, which are properly construed as omissions.¹²⁹ Charles Clarke argued, rather unpersuasively, that disputes by nurses ‘would be a trade dispute, which is not a political, religious or ideological cause’.¹³⁰ The use of nominally anti-terrorist legislation against a friendly government so as to secure deposits of British customers of Lanksbanki gives pause for thought.¹³¹ Lord Goodhart suggested that a long running strike by refuse collectors could cause a ‘serious risk to the health of the

¹²⁵ TACT, section 1(2)(d), (e). Walker ‘The legal definition of terrorism in United Kingdom law and beyond’, 340.

¹²⁶ HC debs, 10 July 2000, col. 643 (Charles Clarke, Home Secretary).

¹²⁷ This was the view of Ken Maginnis (UUP) (HC debs, 18th January 2000, Standing Committee D, pt. 4, page 1) and Simon Hughes, who argued any view could be claimed by someone as an ideological view (HC debs, 18th January 2000, Standing Committee D, pt. 2, page 3). See also Walker ‘The legal definition of terrorism in United Kingdom law and beyond’, 331.

¹²⁸ *Ibid*, 340.

¹²⁹ *Ibid*, 341.

¹³⁰ HC debs, 18th January 2000, Standing Committee D, pt 8, page 2.

¹³¹ Landsbanki Freezing Order 2008, SI 2008/2668. For more see Lennon, G and Walker, C, ‘Hot Money in a Cold Climate’ [2009] PL 37.

public' and come within the definition,¹³² although the legislation was not used against refuse collectors in Leeds during their three months strike in 2009.¹³³ The explicit exclusion of these types of actions, and the use of 'intimidate' rather than 'influence', would improve the definition.

The lack of precision in the definition of terrorism is worrying for its impact on the breadth of the powers in TACT and other counter-terrorist statutes, but it is beneficial for the police as its vagueness, comparable with that of breach of the peace, provides them with more operational choices. The litmus test is whether it is sufficiently defined to be 'prescribed by law'. It is clear that, again like breach of the peace,¹³⁴ the definition of terrorism passes this threshold.¹³⁵ While this operational 'wriggle room' may be necessary for the police, the imprecision in the definition means that the specific powers bear a greater responsibility to have sufficient precision, checks and balances to ensure proportionality.

1.3.3) The 'new terrorism'

It has been asserted by some that contemporary terrorism is distinct from previous forms of terrorism and therefore warrants a discrete approach which adopts a preventative / pre-emptive approach and which may also curtail human rights.¹³⁶ These arguments are consequential to the asserted characteristics of the 'new' terrorism, especially the tendency towards mass casualties, and are premised upon theories of risk whereby action is required to prevent low-probability high-consequence attacks. This section considers the differences between 'old' and 'new' terrorism and the consequences for counter-terrorist policy.

The first question is who are the 'new terrorists'? The term has largely become synonymous with al Qaeda, although defining al Qaeda is itself problematic. Bruce Hoffman asks: 'Is it a monolithic, international terrorist organization with an identifiable command and control apparatus or is it a broader, more amorphous movement tenuously held together by a loosely networked transnational constituency?'¹³⁷ There is growing consensus within the EU that it

¹³² HL debs, 16th May 2000, col. 219.

¹³³ Wainwright, M, 'Leeds bin strike ends after three months' *The Guardian* (London, 23rd November 2009).

¹³⁴ *Steel v United Kingdom* (2005) 41 EHRR 22, app.no.68416/01.

¹³⁵ *Brogan v United Kingdom*.

¹³⁶ E.g. Ignatieff, M, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh UP, Edinburgh 2005); Dershowitz, A, *Preemption: A Knife that Cuts Both Ways* (Norton, London 2006).

¹³⁷ Hoffman, B, *Al Qaeda, trends in terrorism and future potentialities: an assessment* (RAND, Santa Monica 1999) 3.

is the latter,¹³⁸ which Burke has likened to an ideology or a venture-capitalist firm.¹³⁹ In addition to al Qaeda's 'Islamist' terrorism, the Aum Shinrikyo cult is often cited as exemplary of the 'new terrorism'. Although the threat from dissident republicans in Northern Ireland has been increasing in recent years, the main counter-terrorism focus for England and Wales and internationally is 'Islamist' terrorism. Therefore this discussion will similarly centre on those groups. It is important to note that the use of term 'Islamist' terrorism is a shorthand: 'Islamist' terrorism contains many internal conflicts and is by no means homogeneous; indeed, Bin Laden and Zawahiri's successful conclusion to one such power struggle led to a shift from the previous policy of jihad against the 'near enemy' (the relevant domestic governments) towards the 'far enemy' (including the USA and Europe).¹⁴⁰

The major characteristics of 'new terrorism' are: loose networks rather than hierarchical organisations; an international dimension; and, a movement away from violence for political ends towards religious and/or millenarian objectives.¹⁴¹ The difference between the old and new is one of degree, with exemplars of the 'old' terrorism such as the Provisional Irish Republican Army (PIRA) having characteristics of both the 'old' and 'new'. The PIRA have a hierarchical structure (old); substantial international links in terms of arms dealing, finance and shared training with international terrorist organisations and foreign states, ranging from terrorist 'sponsors', like Libya, to the USA,¹⁴² and have operated in and from several countries (new), although their primary seat of operations are the UK and the Republic of Ireland (old).¹⁴³ Their objectives are nationalistic (old). However, while it has been official PIRA policy not to target persons on the basis of their religion, sectarian killings have occurred and there were substantial sectarian undertones to the 'Troubles'

¹³⁸ De Vires, G 'Address to the Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban' (New York, 2005) <http://www.consilium.europa.eu/uedocs/cmsUpload/06_24_final_1267.pdf> accessed 5th March 2007. The UK government's reference to 'Islamist' or 'international' terrorism rather than 'al Qaeda' reinforces this approach (see, for example, MI5, 'Countering International Terrorism: the United Kingdom's strategy' <<http://www.mi5.gov.uk/output/Page553.html>> accessed 4th April 2007).

¹³⁹ Burke, J, *Al-Qaeda: the True Story of Radical Islam* (Penguin, London 2004) 12-3.

¹⁴⁰ Gerges, F, *The Far Enemy: Why Jihad Went Global* (CUP, Cambridge 2005).

¹⁴¹ Tucker, D, 'What is New About the New Terrorism and How Dangerous is it?' (2001) 13 *Terrorism and Political Violence* 1, 1.

¹⁴² Coogan, TP, *The IRA* (Harper Collins, London 2000) 589; Taylor, P, *Provos: the IRA and Sinn Fein* (Bloomsbury, London 1998) 61-2, 84-5, 108-9. For more on the American Government's approach to the PIRA see, for example McElrath, K, *Unsafe Haven: the United States, the IRA and Political Prisoners* (Pluto Press, London 2000).

¹⁴³ The PIRA operated in, for example: Germany, Holland, Belgium (Coogan, *The IRA* 588-9); Harmon, C, *Terrorism Today* (Frank Cass, London 2000) 86-7.

(new).¹⁴⁴ In addition, their involvement in racketeering, drugs and other 'ordinary' crime underlines the fact that terrorist activities may diverge from their stated or overriding ideology.¹⁴⁵

'Islamist' terrorist groups do not necessarily correspond to all the characteristics of 'new terrorism'. Their grouping under a loose network may be likened to the assistance provided between some of the 'old' terrorist organizations and between them and sympathetic States. For example, Libya's provision of arms to the PIRA and the exchange of training between the PLO and the PIRA.¹⁴⁶ There is even a precedent for Osama Bin Laden's role as wealthy patron of terrorist groups' in Giangiacomo Feltrinelli, a wealthy publisher who founded the terrorist organisation Gruppi di Azione Patigiani in Italy in 1970.¹⁴⁷ However, this loose network among the 'old' terrorist groups was bound by a common ideology that was secondary to the various groups' localised objectives whereas the 'Islamist' terrorist groups' common ideology results in, at least some, shared primary objectives. Also, the individual groups within the 'old' networks were typically highly organized hierarchical structures whereas some of the attacks perpetrated by 'Islamist' terrorists have been carried out by ad hoc groups of individuals unrelated to a larger hierarchical structure.¹⁴⁸

In terms of 'Islamist' groups' aims, some commentators have asserted that they have no demands.¹⁴⁹ Ignatieff has gone so far as to characterise al Qaeda and Hamas as 'death cults',¹⁵⁰ arguing that al Qaeda's 'intentions were apocalyptic, not political'.¹⁵¹ While undoubtedly dressed in religious rhetoric there are political objectives, evidenced by demands contained in statements by, for example, Osama bin Laden, who calls for, inter alia, tax, currency and sanitation reform in Saudi Arabia,¹⁵² and Mohammad Sidique Khan, one of the 7/7 suicide bombers, who called for an end to 'the bombing, gassing, imprisonment and torture of my people', which is extremely vague – perhaps referring to

¹⁴⁴ Coogan, *The IRA* 379-80.

¹⁴⁵ Dillon, M, *The Dirty War* (Hutchinson, London 1990) 442-458.

¹⁴⁶ Coogan, *The IRA* 589. Libya supplied the PIRA with 136 tons of arms between August 1985 and October 1986 alone (Taylor, *Provos: the IRA and Sinn Fein* 277).

¹⁴⁷ Tucker 'What is New About the New Terrorism and How Dangerous is it?' 4.

¹⁴⁸ Burke, *Al-Qaeda: the True Story of Radical Islam* 265-7.

¹⁴⁹ See: Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (especially chapter 5); Simon, S and Benjamin, D, 'America and the New Terrorism' (2000) 42 *Survival* 59, 59; Burke, *Al-Qaeda: the True Story of Radical Islam* 23. See also Sendagorta, F, 'Jihad in Europe: the Wider Context' (2005) 3 *Survival* 63, 65, where he argues that 'Islamist' groups do have political agendas but these are inseparable from religion.

¹⁵⁰ Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* 126.

¹⁵¹ *Ibid* 99 (referring to the perpetrators of 9/11).

¹⁵² Burke, *Al-Qaeda: the True Story of Radical Islam* 23.

Palestine or Iraq or both – but is nonetheless tangible.¹⁵³ It is, however, apparent that religion is a characteristic of ‘Islamist’ terrorism and, whether core or not, it is far more elemental than with the PIRA.

Putting aside these serious shortcomings in the attempted designation of ‘new’ and ‘old’ terrorism, what are the consequences for counter-terrorism of these allegedly ‘new’ characteristics? International, loose networks raise cross-jurisdictional issues. Given the diverse and numerous countries where ‘Islamist’ groups operate this presents a serious challenge: not only the willingness but also the capacity for cooperation will vary widely depending on what countries are involved.¹⁵⁴ Particularly problematic are countries such as Somalia, which are arguably non-states or failed states in terms of the effective control their governments can exert. As discussed above, there have been some significant moves to standardise the international response to terrorism post 9/11, although the issue of capacity continues to be problematic. It is notable that, in addition to the fact that an international dimension in terrorism is not new, similar problems are posed by organised crime and serious fraud which often operate across multiple jurisdictions.

The major consequence of the ‘new terrorism’ that is used to justify ‘new rules of the game’¹⁵⁵ – is the shift towards religious or millenarian aims and the consequential proclivity towards mass casualties, often tied into the phenomena of suicide bombers or chemical, biological, radiological and nuclear weapons (CBRN).¹⁵⁶ The assertion that politically motivated terror groups do not espouse violence causing mass casualties is, at best, overly simplistic. The attacks carried out by various ‘Islamist’ terrorists on the World Trade Centre in 1993, the Nairobi embassy in 1998, 9/11, the Madrid and 7/7 bombings all resulted in casualties well above the previous ‘average’ for terrorist attacks.¹⁵⁷ This may reflect the

¹⁵³ Khan, MS, ‘London Bomber: text in full’ <<http://news.bbc.co.uk/1/hi/uk/4206800.stm>> accessed 28th June 2009.

¹⁵⁴ Such difficulties were presumably what prompted the illegal kidnapping of the PIRA member Mullen from Zimbabwe (see *R v Mullen* [2000] QB 520).

¹⁵⁵ To paraphrase PM T. Blair’s statement (Blair, T, ‘Prime Minister’s press conference, 5 August 2005’ <<http://www.number-10.gov.uk/output/Page8041.asp>> accessed 28th May 2009).

¹⁵⁶ See, e.g. Drell, S, Sofaer, A and Wilson, G, *The New Terror* (Hoover Institution Press, California 1999); Laquer, W, *The new terrorism: fanaticism and the arms of mass destruction* (Phoenix, London 2001).

¹⁵⁷ 6 died and over a thousand were injured in the World Trade Centre, 1993 (Burke, *Al-Qaeda: the True Story of Radical Islam* 101); 291 were killed and 5,000 injured in the Nairobi bombing (Tucker ‘What is New About the New Terrorism and How Dangerous is it?’, 6); 3,025 died and hundreds were injured in 9/11 ‘World Marks September 11’ <<http://news.bbc.co.uk/1/hi/world/americas/2250513.stm#image>> accessed 22nd March 2007); 191 were killed and 1,755 injured in Madrid (‘Madrid train attacks’ <<http://news.bbc.co.uk/1/shared/spl/hi/guides/457000/457031/html/default.stm>> accessed

more general trend in international terms whereby terrorist attacks have become less frequent but more violent since the late 1980s.¹⁵⁸ In domestic terms, the Omagh bombing, carried out by the Real IRA, constituted the single largest loss of life during the Northern Ireland Troubles, resulting in 29 dead (plus two unborn children) and about 220 injured.¹⁵⁹ This is less than half as lethal as 7/7, with the casualties being far lower.¹⁶⁰ However, to assess the impact of a terrorist organisation solely in terms of casualties and lethality is overly simplistic; one must also factor in the frequency of the attacks in which it is clear that the 'old' terrorism far outstripped the 'new'.¹⁶¹ It is notable that by 2003, the politically motivated Tamil Tigers, an 'old' terrorist group, had committed more acts of 'suicide terrorism' than any other single group.¹⁶² Nonetheless, the assertion that 'new terrorist' groups aim towards mass casualties, often tied into the possibility of an attack using CBRNs, is a central argument in re-gearing counter-terrorism towards pre-emptive measures and in curtailing – or suspending – human rights. When faced with 'catastrophic' terrorism there is no longer 'an acceptable level of violence'.¹⁶³

1.3.3.1) Risk, prevention and CONTEST

There has always been an element of prevention within counter-terrorist strategies. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism accepted that 'it is undeniable that a successful counter-terrorism strategy includes a preventative dimension'.¹⁶⁴ The fear of mass-casualty attacks has moved this strategy centre stage. This realignment coincides with a broader societal

22nd March 2007); 52 were killed and 784 injured in 7/7 ('Timeline of the 7 July attacks' <<http://news.bbc.co.uk/1/hi/uk/5032756.stm>> accessed 22nd March 2007). For a discussion of the average lethality of terrorist incidents from 1969 to 1999 see Tucker 'What is New About the New Terrorism and How Dangerous is it?', 5-6.

¹⁵⁸ Lederberg, J (ed), *Biological Weapons: Limiting the Threat* (MIT Press, London 2000), 290.

¹⁵⁹ 'Bomb atrocity rocks Northern Ireland' <http://news.bbc.co.uk/1/hi/northern_ireland/151985.stm> accessed 7th March 2007.

¹⁶⁰ See above, footnote 154.

¹⁶¹ For example, the PIRA killed, on average, one British soldier a week during 1972 (Taylor, *Provos: the IRA and Sinn Fein* 109)). During the 1970's on average just over 100 were killed by the PIRA per annum, about 55 were killed per annum during the 1980's, and just over 24 per annum from 1990-98. In total the PIRA killed at least 1,707 in the UK between 1970 and 1998 (McKittrick, D and others, *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles* (Mainstream Publishing, London 2007) table 2).

¹⁶² Pape, R, 'The Strategic Logic of Suicide Terrorism' (2003) 97 *American Political Science Review* 343, 343.

¹⁶³ The phrase is that of the then Northern Ireland Secretary of State, Reginald Maudling, referring to the PIRA.

¹⁶⁴ Schenin 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' [11].

shift towards risk management and avoidance, which has become ubiquitous in contemporary society. This section will introduce risk theory and consider its implications for counter-terrorism.

Although Ewald mused that ‘there is no risk in reality’, the concept of ‘risk’, loosely defined, is pervasive within contemporary society and has been the focus of substantial inter-disciplinary interest.¹⁶⁵ The starting point for delineating these discourses is Beck’s ‘risk society’. One of the progenitors of modern ‘risk studies’ outside economic and mathematical theory, Beck contended that society had experienced a sea change, moving from an industrial to a risk society. He based his thesis upon three ‘pillars’.¹⁶⁶ First, modern risk is no longer bounded by geographical or temporal limits.¹⁶⁷ ‘Islamist’ terrorism exemplifies this: it is a global phenomenon where grievances or instability in, for example, Algeria, Chechnya, Pakistan or Saudi Arabia may find expression through terrorist attacks in European capitals. The initial discourse of the ‘war on terror’, although toned down and more nuanced in recent years, implied a Manichean struggle without end, reinforced by the refutation of any legitimate grievances as an element motivating international terrorists.¹⁶⁸ Second, there is the advent of ‘catastrophic risk’, where the harm cannot be remedied.¹⁶⁹ The ‘new’ terrorism’s apparent tendency towards mass casualty attacks, including the potential for a CBRN attack, combined with the zero-sum approach of suicide bombers fits this mould neatly.¹⁷⁰ Finally, Beck argues that modern risk cannot be managed by traditional insurance models.¹⁷¹ This accords with the British experience in the early 1990s when reinsurers refused to cover the City of London against terrorist attacks, forcing the Government to pass the Reinsurance (Acts of Terrorism) Act 1993, by which it underwrote

¹⁶⁵ Ewald, F, ‘Insurance and Risk’ in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality* (Chicago UP, Chicago 1991) 199.

¹⁶⁶ I adopt Mythen’s terminology and structure (Mythen, G, *Ulrich Beck: A Critical Introduction to the Risk Society* (Pluto, London 2004) 17).

¹⁶⁷ Beck, U, *Risk Society: Towards a New Modernity* (Sage, London 2005) 36-44 and passim.

¹⁶⁸ For instance, the then PM, Tony Blair stated in 2005: ‘the nature of the global threat we face in Britain and round the world is real and existential’, continuing, ‘here were terrorists prepared to bring about Armageddon’ (Blair, T, ‘Speech given by the Prime Minister in Sedgefield, Justifying Military Action in Iraq and Warning of the Continued Threat of Global Terrorism’ *Guardian* (London, 5 March 2004)); the then President George W Bush affirmed that the ‘war on terror’ is ‘not endless’, although he added ‘[w]e do not know the final day of victory’ (Bush, GW, ‘Bush Speech: full text’ (Speech on board the USS Abraham) <<http://news.bbc.co.uk/1/hi/world/americas/2994345.stm>> accessed 19th May 2009).

¹⁶⁹ Beck, *Risk Society: Towards a New Modernity*.

¹⁷⁰ Beck himself originally conceived of events such as global warming and nuclear meltdown, inter alia, as examples of catastrophic risk.

¹⁷¹ Beck, *Risk Society: Towards a New Modernity*.

the risk.¹⁷² The impact of these three 'pillars' undermines the promise of control and gravitates governments away from the provision of 'goods' towards the management or avoidance of 'bads'; essentially: risk management.¹⁷³

Despite the confluences of 'Islamist' terrorism with aspects of Beck's thesis, there are also discontinuities. Mythen and Walklate note, in relation to the unbounding of geographical and temporal risks, that while '[w]e may not be completely surprised if the UK or the USA were subjected to future attacks by Islamic fundamentalist terrorist groups...it may puzzle us if Slovenia were (sic)'.¹⁷⁴ The apparently uninsurable risks posed by 'international terrorism' have been addressed through governmental intervention and some mainstream insurers have entered the field, viewing the risk as worthwhile given the potentially lucrative gains.¹⁷⁵

A more general flaw in Beck's thesis is the lack of deconstruction of the hegemonic discourses propounded by dominant institutions, including the government, policing and security services and media. The quote by Ewald, cited at the beginning of this section, reads in full: 'there is no risk in reality...it all depends on how one analyzes the danger, considers the event'.¹⁷⁶ This emphasises the innately subjective nature of risk. In terms of counter-terrorism the construction is heavily dependent on the adequacy of the data / intelligence on which it is based, which by its nature cannot be all encompassing.¹⁷⁷ The limitations of intelligence have been highlighted by the absence of WMD in Iraq and the 'dodgy dossier'.¹⁷⁸ There is also the example of the attempted car-bombing of Glasgow airport, the perpetrators of which were not on the MI5 database.¹⁷⁹ As O'Malley notes, risk assessments based on incomplete data may perpetuate a vicious circle of probability wherein the assumptions on which the data are based are reinforced because they are tied into the risk analysis.¹⁸⁰

¹⁷² See also, in the USA, the Terrorism Risk Insurance Act 2002.

¹⁷³ Beck, *Risk Society: Towards a New Modernity*.

¹⁷⁴ Mythen, G and Walklate, S, 'Terrorism, Risk and International Security' (2008) 39 *Security Dialogue* 221, 225-6.

¹⁷⁵ O'Malley, P, *Risk, Uncertainty and Government* (Glasshouse Press, London 2004) 10.

¹⁷⁶ Ewald, 'Insurance and Risk' 199.

¹⁷⁷ See Chapter 5.3.

¹⁷⁸ Griggs, I and Braddy, B, "'Dodgy Dossier' was wrong its author says' *Independent* (London, 17 February 2008).

¹⁷⁹ Norton-Taylor, R and Cobain, I, 'Threat Level Lowered as Inquiry Examines Foreign Connection' *Guardian* (London, 5 July 2007).

¹⁸⁰ O'Malley, P, 'Risks, Ethics and Airport Security' (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 414, 414.

Another factor undermining the objectivity of the risk assessment is the role of emotions. Emotions, including fear and anger,¹⁸¹ feed into the construction of the terrorist 'risk' being 'embedded in relations of power' and may be exploited by governments, especially when emotions are running high, for instance following a terrorist attack.¹⁸² Just as in relation to 'ordinary' crime, the fear of crime may bear scant resemblance to the likelihood of crime, so too fear of terrorism may not be commensurate to the probability of a terrorist attack. Sunstein argues that when strong emotions are involved the low-probability of the event is less important to people than the 'badness' of the outcome, resulting in 'probability neglect' which combines with the disproportionate fear displayed in the face of new risks.¹⁸³ The shift towards high-casualty high-impact targets by 'Islamist' terrorists increases the likelihood of 'probability neglect'.¹⁸⁴ The impact of these subjective factors – emotions and the interpretation of limited data/intelligence – means that the calculations of risk are by their nature 'unscientific and value-laden policy choices'.¹⁸⁵

The tendency towards mass casualty attacks has shifted the emphasis in counter-terrorism to risk informed strategies, a major consequence of which is a shift towards prevention. This is epitomised by the application of the precautionary principle. The principle is applied when there is the potential for serious, often irrevocable, harm but there is uncertainty as to whether the outcome is likely or not, requiring that the absence of certainty should not be a reason for inaction.¹⁸⁶ As a legal principle, it was first applied in the field of European law relating to environmental dangers and has also been applied, *inter alia*, in relation to GM foods.¹⁸⁷ There is no suggestion that it has achieved the status of legal principle in relation to counter-terrorism, but it has clearly informed policy and practice. In 2005, in relation to WMD, Iraq and international terrorism the then Prime Minister, Tony Blair stated: 'We

¹⁸¹ Lerner, Jea, 'Effects of Fear and Anger on Perceived Risks of Terrorism: a National Field Experiment' (2003) 14 *Psychological Science* 144; Furedi, F, *Culture of Fear Revisited: Risk-taking and the Morality of Low Expectation* (Continuum, London 2007).

¹⁸² Burkitt, I, 'Powerful Emotions: Power, Government and Opposition in the 'War on Terror'' (2005) 39 *Sociology* 679.

¹⁸³ Sunstein, C, 'Terrorism and Probability Neglect' (2003) 26 *J Risk and Uncertainty* 121.

¹⁸⁴ Tucker 'What is New About the New Terrorism and How Dangerous is it?', 3.

¹⁸⁵ Zedner, L, 'Neither Safe nor Sound? The Perils and Possibilities of Risk' (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 423, 428.

¹⁸⁶ Haggerty, K, 'From Risk to Precaution: The Rationalities of Personal Crime Prevention' in R Ericson and A Doyle (eds) *Risk and Morality* (U Toronto Press, Toronto 2003).

¹⁸⁷ Fisher, E, 'Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community' (2002) 9 *Maastricht JECJ* 7; Anker, H and Grossman, M, 'Authorization of Genetically Modified Organisms: Precaution in US and EC Law' (2009) 4 *EFFLR* 3.

cannot be certain...But do we want to take the risk?'¹⁸⁸ The advent of suicide bombers further encourages this approach as the deterrent effect of criminal sanctions becomes negligible. Section 44 is a clear example of the application of the precautionary principle. Excluding cases based on specific intelligence, the uncertainty as to who poses a risk has reinforced the logic of 'target hardening', itself grounded in the risk-informed tenets of situational criminology,¹⁸⁹ and created a presumption of risk: every person becomes a potential risk until proven otherwise.¹⁹⁰ As such, section 44 is an example of what Walker terms 'all-risks' policing, which occurs when 'the risk calculation shifts from persons to actions and objects' whereby 'the police will treat anyone and everyone as a risk'.¹⁹¹ 'All-risks' policing is a pre-emptive approach, which typically arises when there is insufficient specific intelligence to 'discern friend from foe'.¹⁹²

The fieldwork reveals that section 44 is viewed by the police primarily as a preventative power. Indeed, even approaching the power 'blind' it is evident that a substantial element of its operational objectives will go to 'protect', which emphasises risk management. However, the focus on prevention raises difficulties regarding how to measure adherence to CONTEST's principles: the logic of prevention suggests increasing resources even if the consequences (of the problem or reaction) are unknown. The absence of an event may mean the resources were well placed and did their job or it could be that the event (especially when dealing with low-probability occurrences) would not have come to pass in any case. Similar issues are raised in terms of accountability, where there is an obvious difficulty in ensuring accountability for actions taken in anticipation of future events. Again, the absence of the event may mean the actions were necessary or it may be that the event would not have come pass in any event. These potential deficiencies are aggravated in the field of counter-terrorism by the fact that action is often taken on the basis of closed information. The mere failure of those events transpiring does not necessarily warrant censure, but care must be taken to ensure that decision-makers are held accountable for decisions made when events have, or have not, transpired. There are also tensions between human rights and preventative strategies, which will now be considered.

¹⁸⁸ Blair 'Speech given by the Prime Minister in Sedgefield, Justifying Military Action in Iraq and Warning of the Continued Threat of Global Terrorism'.

¹⁸⁹ See: Clarke, RVG, *Situational Crime Prevention: Successful Case Studies* (2nd edn Harrow and Heston, New York 1997).

¹⁹⁰ MPSSNR01.

¹⁹¹ Walker, C, "'Know thine enemy as Thyself': Discerning Friend from Foe under Anti-Terrorism Laws' (2008) 32 *Melbourne Law Review* 275, 277.

¹⁹² *Ibid.*

1.3.3.2) *Human rights and the 'new terrorism'*

The assertion that human rights are a luxury that one cannot afford while facing 'nihilistic' terrorists whose only aim is to bring on apocalypse is best exemplified by the debates surrounding torture and in particular the 'ticking bomb'. Although the prohibition on torture is not engaged by the routine exercise of section 44, the critique of the thesis that human rights are inappropriate as a normative principle in counter-terrorism will centre around the prohibition on torture as it is a non-derogable and non-qualified right; if it is permissible to violate this right then derogable and qualified rights must surely also be open to compromise or contravention. This will be followed by an overview of the rights relevant to section 44 and possible grounds for their qualification, which are discussed in-depth in Chapters 4 – 6.

An increasing number of academics maintain that torture is justified, or even required, in certain 'extraordinary' circumstances.¹⁹³ The proposition is underpinned by a Benthamic act-utilitarian calculus: the harm done to the person who is tortured is outweighed by the consequential prevention of harm to a greater number of persons. Typically the arguments are framed in terms of 'ticking bomb' scenarios, when the outcome would be of 'catastrophic proportions'.¹⁹⁴ The underlying justification of torturing a suspect to locate the 'ticking bomb' is one of necessity. However, to underpin a general exception by using necessity is contradictory: necessity is pleaded successfully as a defence because a given situation is 'unique, isolated and extraordinary'.¹⁹⁵ Nonetheless, the option to plead this defence in 'ticking bomb' cases has been left open by the Israeli Supreme Court and, although nominally refuting a defence of necessity in relation to torture in what was thought to be a life or death situation,¹⁹⁶ the German Constitutional Court withheld punishment in that case, thus providing a similar outcome in practice if not in theory.¹⁹⁷ However, when the claimant who had been threatened with torture in the German case appealed to the ECtHR, the court held that the police had violated his rights under Article 3, reiterating that

¹⁹³ E.g. Gross, O, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience' (2004) 88 Minnesota LR 1481; Dershowitz, A, *Why Terrorism Works* (YUP, London 2002); Bagaric, M and Clarke, J, 'Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable' (2005) 39 USF L Rev 581.

¹⁹⁴ Gross 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience'. Dershowitz, *Why Terrorism Works*, Chapter 4.

¹⁹⁵ Kremnitzer, M, 'The Landau Commission report: was the security service subordinated to the law, or the law to the "needs" of the security service?' (1989) 24 ILR 216, 237. See also Morgan, R, 'The utilitarian justification of torture: denial, desert and disinformation' (2000) 2 Punishment & Society 181.

¹⁹⁶ The case concerned a kidnapped child whom the police believed to be alive at the time, although he was in fact dead.

¹⁹⁷ See: Jessberger, F, 'Bad Torture-Good Torture? What International Criminal Lawyers Learn from the Recent Trial of Police Officers in Germany' (2005) 3 Journal of International Criminal Justice 1059.

‘the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue’.¹⁹⁸

The apparent necessity in the ‘ticking bomb’ scenario rests on an ‘intellectual fraud’:¹⁹⁹ that infallible intelligence exists that the suspect is guilty, that there is a bomb and that it will kill many people. History has proven again and again that seemingly irrefutable evidence is often incorrect;²⁰⁰ the high pressure scenario of an imminent ‘ticking bomb’ is likely to increase rather than reduce this possibility. A more realistic scenario would entail a suspect who is highly likely to, rather than certainly does, have knowledge of a ‘ticking bomb’. This is far more cloudy moral ground where the question becomes whether it is legitimate to torture someone suspected of being guilty (thus possibly innocent) to protect the lives of others. This risks descending into quantitative madness: what percentage of certainty is needed to torture someone? How many people need be at risk? If the justification is framed in terms of necessity then why not torture the suspect’s family? This may be a more effective way of gaining knowledge and they are no less innocent than those who are incorrectly presumed to be guilty and tortured.²⁰¹ There are also potential problems with the assertion of the ‘innocents’ to be killed – is this to be judged objectively? If so, how?²⁰² Another objection concerns the effectiveness of torture in obtaining accurate information. The unreliability of the information thus gained was cited by Lords Bingham and Carswell in their majority decisions in *A v Secretary of State for the Home Department*, which upheld the exclusionary rule against information procured under torture.²⁰³ However, it must be acknowledged that sometimes torture will elicit useful and accurate information.²⁰⁴

The broader impact on counter-terrorism from the publicising of torture and degradation, as occurred, for example, in Abu Ghraib prison, is more difficult to quantify but surely is likely

¹⁹⁸ *Gäfgen v Germany* (2011) 52 EHRR 1 app.no.22978/05 [107]

¹⁹⁹ Luban, D, 'Liberalism, torture and the ticking bomb' (2005) 91 Virginia LR 1425, 1452.

²⁰⁰ The various miscarriages of justice in the UK centred around suspected terrorists are obvious examples (see Walker, C. & Starmer, K. (eds) *Miscarriages of justice: a review of justice in error* (Blackstone, London 1999).

²⁰¹ Luban 'Liberalism, torture and the ticking bomb', 1444.

²⁰² Gross 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience', 1498.

²⁰³ *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, paras. 11, 17, 28, 39, 52 (Lord Bingham) and 147 (Lord Carswell).

²⁰⁴ Rumney, P, 'The Effectiveness of Coercive Interrogation: Scholarly and judicial responses' (2005) 44 Crime, Law & Social Change 465. See also Lord Roger’s comments in *A v Secretary of State for the Home Department* [130].

also to act as a recruiting call for terrorists.²⁰⁵ Torture, whether carried out on the ‘guilty’ or ‘innocent’, is likely to encourage that person’s radicalization and militancy.²⁰⁶ The use of torture may even result in a pyrrhic victory, as occurred in the Algerian War of Independence where, when French military victory was within reach, it became politically impossible to impose because of domestic opposition which was, to a degree, galvanised around opposition to the use of torture by the French army.²⁰⁷ There are too many grey areas, too many unproven presumptions and, potentially, virulent consequences which would undermine counter-terrorist strategies to countenance torture, in any circumstances, whether sanctioned ex ante or ex post facto, judicially or by the executive. The fact that, in addition to internal incoherence, the arguments for ‘torture’ are contrary to the overall counter-terrorist strategies emphasises that there is no trade-off between human rights and security. Rather, as acknowledged in CONTEST, human rights must be at the centre of counter-terrorist strategies.

All human rights, except the prohibitions on torture, slavery and punishment without law, may be derogated from or are subject to ‘internal limitations’, in the form of qualifying (sub-) paragraphs.²⁰⁸ In relation to the ECHR articles relevant to this research, all are potentially open to derogation under Article 15. There are limitations in relation to derogation from Article 6 as there must be continuing availability of judicial review for all non-derogated rights.²⁰⁹ In terms of internal limitations, Article 5 is subject to the exceptions in the sub-paragraphs in Article 5(1). Articles 8, 10 and 11 have ‘qualifying paragraphs’ whereby an interference with those rights may be justified if it is ‘in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or for the prevention of crime, or for the protection of the rights and freedoms of others’. Counter-terrorist related activities are likely to engage the national security and public safety aspects of these paragraphs, in addition to the prevention of crime and the protection of the rights (typically to life) and freedoms of others. Claims under these rights are likely to stand or fall depending on whether the procedure can be proven to be in accordance with the law and necessary in a democratic society. There are no ‘internal

²⁰⁵ On Abu Ghraib see Hersh, S, *Chain of command: the road from 9/11 to Abu Ghraib* (Allen Lane, London 2004); Greenberg, K. & Dratel, J. *The torture papers: the road to Abu Ghraib* (CUP, Cambridge 2005).

²⁰⁶ Gerges, *The Far Enemy: Why Jihad Went Global*, 9.

²⁰⁷ This is, of course, a hugely simplistic reading of a complicated war, for more see: Horne, A, *A savage war of peace: Algeria 1954-62* (NY Review Books, New York 2006). Henri Alleg’s *La Question* (Alleg, H, *La Question* (Editions de Minuit, Paris 1961)), originally published in 1958 and then banned by the French government brought the use of torture centre stage.

²⁰⁸ ECHR, Article 15; ICCPR, Article 4.

²⁰⁹ The prohibition of torture and slavery respectively.

limitations' on Article 14 and the case-law has taken a robust approach, discounting as irrelevant the motivation –including the accuracy or not of the underlying factors – although this right does not 'stand alone' but is parasitic upon another right also being alleged to be violated.²¹⁰ In addition to these self-contained limitations, the application of the margin of appreciation and the domestic principle of deference may exert further, substantial limitations on all of these rights, albeit to a greater or lesser degree. These issues are analysed in depth in Chapters 4-6.

1.4) Research questions and chapter outline

Having outlined and justified the normative principles which frame this research and having explored the concept of terrorism, it is time to turn to the specific research questions of this thesis and to outline its contents in response to those questions. The first part of this thesis, Chapter 2, sets forth the methodology that was employed in relation to the empirical aspects of the thesis.

The second part, Chapter 3, addresses the research question:

- *How did the powers of stop and search develop historically?*

The development of the power to stop and search is analysed, in terms of both 'ordinary' and counter-terrorist powers. The historical review of the 'ordinary' stop and search powers ranges from the vagrancy acts through to the contemporary powers under PACE and the Criminal Justice and Public Order Act 1994 (CJPO), section 60. Counter-terrorist powers are assessed from their origins in Northern Ireland through to the Prevention of Terrorism (Additional Powers) Act 1996. The political, social and historical contextualisation permits an examination of the trends and discontinuities, focusing on the objectives, necessity, limitations and consequences. The conclusions enable a nuanced approach to section 44, whereby the lessons of the past may assist in predicting future impacts and trends.

The third part of the thesis examines section 44 itself. Chapters 4 and 5 address the research questions:

- *How is section 44 used?*
- *How ought section 44 be used?*

Chapter 4 concerns the authorisation process for section 44. It opens by setting police perspectives on the policy objectives of section 44 and how it is used by the MPS and British Transport Police (BTP). It then analyses the legislation and safeguards and limitations placed on the process by TACT and the accompanying regulations before assessing the

²¹⁰ *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2004] UKHL 55.

adherence of the authorisation in terms of the framework principles. Chapter 5 considers the deployment of section 44. It begins with an examination of the legislation, relevant jurisprudence and practice among the MPS and BTP before critiquing the systems of accountability and recommending changes which would ensure compliance with the normative principles framing this thesis.

The penultimate research question asks:

- *How does section 44 impact upon the community?*

This is the subject of Chapter 6. This Chapter draws upon doctrinal studies of discrimination in the criminal justice system, an analysis of the statistics on the use of section 44 and the experiences of the community representatives interviewed to highlight the areas where section 44 appears to impact detrimentally upon sections of the community. Throughout, the normative principles form the framework within which the impact on the community is assessed.

The final research question is addressed in the conclusion:

- *Is it possible to reform section 44 so as to comply with the normative principles?*

This draws upon the previous questions, tying together the usage of the power and the historical difficulties in controlling stop and search to determine whether it is possible to control the discretion under section 44 so as to bring it within the framework principles or whether the problems arise due to flaws inherent in the design of stop and search powers.

1.5) Conclusion

This introduction has outlined the main thesis of this research – that section 44 ought to be contained in clearly defined, proportionate legislation and be authorised and exercised in a manner that is proportionate and in compliance with human rights, ensures accountability and advances the aims of CONTEST. Adherence to these normative principles would mean that this extraordinary power is bounded by common values which would ensure its appropriate usage and minimise the detrimental consequences on the community, even though, as discussed above, these principles operate at times in tension with each other and with some of the strategies underpinning CONTEST. The next chapter explains the methodologies used in this research.

Chapter 2) Methodology

2.1) General methodology

As discussed in Chapter 1, the theoretical framework adopted is shaped by risk theories, bounded by the normative principles which require adherence to human rights, accountability and the CONTEST strategy. This thesis uses mixed methods, combining empirical and doctrinal research to determine not only how section 44 ought to and is perceived to operate but also how it does in fact operate. As such, the research is located within the field of socio-legal studies. This is not to say that the academic discipline of sociology is to be privileged when assessing the use and impact of section 44 or the processes of the law at the expense of consideration of the substantive law; all will be addressed. Rather it is to posit that law is a social, or perhaps more accurately a socio-political, phenomenon that benefits from a systematic, empirically grounded study drawing upon sociological methodology and socio-political theory as well as legal theory and doctrinal methods.¹ In this way the conclusions from the empirical research can inform those from the doctrinal research, strengthening both. This approach is particularly suitable given the interdisciplinary nature of counter-terrorism, which encompasses (at least) political science, sociology and law. To remove counter-terrorist law from its socio-political context would be to weaken the results irrevocably.

This Chapter begins by outlining the approach taken towards the doctrinal research before discussing the general approach taken in relation to the empirical aspects of this research. The sample criteria will then be explained, with details of the groups being included. The specific methodologies to be used when addressing each fieldwork question will be detailed, before concluding with an assessment of issues arising in relation to ethics and risks.

2.2) Doctrinal methods

This thesis draws upon a wide range of documentary sources. Primary sources include domestic, ECtHR and international case-law, legislation, treaties and conventions. A wide range of secondary sources have been examined on the major themes of this thesis, including: counter-terrorism; policing; race and the criminal justice system. These include journals, books, conference papers and official reports, from government or governmental bodies in the UK, ROI and USA, in addition to reports from institutions such as the UN and Council of Europe and from non-governmental organisations such as Liberty and the ACLU. These were accessible online, in the library at the University of Leeds, or through inter-

¹ Cotterrell, R, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171.

library loans. These sources are integrated into the body of this thesis rather than being considered in a separate literature review.

2.3) Empirical methods

The overall approach to the fieldwork questions was qualitative, using semi-structured interviews, with secondary quantitative and doctrinal data also used to provide wider settings. This 'mixed method' approach is appropriate given the socio-legal nature of the research. The paucity of research and data on section 44, with the exception of doctrinal analysis of the case-law and the legal implications of racial profiling, made a qualitative approach particularly suitable as the primary fieldwork methodology as it provided the flexibility needed to respond to the data as it emerged. The need for flexibility dictated that semi-structured interviews would be more appropriate than fully structured interviews. Unstructured interviews were not used as it was necessary to ensure a degree of consistency within and across the sample groups to ensure comparability.² The semi-structured interview also provided a better method for probing depth, nuance and complexity than quantitative methods which compensates for the comparative weakness in terms of lack of breadth.³ This approach is consistent with other research into the use and impact of non-counter terrorist stop and search powers, which have found that semi-structured interviews facilitate people speaking more freely on sensitive issues.⁴ Previous research has found that quantitative surveys of people who had been stopped and searched under 'ordinary' laws have had 'prohibitively low response rates'.⁵

2.4) Sampling criteria

Thirty-eight full length and five 'short' interviews were carried out with interviewees from three sample groups: the police, stakeholders and 'community representatives'. A purposive approach was taken because a randomised sample was neither appropriate to address the fieldwork questions, many of which required particular expertise, nor was it practical, given the restraints on time and resources inherent in a PhD thesis. A case-study approach was taken, which aims to generalise the theories posited rather than generalise to the entire population.⁶ The police were the central sample as they had the expertise to address the questions regarding the authorisation and deployment of section 44. Gate-keepers to the police were approached initially, and once some access was secured a 'snow-balling

² Brewerton, P and Millward, L, *Organizational Research Methods: A Guide for Students and Researchers* (Sage, London 2001) 70.

³ Mason, J, *Qualitative Researching* (2nd edn Sage, London 2002).

⁴ Stone, V and Pettigrew, N, 'The views of the public on stops and searches' (Home Office (PRS 129), London 2000) 3-4. See, e.g. the Police Research Series 127-132.

⁵ *Ibid.*

⁶ Mitchell, T, 'Case and situation analysis' (1983) 31 *Sociological Review* 186, 207.

strategy' was adopted which generated further police, stakeholder and 'community representative' interviewees.⁷

2.4.1) The police

The case-study approach focused on two police forces, the MPS and the BTP.⁸ This methodology is justified for two reasons. First, the PhD is carried out by one researcher over a finite period, which necessitates limiting the fieldwork according to these resources. Second, while each police force will exhibit discrepancies when compared with another, arising from local variances and the fact that each force is independent, stop and search powers have been increasingly standardised.

The MPS were selected as their usage accounts for 67% of the total usage of section 44 among the Home Office forces in England and Wales, with 194,984 stops and searches having been carried out between 2001 and 2007/08.⁹ The MPS had a rolling authorisation in place for section 44 from February 2001 to July 2009.¹⁰ The force area is a high risk one that has already suffered an international terrorist attack, as well as its long history of attacks from Irish Republican terrorist groups. It is also the most substantial urban centre in the UK in terms of geography and demographics, having a population of 7,172,091 people and a force of 31,128 full time officers.¹¹

In addition, the use of section 44 by the MPS has been the subject of criticism, legal action and reform. The MPS Commissioner was the defendant in the *Gillan* case.¹² In reaction to criticism by Lord Carlile and new National Police Improvement Agency (NPIA) guidelines, partially prompted by the *Gillan* case, the MPS ran a pilot scheme for a 'patchwork' authorisation in four boroughs in the summer of 2009, which was rolled out force wide in

⁷ Bryman, A, *Social research methods* (OUP, Oxford 2008) 184-5.

⁸ Mitchell 'Case and situation analysis' 207.

⁹ Home Office 'Statistics on Race and the Criminal Justice System: 2002' (Home Office, London 2003); Home Office 'Statistics on Race and the Criminal Justice System - 2003' (Home Office, London 2004); Home Office 'Statistics on Race and the Criminal Justice System - 2004' (Home Office, London 2005); Home Office 'Statistics on Race and the Criminal Justice System - 2005' (Home Office, London 2006); Ministry of Justice 'Statistics on Race and the Criminal Justice System - 2006' (Ministry of Justice, London 2007); Ministry of Justice 'Statistics on Race and the Criminal Justice System 2006/07' (Ministry of Justice, London 2008); Ministry of Justice 'Statistics on Race and the Criminal Justice System - 2007/08' (Ministry of Justice, London 2009).

¹⁰ MPS 'MPS Use of section 44 TACT in London - 2009 Update' (MPS, London 2009).

¹¹ Office for National Statistics 'Census 2001: key statistics for local authorities in England and Wales' (HMSO, London 2003) 72. Note that this includes the population of the City of London, which has its own police force. Home Office 'Police Service Strength' (Home Office (Statistical Bulletin 13/07), London 2007) 14.

¹² R (Gillan) v Commissioner of Police of the Metropolis [2006] UKHL 12..

July 2009.¹³ The fieldwork was carried shortly after the pilot scheme and could therefore inquire into officers' opinions of the two approaches. The borough in which the fieldwork was carried out will not be named and full citations will not be given for borough specific publications in order to ensure anonymity. The particular borough was chosen because it has high risk areas, it is one where section 44 is likely to be used, and it has a highly diverse population, which enables testing of the thesis that section 44 disproportionately targets ethnic minorities.

The British Transport Police was chosen as the second force for a number of reasons. They are the second 'heaviest' users of section 44, having carried out some 198,000 section 44 stops and searches between 2005/06 and 2008/09.¹⁴ They are significant in terms of the CONTEST strategy, railway lines being a part of the critical national infrastructure (CNI) and one that has been targeted, on 7/7 and previously, by the PIRA. The BTP also responded to the new NPIA guidelines and to the general criticism about the use of section 44 by introducing a new approach in deploying section 44. The fieldwork was again carried out shortly after the new approach was introduced and could therefore use the semi-structured interviews to probe officers' opinions of the two approaches. The sample included officers from two different force-areas within the BTP, which will not be named. Due to the nature of the BTP, the officers worked in both rural and metropolitan areas, although most of their work was focused on the latter.

The police samples were drawn from across the ranks and experience levels. This is in keeping with previous research, the range ensuring a cross-section of the police.¹⁵ In the MPS borough and in one of the BTP areas, the officers interviewed were part of dedicated teams who routinely carried out section 44 stops. There were a total of eleven MPS officers interviewed, comprising three sergeants, two police constables and two PCSOs from the borough, in addition to a detective inspector and an inspector involved in section 44 / CTU operations centrally, and two officers involved in the preparation of the section 44 authorisations. A program manager for the data-quality programme in the MPS was also interviewed. There were twelve BTP officers interviewed, comprising three sergeants, six police constables and one PCSO from the two police areas and an Assistant Chief Constable and a superintendent. There was only one PCSO interviewed within the BTP sample as they

¹³ MPS, 'MPS Use of section 44 TACT in London - 2009 Update'.

¹⁴ BTP 'Annual Report: 2005-06' (BTP, 2006); BTP 'Annual Report: 2006-07' (BTP, 2007); BTP 'Annual Report: 2007-08' (BTP, 2008); BTP 'Annual Report: 2008-09' (BTP, 2009).

¹⁵ Willis, C, 'The use, effectiveness and impact of police stop and search powers' (Home Office (RPU 15), London 1983); Quinton, P, Bland, N and Miller, J, 'Police Stops, Decision-making and Practice' (Home Office (PRS 130), London 2000).

were deployed in relation to section 44 in only one of the areas. A group of BTP officers was observed for an afternoon while exercising section 44.

In the following chapters the police interviews are cited by reference to their force (MPS/BTP) and whether they are 'senior' (SNR) or 'front-line' (FL) officers and a randomly assigned number (e.g. MPSSNR05). To ensure anonymity the gender of the interviewees may be changed. Officers ranked sergeant or over or who are involved in the authorisation process are categorised as senior officers, although some of the sergeants also carried out section 44s. The MPS data quality manager is cited as 'MPSDQ'.

2.4.2) Stakeholders

The stakeholder sample was purposively selected as being non-police officers who were professionally engaged with section 44 and could address, from their professional viewpoint, one or more of the field-work questions. Five people were interviewed in this category: Lord Carlile, the Government's Independent Reviewer of Counter-terrorist legislation; Mike Franklin, who is the Independent Police Complaints Commission (IPCC) chair for London and the South East, with responsibility for stop and search; a member of the Association of Police Authorities; a senior professional member of a Police Authority (PA) and a civil servant who worked with the Ministry of Defence in relation to their Police Committee, which performs a similar function to a PA. Members of Police Authorities also feature in the 'community' sample. However, the preceding members are included in the stakeholder category as they are employed full-time by the APA and a PA respectively rather than being 'community' members. Lord Carlile and Mike Franklin will be cited by name, the Ministry of Defence Police Committee interviewee will be cited as 'MDPC', while the others will be referred to as 'PA01' and 'PA02'.

2.4.3) Community sample

A purposive approach was again adopted for the 'community' representatives. There were several reasons for this approach which are specific to this sample group. First, the 'professional' sample was larger than originally anticipated because access was forthcoming and therefore took more time and also provided sufficient new material to ensure originality. Second, all but two of the 'community' interviewees were contacted through snow-balling from police interviewees. Attempts were made to gain access beyond police contacts, through contacts made personally at conferences and other events and through 'cold calling' relevant community organisations, local politicians etc. Virtually all these attempts failed. This is likely to be in part due to the research saturation of some of these communities who have, since, since 9/11, been the subject of various studies. Third, it would not have been possible to use a probability sample that claimed to represent the impact of section 44 on 'communities' in a broad sense within this thesis in terms of time or word limits. While the

impact on the 'Muslim community' is the focus of much of the criticism regarding the exercise of section 44, the fieldwork revealed at least three additional 'communities' or groups who perceive themselves to be discriminated against through the exercise of section 44. It seems highly likely that other 'communities', such as 'Black' youths, also feel disproportionately targeted by the power. To research the impact of section 44 on 'Muslim communities' alone is a task sufficient for a PhD in its own right, requiring interviews with members of the various sub-groups among 'British Muslims'. Finally, and following from the last point, there is a considerable and growing body of published secondary literature dealing with the impact of anti-terrorists laws on communities, in particular on Muslims. The Home Office report, 'What perceptions do the UK public have concerning the impact of counter-terrorist legislation implemented since 2000?', surveyed much of this literature and found that only a small amount adopted sufficiently rigorous methods to be classed as 'high quality research'.¹⁶ Many of these outputs had greater resources in terms of time, money and personnel. It would not have been possible to meaningfully add to this body of research unless the community impact of section 44 was the sole focus of this PhD.

Since it was not possible to accurately reflect the multiple 'communities' within each police force, the sample consists of 'community representatives'. Of the eight full length interview, six were or had until recently been community representatives on police-community forums, who were contacted through snow-balling from police interviewees. Two others were persons who had publicly criticised the exercise of section 44 in relation to specific groups, through the media and in submissions to a Government Committee. These were contacted directly. Of the former, one had until recently been a member of the Metropolitan Police Authority (MPA), three were involved in MPS/community forums; and, two were involved in BTP/community forums at a national level. In addition to representing the 'community' generally, one of the interviewees spoke primarily for 'business', another was a Pakistani Muslim and particularly interested in Pakistani and Muslim police-community relations, while a third was involved in issues between the police and the LGBT communities. This sample is not and does not claim to be indicative of the 'public', but in conjunction with doctrinal analysis the sample serves to highlight areas of concern.

In addition to these long interviews, short interviews were carried out with five interviewees. These occurred during an observation of one of the BTP forces exercising section 44. After stopping the person under section 44 the officer asked whether he or she would be interested

¹⁶ Home Office 'What perceptions do the UK public have concerning the impact of counter-terrorist legislation implemented since 2000?' (Home Office (Occasional Paper 88), London 2010).

in participating in research on section 44 and handed him or her a piece of paper which briefly outlined the research.¹⁷

The long interviews will be cited in the following Chapters as ‘COMM’ with randomly assigned letters (e.g. COMMB). The short interviews will be cited as ‘COMMS’ with randomly assigned numbers prefaced by ‘S’ (e.g. COMMS3). To ensure anonymity the gender of the interviewees may be changed.

2.4.4) Summary of sample groups

The table below summarises the interviewees by sample group.

Table 2.1: Summary of interviewees

Category	Sub-categories	Label	Number of Interviewees
Police	MPS: front-line officers	MPSFL (and randomly assigned number)	7
	MPS: senior officers	MPSSNR (and randomly assigned number)	4
	MPS: data quality manager	DQM	1
	BTP: front-line officers	BTPFL (and randomly assigned number)	7
	BTP: senior officers	BTPSNR (and randomly assigned number)	5
Stakeholders		PA01; PA02; MDPC; Lord Carlile; Mike Franklin	5
Community Representatives	Long interviews	COMM (and randomly assigned letter)	8
	Short interviews	COMMS (and randomly assigned number)	5

2.4.5) Interview Schedule

The interview schedule for each sample, with separate ones for senior and front-line officers, are provided in Appendix A. All interviewees were given the interview schedule beforehand, with the proviso that it was only a guide and some questions might be skipped and others added. This was done to facilitate access. Some of the interviewees went over

¹⁷ See Appendix A.

the guide before the interview and prepared short notes. This provided interesting responses. For instance, one front-line officer went over CONTEST and the HRA; while this preparation did not limit the scope of the discussion it provided an interesting context as he had recently spent a half hour or so considering the issues around section 44. There was no opportunity to do a pilot interview, but the semi-structured format allowed the interviews to develop 'on-the-spot' and the schedules were modified after the first few interviews. This is in keeping with a grounded theory approach which utilises open coding, building a theory around the data after it has been collected and coded.¹⁸ The schedule for the Data Quality Manager, for example, focused on stop forms, while the actual interview focused more on the importance of data quality to intelligence. The 'headline' questions were asked in all interviews, but not necessarily in the same order, nor were the same 'sub-questions' asked of all interviewees. Rather the responses of the interviewees dictated the time spent on particular themes. This reflexive approach to interviewing is possible because of the semi-structured approach and enabled far greater depth within the interviews and for the particular experiences and expertise of the interviewees to come to the fore.

All interviews started with an explanation of the thesis and what would be done with the material gathered and then a consent form was signed, as is discussed below. This was followed by some biographical and general questions as to the purpose of section 44 and how it fits into CONTEST. The next sections varied depending on the sample group and the research questions that they addressed. Thus, the schedule for front-line officers focused on the deployment of section 44, while the schedule for senior officers included some questions on the deployment but few on the encounter, instead focusing on the authorisation process and how the community was engaged in relation to the power. The full-length community interviews focused on the encounter and police-community accountability, while the short interviews focused solely on the encounter. The stakeholder interviews varied somewhat depending on the expertise of the interviewee. Thus the interview with Mike Franklin focused on the encounter and police-community accountability, in particular complaints, while the interview with Lord Carlile included discussion of the deployment and authorisation of section 44. The schedules for the APA, PA and MDPC interviewees focused on police-community accountability and touched on issues around deployment and the encounter. The DQM interview was the least structured of the interviews as least was known about the subject before the interview. The schedule included questions around stop forms, PDAs and general data-quality.

2.4.6) Analysis

All interviews were recorded on a digital voice recorder and transcribed. The transcripts

¹⁸ Glaser, B and Strauss, A, *The discovery of grounded theory: strategies for qualitative research* (Aldine Publishing, New York 1967).

were open coded using NVivo 7.¹⁹ A grounded theory approach was taken in relation to the analysis of the fieldwork data, in general and specifically in relation to the analysis in NVivo, using an iterative approach whereby the data from the interviews was analysed and fed back into the later interviews.²⁰ For example, the ‘community representative’ interviews led to new codes and the police interviews were then re-read and re-coded to include these. The use of coding allows all information under that heading to be retrieved easily so that the responses from the various interviewees could be compared and assisted in ensuring rigorous analysis of the data.²¹ This method was necessary to ensure that no data was overlooked, given the number of interviews and the substantial transcripts. In addition, the use of tree-nodes underlined the key themes as they emerged. A node in Nvivo is the equivalent of a code or topic heading. A tree-node is one which can be organised into a hierarchy, as opposed to a free node which is unconnected to the other nodes. In NVivo tree-nodes are divided into parent and child nodes, corresponding to ‘topic’ and ‘sub-topic’. A sample of the codes used is produced in Appendix A.

2.5) Quantitative Sources

Two main quantitative sources are used in this thesis relating to the exercise of section 44. The first is the Statistics on Race and the Criminal Justice System, produced under the Criminal Justice Act 1991, section 95 (Section 95 statistics).²² These record the number of section 44 stops carried out per Home Office police force, in England and Wales, broken down by ethnicity. The ‘hit rate’, that is the number of stops and searches which result in an arrest, are also recorded in terms of those resulting in arrests for terrorist related offences and non-terrorist related offences. The second major source is the MPS’ borough stop data, published since November 2008, which breaks down the number of section 44 stops by ethnicity, gender and age.

These statistics provide important data on the usage of section 44. However, as discussed in more detail in Chapters 3 and 6, there are perennial difficulties in drawing firm conclusions relying solely on such statistics. One issue is the under-reporting of stops by police, which

¹⁹ Strauss, A and Corbin, J, *Basics of qualitative research: techniques and procedures for developing grounded theory* (Sage, London 1990) 61.

²⁰ Glaser and Strauss, *The discovery of grounded theory: strategies for qualitative research*.

²¹ Silverman, D, *Doing Qualitative Research* (3rd edn Sage, London 2010) 255-6.

²² Home Office, ‘Statistics on Race and the Criminal Justice System: 2002’; Home Office, ‘Statistics on Race and the Criminal Justice System - 2003’; Home Office, ‘Statistics on Race and the Criminal Justice System - 2004’; Home Office, ‘Statistics on Race and the Criminal Justice System - 2005’; Ministry of Justice, ‘Statistics on Race and the Criminal Justice System - 2006’; Ministry of Justice, ‘Statistics on Race and the Criminal Justice System 2006/07’; Ministry of Justice, ‘Statistics on Race and the Criminal Justice System - 2007/08’.

has been identified in relation to the reporting of 'ordinary' stop and search.²³ Observational methods could identify whether under-reporting occurs in relation to section 44. This would require more than one researcher observing a force over extended periods of time and was not feasible for this thesis. The observational work that was carried out with the BTP was not of a sufficient scale to determine whether there was under-reporting or not. However, the interviews provided an opportunity to probe the issue, with the police and 'community' samples.

Difficulties also arise around the issue of the disproportionate use of section 44 against particular 'communities'. Both data sets reveal that 'Black' and 'Asian' people are stopped more often per head of population than 'white' people. However, this bare data broken down by crude ethnic labels does little to address the question of whether particular 'communities' are targeted, be they communities which transverse ethnicities, such as Muslims, or which are a sub-group of one ethnicity, such as Pakistanis. In addition, disproportionality is identified by comparing the proportion of stops of each ethnicity to the overall population, based on the last census which was out of date at the time of writing. If minority ethnic communities are underrepresented in comparison to the census then any disproportionality in the statistics will be exaggerated, and vice versa.²⁴ Another issue is whether disproportionality should be judged against the 'available' or 'resident' population.²⁵ Equally contested is what significance can be placed on the 'hit rate' and whether statistical analysis based on the 'hit rate', such as the 'outcome test', discussed further in Chapter 6, can adduce the existence, or not, of discriminatory behaviour.²⁶ Doctrinal analysis of these difficulties will contextualise the use of the statistical sources. All these issues are discussed in depth in Chapters 3 and 6.

²³ N Bland et al. 'Upping the PACE? An evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches' (Home Office (PRS 128), London 2000).

²⁴ Delsol, R and Shiner, M, 'Regulating stop and search: a challenge for police and community relations in England and Wales' (2006) 14 *Critical Criminology* 241, 249.

²⁵ FitzGerald, M and Sibbitt, R, 'Ethnic monitoring in police forces: a beginning' (Home Office (HORS 173), London 1997); Miller, J, 'Profiling populations available for stops and searches' (Home Office (PRS 131), London 2000).

²⁶ Ayres, I, 'Outcome tests of racial disparities in police practices' (2002) 4 *Justice Research and Policy* 132; N Persico and PE Todd, 'The Hit Rates Test for Racial Bias in Motor-Vehicle Searches' (2008) 25 *Justice Quarterly* 37; c.f. Engel, R, 'A Critique of the "Outcome Test" in Racial Profiling Research' (2008) 1 *Justice Quarterly* 25; Engel, R and Tillyer, R, 'Searching for Equilibrium: The Tenuous Nature of the Outcome Test' (2008) 25 *Justice Quarterly* 54; Engel, R, Calnon, J and Bernard, T, 'Theory and racial profiling: shortcomings and future directions in research' (2002) 19 *Justice Quarterly* 249; Anwar, S and Fang, H, 'An alternative test of racial prejudice in motor vehicle searches: theory and evidence' (2006) 96 *The American Economic Review* 127.

2.6) Ethics

Ethical concerns in socio-legal research have been underlined by the introduction of the Human Rights Act 1998 and the Data Protection Act 1998.²⁷ Although this research touches on sensitive areas such as terrorism, the use of counter-terrorism powers, police / community relations and actual or perceived disproportionality, the fieldwork does not raise ethical concerns over and above those normally occurring with fieldwork. All the fieldwork was conducted in adherence to the British Society of Criminology's code of ethics and the research was approved by the Research Ethics Review process required by the Faculty of Education, Social Science and Law. The key ethical concerns are: informed consent; data-protection and confidentiality; potential risks to the participants and/or the interviewer. These will be considered in turn.

Informed consent is the foundation of an ethical approach to field-work. All the full-length interviewees were competent adults who were in a position to give consent. One of the interviewees for the 'short' interviews was a sixteen year old and particular care was taken to explain the thesis and ensure informed consent. To ensure that fully informed consent was obtained the participants were provided in advance with an abbreviated methodology and outline of the research, as well as the interview schedule.²⁸ At the beginning of the interview the nature of the research, the research questions and the plans for dissemination were outlined to ensure that the participants had full and open information on all aspects of the work.²⁹ Interviewees were asked permission for the interviews to be recorded and were reminded that their involvement was on a strictly voluntary basis and that they could rescind their consent at any stage during the interview and were not obliged to answer any questions. Each interviewee then read and signed the consent form, which is reproduced in Appendix A.

In relation to data-protection and confidentiality, the research adheres to the data protection principles set forth in the Data Protection Act 1998. All personal data was kept in a secure location, separate from the transcripts and recordings of the interviews, with password protection, where relevant, to guard against accidental loss or destruction of, or damage to the data.³⁰ The transcripts and recordings were also secured with password protection and kept in a secure location. The individual participants in the police and community groups have been accorded anonymity, being referred to by the abbreviations detailed above. It would be difficult to discuss sensibly the findings of the fieldwork without acknowledging

²⁷ Noaks, L and Wincup, E, *Criminological research: understanding qualitative methods* (London, Sage 2004).

²⁸ See Appendix A.

²⁹ Principle 2 (Data Protection Act 1998 Schedule 1, part I, paragraph 2).

³⁰ Principle 7 (Data Protection Act 1998 Schedule 1, part I, paragraph 7).

the particular circumstances which exist in the two police forces. Therefore the MPS and BTP have been identified, although the borough and force areas which are the subject of the fieldwork have been kept anonymous. Lord Carlile and Mike Franklin were named as their comments must be understood in the light of their professional roles. Both consented to being named in the research. The other members of the stakeholders group were interviewed due to their professional interest in section 44 and were therefore identified by organisation. All participants will be offered a copy of the completed research or a summary thereof. All data and records will be destroyed after the completion of this PhD.

Despite the sensitive nature of the topic under research, there were no additional risks over and above those normally occurring with fieldwork. As noted already, all the full-length interviews were with competent adults who gave their informed consent to participate. There are no concerns in this research regarding full disclosure of the object of the research and no deception or monetary inducements were used.³¹ The interviews were carried out mainly at the interviewee's place of work or at the University of Leeds, with two interviews carried out at the interviewees' home. To ensure the interviewer's safety, for all interviews carried out off campus another individual was informed of the location of the interview and expected time of return and was called when the interview was concluded.

2.7) Conclusion

The fieldwork methodology is informed by the general methodology and location of the work within socio-legal studies, primarily using the qualitative methods of semi-structured interviews. Although this sacrifices breadth it has been argued that the added depth compensates for this and that in addition the novel nature of this research, and its use of grounded theory requires the flexibility inherent in the approach. This chapter has outlined the rationale behind the methodological choices and their weaknesses and strengths, arguing that where the weaknesses cannot be avoided awareness of them will ensure that the data is used in an appropriate manner and that on the whole the strengths outweigh the weaknesses.

³¹ Punch, M, 'Politics and ethics in qualitative research' in N Denzin and Y Lincoln (eds) *Handbook of qualitative research* (Sage, London 1994).

Chapter 3) The History of Stop and Search

This Chapter charts the legal development of the power to stop and search, contemporarily scattered across nearly thirty different statutes, contextualising the powers historically, socially and politically.¹ In doing so it addresses the first research question: how did the powers of stop and search develop historically? By examining these powers as they existed historically it is possible, aided by hindsight, to draw important conclusions regarding their necessity, limitations and consequences, both beneficial and detrimental. These lessons can then be applied when analysing section 44.

The Chapter begins with the non-counter terrorist powers, detailing their evolution from the Vagrancy Acts through to PACE, and their various contemporary manifestations. The subsequent section considers counter-terrorist-powers of stop and search, from the Special Powers Acts through to the Prevention of Terrorism Acts. This division reflects the differing motivations and purposes of the powers. The analysis will focus on the extent and usage of these powers, their evolution, the nominal reasons behind them, the motivations determinable from the patterns of usage and their impact upon the targeted communities.

3.1) Stop and Search pre-PACE

The Vagrancy Act 1824, section 4, is regarded as one of two predecessors to the post-PACE stop and search powers, the other being the Metropolitan Police Act 1839, section 66. This section charts the historical development of the vagrancy statutes, from the Statute of Labourers 1349 to the Vagrancy Act 1824, highlighting the changes in focus over the centuries. The powers are then assessed in terms of their legality, focusing on section 4, before considering the impact of the discriminatory exercise of section 4 and section 66 in the late 1970s and early 1980s and how the power to stop and search was reformed under the Royal Commission for Criminal Procedure (RCCP).

¹ See table 3.1, below at 3.4.

It must be emphasised at the outset that the powers under the Vagrancy Acts are not stop and search powers but powers to arrest, with some ancillary stop and search powers.² Analysis of these powers are pertinent for two reasons. First, section 4, specifically the 'sus' law component, is commonly cited as progenitor of post-PACE stop and search powers and has been compared with TACT, section 44.³ This may be attributed mainly to the confluence among sections of the public between 'street' police powers, such as the Metropolitan Act 1839, section 66, and 'sus' and in part to its (illegal) use as a de facto stop and search power.⁴ This public perception arguably continues today, as evidenced by the convergence of 'sus' and stop and search in the writings of commentators,⁵ which makes it extremely difficult to disentangle the use and impact of 'sus' from that of section 66 and similar stop and search powers. It is notable that section 4 continues to be used as a comparator against stop and search powers. For example, Fraser Sampson of the West Yorkshire APA, stated that TACT, section 44 'is plainly not a sort of 21st century 'sus' law'.⁶ The second reason for the relevance of 'sus' to this thesis is that the use of 'sus' to 'control the streets' bears close resemblance to aspects of post-PACE stop and search powers.⁷ Both PACE, section 1 and 'sus' are 'street powers', which, as noted by Demcuth, require 'the exercise of an officer's discretion in assessing a person's motive or intent...; both have been put forward

² For example, the Vagrancy Act 1824, section 8 permitted a Justice of the Peace to search any person convicted of an offence under sections 3 – 4 or their property.

³ Walker, C, 'Stop and Search' [2005] CrimLR 414, 418; Bowling, B and Phillips, C, *Racism, crime and justice* (Longman, Harlow 2002) 139; Smith, R, 'Rights & wrongs: the future of policing?' (2008) LS Gaz 11; Sampson, F, 'Powers of scrutiny' [2009] Police Professional 16; Edwards, R, 'Stop and search, terrorism and the human rights deficit' (2008) 37 Common Law World Review 211; Brogden, A, "Sus' is dead: but what about 'Sas'?" (1981) IX New Community 44.

⁴ Williams, K and Ryan, C, 'Police Discretion' [1986] PL 285, 290; [8].

⁵ See above, footnote 3.

⁶ Sampson 'Powers of scrutiny' 17.

⁷ Demuth, C, "Sus': a report on the Vagrancy Act 1824' (Runnymede Trust, London 1978) 51.

by the police as important for the prevention and detection of offences...; and both have been identified as a source of friction between the community and its police officers'.⁸

3.1.1) Rogues and vagabonds

The first vagrancy statute, the Statute of Labourers 1349, prohibited begging and required all able bodied persons to work, on pain of imprisonment.⁹ This narrow focus on vagrants ('destitute wanderer[s]')¹⁰ reflected the anti-migratory policy behind the legislation that aimed to ensure a sufficient supply of cheap labour for the feudal lords, which had never fully recovered from the Crusades and had been severely depleted by the Black Death.¹¹ Sixteenth-century statutes broadened the class to include criminal types, such as counterfeiters and fraudsters.¹² Punishments became more severe, with those for the 'criminal' types exceeding the severity accorded to the merely 'idle'.¹³ This dichotomy between the 'impotent beggar' and the 'sturdy tramp',¹⁴ whereby able-bodied vagrants were viewed as a nuisance or potential criminals and accordingly subjected to more severe punishment was reinforced in 1530 when licences were issued to permit the impotent to beg, although the system was soon superseded by the Poor Law.¹⁵

⁸ Ibid 1-2.

⁹ 35 Ed. I 1307 (c 1).

¹⁰ Working Party on Vagrancy and Street Offences 'Working Party on Vagrancy and Street Offences working paper' (HMSO, London 1974).

¹¹ Foote, C, 'Vagrancy Type Law and Its Administration' (1956) 104 University of Pennsylvania LR 615; Chambliss, W, 'A Sociological Analysis of the Law of Vagrancy' (1964) 12 Social Problems 67, 70. See also *Papachristou v Jacksonville* 405 US 156 (1972), 161.

¹² See 22 Hen. VIII 1530 (c 12), 1 Ed. VI 1547 (c 3), 14 El. 1571 (c 5).

¹³ For example, 22 Hen. VIII. 1530 (c 12) provided that a idler who gave no account of his living be tied cart naked and whipped through the town until bloody while those using 'subtil crafty and unlawful games' were to be whipped for two days then put in the pillory for the third day.

¹⁴ Cunningham, W, *The growth of English commerce and industry during the Early and Middle Ages* (CUP, Cambridge 1915) 408.

¹⁵ 22 Hen. VIII 1531 (c 12).

The Poor Law 1563, placed responsibility for the destitute upon the members of the parish, who supported them through their taxes, in addition to the inter-generational support provided by next-of-kin.¹⁶ It responded in part to the additional burden of the poor upon society that followed the dissolution of the monasteries, which had previously provided relief.¹⁷ The Poor Law emphasised the community relationships, in particular the vertical ones between the labourer or small farmer and the landlord and gentry, which were characterised by paternalism and condescension on the part of landlords and gentry and reciprocated through deference on the part of the small farmers and labourers.¹⁸ These were central to early modern British society.¹⁹ This web of authority and deference was a crucial method of control whereby 'the gentry and the employing farmers held a total control over the life of the labourer and his family', including dictating to a significant degree whether and with what severity the criminal law would be enforced.²⁰

Making the parish responsible for the destitute provided an extra impetus to designate non-local vagrants as, in the terminology of the day, 'strangers' because they placed an added burden upon the finances of the parish.²¹ This division into 'strangers' as opposed to local vagrants reflects the aspects of social control that were central to the later Vagrancy Acts.

¹⁶ Lees, L, *The solidarities of strangers: the English Poor Laws and the people, 1700-1948* (CUP, Cambridge 1998) 169-70.

¹⁷ 27 Hen. VIII 1536 (c28) and 31 Hen. VIII 1539 (c13). Cunningham, *The growth of English commerce and industry during the Early and Middle Ages* 538-9; Ribton-Turner, C, *A history of vagrants and vagrancy and beggars and begging* (Chapman and Hall, London 1887) 84-5.

¹⁸ Hay, D, 'Property, authority and the criminal law' in D Hay and others (eds) *Albion's fatal tree: crime and society in eighteenth-century England* (Penguin, London 1975).

¹⁹ Ibid. I take Giddens' definition of modernity as relating to post-feudal European society (Giddens, A, *Modernity and self-identity: self and society in the late modern age* (Stanford UP, Palo Alto 1991) 14-5).

²⁰ Thompson, E, 'The crime of anonymity' in D Hay and others (eds) *Albion's fatal tree: crime and society in eighteenth-century England* (Penguin, London 1975) 277. On the influence that the gentry and employing farmers held in terms of the implementation of the criminal law see generally Hay, D and others, *Albion's fatal tree: crime and society in eighteenth-century England* (Penguin, London 1975).

²¹ Feldman, D, 'Migrants, immigrants and welfare from the Old Poor Law to the Welfare State' (2003) 13 *Transactions of the RHS* 79, 84. This resulted in, for example, the Vagrancy Act 1782, section 25 permitting the public whipping of any female vagrant who gave birth in a parish to which she did not belong.

Settlement Laws, which allowed parishes to refuse relief to, and in some cases forcibly remove, vagrants to their home parish reinforced the distinction between 'strangers' and local vagrants.²² By 1692 'strangers' were forced to announce their presence in church, with residence, even temporary, only granted if they were deemed to be of 'good character' and could produce a certificate of future support.²³ Due to the fact that, from Elizabethan times, British society was highly mobile, the effects of the Settlement laws on migrants were significant.²⁴

A series of events conflated to increase the pressure on labourers and subsistence farmers in the 18th century, resulting in destitution and mass migration to the burgeoning cities and rupturing the ties of kinship and community. These included the enclosure of land,²⁵ rising grain prices caused by the Napoleonic Wars,²⁶ mechanical advances and the lure of greater wages and opportunities in the cities.²⁷ The ever increasing number of vagrants had to confront the mainstream belief that poverty was indicative of – and resulted from – moral decay.²⁸ Some commentators developed the earlier dichotomy between the 'impotent' poor and 'able-bodied' vagrants, distinguishing between the indigent, who were destitute as a result of their (innate) immorality and idleness, and the 'poor', who were afflicted by external

²² For example, 13 & 14 Charles II 1662 (c12) permitted removal of persons who had lived without legal grounds in a parish for less than forty days. These were eased in the mid-nineteenth century with the Poor Removal Act 1846 providing that those resident in a parish for five years could not be removed. This was reduced to one year by 24 & 25 Victoria 1861 (c 76).

²³ 3 & 4 William and Mary 1692 (c11). Lees, *The solidarities of strangers: the English Poor Laws and the people, 1700-1948* 29, 47-50.

²⁴ Feldman 'Migrants, immigrants and welfare from the Old Poor Law to the Welfare State' 83. Bcicr, A, *Masterless men: the vagrancy problem in England 1560-1640* (Methuen, London 1985) chapter 3.

²⁵ Neeson, J, *Commoners: common right, enclosure and social change in England, 1700-1820* (CUP, Cambridge 1993).

²⁶ Rose, M, *The English Poor Law, 1780-1930* (David & Charles, Newton Abbot 1971) 19.

²⁷ Lees, *The solidarities of strangers: the English Poor Laws and the people, 1700-1948* 86; EP Thompson, *The making of the English working class* (Penguin, Harmondsworth 1981).

²⁸ This was occasionally challenged, see Lees, *The solidarities of strangers: the English Poor Laws and the people, 1700-1948* passim.

occurrences beyond their control.²⁹ The work-less became, in the public mind, the work-shy.³⁰ The belief that the 'idle' poor were merely a step – if that – away from succumbing to criminality became increasingly common.³¹ Correspondingly, the policy focus behind the vagrancy laws had, by this stage, moved from the provisions of cheap labour to the protection of goods, reflecting Britain's predominantly mercantile society.³² This is evident in the alteration of the Poor Law's focus from domiciliary support or temporary lodgings to the introduction of work based relief, which forbade the provision of relief to able-bodied men outside the workhouse except in exchange for work.³³ The total effect was to shunt even the local destitute towards the edge of society, where the vagrant 'strangers' had already been confined.

3.1.2) 'Sus' and the Metropolitan Police Act 1839, section 66

These public perceptions regarding the vagrants and able-bodied poor are reflected in criminalisation of sub-criminal behaviour in the Vagrancy Act 1824. The Act repealed all earlier vagrancy statutes, aiming to simplify the law which by then had spread across twenty-seven statutes.³⁴ Section 4 was a mishmash of various types of offences including the traditional vagrancy offences, offences against the Poor Law, offences against public decency and morality, and the infamous offence whereby a 'reputed thief' or 'suspected person' loitering with intent to commit a felony in a public place could be arrested without warrant. This latter offence gave section 4 its colloquial name: the 'sus' law, and gained particular notoriety from the 1960s amid increasingly fraught police-community relations.

²⁹ Colquhoun, P, *A treatise on the police of the metropolis* (Patterson Smith, New Jersey 1806) 365-6.

³⁰ Lees, *The solidarities of strangers: the English Poor Laws and the people, 1700-1948* 111.

³¹ Sir Thomas More made this connection between unemployment and crime as early as 1516 (Sir Thomas More, *Utopia: edited with an introduction* (Bedford/St. Martin's, Boston 1999) 103-4).

³² Chambliss 'A Sociological Analysis of the Law of Vagrancy' 72.

³³ For example, 9 Geo I 1722 (c7) empowered parishes to buy or rent workhouses and refuse relief to any who refused to work there. See also the Outdoor Labour Test Order (1842) and the Outdoor Relief Regulation Order (1852).

³⁴ HC debs. 12th March 1822 vol. VI, col. 1047 (Mr Chetwyn).

The Earl of Halsbury, writing in 1912, noted that the law bore 'little or no relation to the subject of poor relief, but [was] more properly directed towards the prevention of crime and the preservation of good order, and the promotion of social economy'.³⁵

Persons committing offences under section 4 were punished as either 'idle and disorderly persons', 'rogues and vagabonds' or 'incorrigible rogues'.³⁶ The potential breadth of the class of 'rogues and vagabonds' is staggering. It included the offences of being armed with an offensive weapon, being found on enclosed premises for any unlawful purpose,³⁷ telling fortunes, sleeping rough,³⁸ and indecent exposure,³⁹ in addition to all 'suspected persons' and those facing a second conviction for being 'idle and disorderly'.⁴⁰

The 'sus' offence itself had three elements. Firstly, the person had to be a 'reputed thief' or 'suspected person'. The former required proof of a 'recent, relevant conviction of an offence

³⁵ Earl of Halsbury, *The Law of England* (Butterworths & Co., London 1912) 606-7 quoted in Chambliss 'A Sociological Analysis of the Law of Vagrancy' 74.

³⁶ An incorrigible rogue was any convicted of an offence under the Vagrancy Act who had already been convicted as a rogue and vagabond, or who escaped from prison, or who was apprehended as a rogue and vagabond and violently resisted arrest (Vagrancy Act 1824, section 5).

³⁷ The accused must be found on the premises but need not be apprehended there (*Moran v Jones* [1911] 75 JP 411). Being 'found' includes being 'discovered or seen' (*L v DPP* [2007] EWHC 1843 (Admin)). The unlawful purpose must be criminal; an act of immorality will not suffice, however, it is not necessary to prove intent to commit a crime at the time or place where D was found (*Hayes v Stevenson* [1860] 3 LT 296; *Re Joy* [1853] 22 LT Jo 80).

³⁸ The offence of sleeping rough required proof that the person: a) had been directed to accommodation usually provided free and failed or refused to apply; b) persistently wanders abroad; or c) causes, or appears likely to cause, damage to property, infection with vermin or any other offensive consequence (Vagrancy Act 1824, section 1). Of note, the Metropolitan Police Act 1839, section 64 gave the Metropolitan police the power to arrest anyone lying or loitering in public place between sunset and 8 am who cannot give a satisfactory account of themselves.

³⁹ Vagrancy Act 1824, section 4.

⁴⁰ The 'idle and disorderly' were defined by section 3 as: 'every petty chapman or pedlar wandering abroad, and trading without being duly licensed, or otherwise authorised by law; every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner; and every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do'. For a detailed commentary on each of these offences, excepting the last two, see Working Party on Vagrancy and Street Offences, 'Working Party on Vagrancy and Street Offences working paper' 13-184.

of dishonesty'.⁴¹ The classification of persons as 'suspected' persons was based upon their antecedent behaviour, with or without convictions.⁴² In common with 'reputed thieves', the convictions did not need to be known to the officer at the time.⁴³ As explained in *Hartley v Ellnor*, a 'person may be a suspected person on a particular day, even though he has not been previously convicted, or even though he has not had a reputation for bad character in the past'.⁴⁴ In practice it often involved the person being observed acting in a suspicious manner twice, the second occasion constituting the offence.⁴⁵ During the height of its notoriety, this typically consisted of checking car doors or acting in a way that appeared preparatory to pick-pocketing or similar. The typical 'sus' case consisted of testimony from one or more policemen against that of the claimant.⁴⁶ By 1974, the MPS only charged people in relation to being a 'suspected person' and not a 'reputed thief'. The second requirement was that the suspicious behaviour occurred in or while frequenting⁴⁷ one of the places prescribed in the Act – a broad definition covering most public areas.⁴⁸ Finally, the 'suspected person' or 'reputed thief' had to intend to commit an arrestable offence.⁴⁹ Although mere suspicion of intent was insufficient it was not necessary to show the defendant was guilty of intending to commit any particular act(s). It merely needed to

⁴¹ Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* (HC 1979-80, 559) 47.

⁴² *Ibid* 47; *Ledwith v Roberts* [1937] KB 232, 245.

⁴³ *R v Clarke* [1950] 1 KB 523; *R v Fairbairn* [1949] 2 KB 690.

⁴⁴ *Hartley v Ellnor* [1917] 117 LT 304, 262.

⁴⁵ *Ibid*.

⁴⁶ Demuth "Sus": a report on the Vagrancy Act 1824' 18-28; Working Party on Vagrancy and Street Offences, 'Working Party on Vagrancy and Street Offences working paper' 114-5.

⁴⁷ 'Frequenting' means being in a place long enough for the purposes aimed at (*Clark v Taylor* (1948) 112 JP 439).

⁴⁸ These were: any river, canal, or navigable stream, dock or basin or any quay, wharf or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or any place adjacent to a street or highway' (section 4). A 'public resort' was held not to include a pleasure steamboat (*R v Taylor and Jones* (1857) 21 JP 488), but included a railway platform (*R v Davis* [2008] UKHL 36), a place to which the public are invited (*Glynn v Simmonds* [1952] 2 All ER 47 and *Russell v Thompson* [1953] NI 51(CA)).

⁴⁹ *R v Pavitt* (1911) 75 JP 432 and *Ledwith v Roberts*.

appear to the magistrate, from circumstances and the person's known character, that he did so intend.⁵⁰

The other major progenitor of modern stop and search powers was the Metropolitan Police Act 1839, section 66. It was mirrored by local Acts in some other metropolitan areas such as Manchester, Liverpool and Rochdale.⁵¹ It permitted the police to 'stop, search and detain' any persons, 'vessel, boat, cart or carriage' which were reasonably suspected of 'having or conveying' stolen or unlawfully obtained items.⁵² This included the power to detain a person for the purposes of questioning.⁵³ Reasonable suspicion was held to be 'essentially a question of fact' which 'ha[d] to be looked at in a general objective context'.⁵⁴ If the stop/search progressed to an arrest the officer had to inform detainees of the charge against them.⁵⁵ Originally section 66 was linked to the Metropolitan Police Courts Act 1839, section 24 whereby it was an offence to be unable to account for unlawful possession of an article. This reversed burden of proof was deemed unacceptable and section 24, along with similar provisions in other statutes, was repealed by the Criminal Law Act 1977. Thereafter prosecutions subsequent to a section 66 stop and search had to come within the ambit of the Theft Act 1968.⁵⁶ There are similarities in the use of section 66 when compared with 'sus', although the latter created an offence while the former did not. This distinction was,

⁵⁰ Prevention of Crimes Act (1871), section 15.

⁵¹ Manchester Police Act 1844, section 218; Liverpool Corporation Act 1922, sections 551, 553; Rochdale Corporation Act 1948, section 115. Similar provisions include the following: Birkenhead Corporation Act 1881, section 99 (as amended by Birkenhead Corporation Act 1923, section 104); Birmingham Corporation (Consolidation) Act 1883, section 137(2); Burnley Borough Improvement Act 1871, section 342; Hertfordshire County Council Act 1935, section 130; Newcastle-upon-Tyne Improvement Act 1841, section 39; Oldham Borough improvement Act 1865, section 204; St Helens Borough Improvement Act 1869, section 257 and Salford Improvement Act 1869, section 242.

⁵² Metropolitan Police Act, section 66. Note that a 'carriage' is to be construed as including reference to a motor vehicle or trailer (Road Traffic Act 1972, section 195).

⁵³ *Daniel v Morrison* (1980) 70 CrAppR 142.

⁵⁴ *King v Gardner* (1980) 71 CrAppR 13, 14. See also *Ware v Matthews* 11th February 1981 QB and Bailey, SH and Birch, DJ, 'Recent developments in the law of police powers' [1982] CrimLR 475, 476-477.

⁵⁵ *Christie v Leachinsky* [1947] AC 543; *R v Hamilton* [1986] CrimLR 187.

⁵⁶ Sir C Philips, *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092, 1981) [23].

however, blurred in practice, in particular by the difficulty in distinguishing between the suspicion required to arrest (necessary for 'sus') and that required for a stop.⁵⁷

3.1.3) Assessment

In assessing the vagrancy statutes, in particular Vagrancy Act 1824, section 4, it is interesting to compare the approach that was taken in Ireland in respect of aspects of section 4,⁵⁸ and in the US in relation to analogous vagrancy ordinances, which were respectively held to be unconstitutional. While there are different constitutional considerations in the three jurisdictions the main points of argumentation concerned the rule of law and are applicable to the UK. The leading cases are *King v Attorney General*,⁵⁹ in Ireland, and *Papachristou v City of Jacksonville*,⁶⁰ in the USA, both heard by the respective Supreme Courts.

King and *Papachristou* focused on the vagueness of the relevant law. In *Papachristou*, the plaintiffs were charged with various counts of vagrancy, specifically 'prowling by auto', 'loitering', being 'vagabonds' and being 'common thieves'.⁶¹ While some of the terms differ from those in the Vagrancy Act 1824, section 4, the difference is not substantial.⁶² The US Supreme Court held the Jacksonville ordinance to be 'plainly unconstitutional' for

⁵⁷ Willis 'The use, effectiveness and impact of police stop and search powers'. See below, Section 3.2, for further discussion on the standard of suspicion required for stop and search.

⁵⁸ The application of the Vagrancy Act 1824, section 4 was extended to Ireland and Scotland under the Prevention of Crimes Act 1871, section 15. See also The Law Reform Commission 'Report on vagrancy and related offences' (Law Reform Commission, Dublin 1985).

⁵⁹ *King v Attorney General and DPP* [1981] IR 233.

⁶⁰ *Papachristou v Jacksonville* (1972).

⁶¹ *Ibid.*

⁶² The relevant section of the Jacksonville Ordinance Code § 26-57 read as follows: 'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants'.

‘vagueness’ because it failed to give fair notice to persons that their conduct would be illegal.⁶³ In *King*, the Irish Supreme Court considered solely the ‘sus’ offence. Henchy, J, with whom the other Justices agreed, criticised the ingredients of the offence and the method by which it was proved for being ‘so arbitrary, so vague, so difficult to rebut, [and] so related to rumour or ill-repute or past conduct...that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance’.⁶⁴

In the leading UK case of *Ledwith v Roberts*, Scott, LJ strongly criticised the terms ‘suspected person’ and ‘reputed thief’ as ‘old phrases [which] have to-day lost their meaning’ and remain on the Statute Book ‘as vague and indefinite words of reproach’.⁶⁵ He argued that to retain such laws seems ‘inconsistent with our national sense of personal liberty or our respect for the rule of law’.⁶⁶ He was, however, alone in this criticism. Greer, LJ acknowledged that the words of the ‘sus’ provision ‘are not very clear’ but did not suggest that they were so vague as to violate the rule of law, while Greene, LJ did not refer to any ambiguity.⁶⁷ Both the Home Office Working Party on Vagrancy and Street Offences (Working Party), set up to investigate the law on vagrancy and other street offences, and the Home Affairs Committee’s (HAC) Report on ‘Race Relations and the “Sus” Law’ failed to comment on the vagueness of the provisions.⁶⁸ Despite the near silence of the judiciary on the matter, it is apparent that the ‘sus’ provision was too vague to give fair notice to persons that their behaviour would be criminalised and thus violated the rule of law. To quote Kenny, J in *King*: ‘both governing phrases “suspected person” and “reputed thief” are so

⁶³ *Papachristou v Jacksonville* (1972) 162, 171.

⁶⁴ *King v AG & DPP* [1981] 257.

⁶⁵ *Ledwith v Roberts*, 277.

⁶⁶ *Ibid*, 277.

⁶⁷ *Ibid*, 244.

⁶⁸ Working Party on Vagrancy and Street Offences, ‘Working Party on Vagrancy and Street Offences working paper’; Working Party on Vagrancy and Street Offences ‘Report of the Working Party on Vagrancy and Street Offences’ (HMSO, London 1976); Home Affairs Committee, *Race relations and the “Sus” law: 2nd Report*.

uncertain that they cannot form the foundation for a criminal offence'.⁶⁹ It is notable that the ECtHR held TACT, section 44 not to be 'in accordance with the law', due in large part to its vagueness and the consequentially unfettered discretion it affords officers.⁷⁰

Lacey, discussing US vagrancy offences generally, described them as criminalising a 'personal condition', in so far as it is not the person's actions that are being punished but their being a member of a prohibited class, such as a vagrant or reputed thief.⁷¹ This designation applies equally to the earlier vagrancy statutes in so far as they presumed criminality in, firstly, 'strangers' and then 'able-bodied vagrants'. This criminalisation of a 'personal condition' is also evident in 'sus' in so far as the antecedent character of the person was admissible as evidence towards the offence. This reveals a clear pre-emptive motivation in the law which goes hand in hand with a presumptive allocation of risk to entire classes of people such as 'strangers', 'indigents', 'reputed thieves', and 'suspected persons'. The pre-emptive motivation in the Vagrancy Act 1824, section 4 was acknowledged in evidence to the HAC by the Chief Constable of the West Midlands Police Force who stated that section 4 is 'a control which works on people's minds, which means they are less likely to be lurking around'.⁷²

This presumption of criminality may be distinguished from 'all-risks' policing in so far as the risk allocation has not moved from persons to places but rather from specific people to a class of people, although the requirement in 'sus' that the behaviour occurs in a designated area is clearly comparable to the geographical risk allocation evident in section 44. More broadly, however, parallels can be drawn with the movement from specific to generalised risk. In relation to section 4, aspects of it stand on all fours with 'all-risks' policing, given the requirement that the 'suspicious' behaviour occurs in one of the designated areas. The

⁶⁹ *King v AG & DPP [1981] 263.*

⁷⁰ Discussed in Chapters 4 and 5.

⁷¹ Lacey, F, 'Vagrancy and other crimes of personal condition' (1952-53) 66 Harvard LR 1203.

⁷² Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report Q.64* (Sir Philip Knights).

HAC recognised and accepted the need for deterrence and the prevention of crime but argued that this could be equally well served by increased police presence on the streets.⁷³ In *Papachristou*, Justice Douglas was dismissive of any pretence towards the vagrancy ordinance's usefulness in preventing future criminality, stating '[t]he implicit presumption in these generalized vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment'.⁷⁴

One of the consequences of permitting police powers in anticipation of crime, indeed, before even an inchoate crime has occurred, is that it necessitates vagueness in the statute so as to accommodate the broad discretion required by officers. This holds equally true of TACT, section 44, as discussed in later Chapters. This broad discretion carries the danger of enabling the discriminatory application of the power. This point was noted by both the US and Irish Supreme Courts. In *Papachristou*, Justice Douglas criticised the Jacksonville ordinance for 'encouraging arbitrary and discriminatory enforcement of the law' through the 'unfettered discretion' it affords the police and for criminalising activities that are 'normally innocent'.⁷⁵ In *King*, it was held that the 'sus' provision 'in its arbitrariness and its unjustifiable discrimination...fails to hold...all citizens to be equal before the law' and was therefore unconstitutional.⁷⁶

By contrast, in *Ledwith Greer*, LJ rejected the interpretation of 'sus' as applying to anyone whom an officer thinks has been acting suspiciously as this would have 'given [the police] a power extremely dangerous to any well-behaved person who may have good reason for frequenting or loitering in the places mentioned'.⁷⁷ His acceptance of the power when limited to the classes of 'suspected persons' and 'reputed thieves' without criticism implies that, when limited to those classes, the power was not 'extremely dangerous'. Scott, LJ's

⁷³ *Ibid* [35, 45].

⁷⁴ *Papachristou v Jacksonville* (1972) 171.

⁷⁵ *Ibid* 163, 170. See also *Thornhill v Alabama* 310 US 88 (1940).

⁷⁶ *King v AG & DPP* [1981] 255; Bunreacht na hÉireann, Article 40, sections 1, 3.

⁷⁷ *Ledwith v Roberts*, 251-2.

condemnation of the power's vagueness has been noted. However, he does not connect that with its potential for arbitrary and discriminatory use. He argues instead that the 'class against which the legislation was directed has ceased to exist' because of social reforms such as unemployment benefit.⁷⁸ In his earlier recitation of the history of the Vagrancy Acts, he speaks of the 'class...of the hordes of unemployed persons...wandering over the face of the country', asserting them to have been 'a definite and serious menace to the countryside'.⁷⁹ It is not entirely clear whether, if the class continued to exist, he would have objected as strenuously to the power. The Working Party admitted that much of the criticism of 'sus' arose from the view that the power was 'open to abuse, and lays the police open to allegations of abuse when they invoke it' but neither commented further on the matter nor advocated any safeguards to reduce the potential for abuse.⁸⁰ The HAC acknowledged that any offence which left a 'significant proportion of those convicted with a sense that their conviction was unjust' was contrary to the public interest.⁸¹ They rejected the accusation that the MPS acted 'with a deliberate racial bias', but conceded that 'selective perception of potential offenders is inherent in "sus"'.⁸²

Tied into this potential for discriminatory application is the criminalisation of sub-criminal behaviour under section 4. In *King*, Henchy, J criticised in particular the fact that 'sus' made ordinarily legal behaviour unlawful and 'indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality'.⁸³ Domestically, in *R v Dean*, Shearman, LCJ commented that 'it would be in the highest degree unfortunate' if the police relied on the Vagrancy Act 1824 to obtain a conviction where there was insufficient evidence to charge the suspect with a criminal

⁷⁸ *Ibid*, 276.

⁷⁹ *Ibid* 271.

⁸⁰ Working Party on Vagrancy and Street Offences, 'Report of the Working Party on Vagrancy and Street Offences' [68].

⁸¹ Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* [27].

⁸² *Ibid* [27, 33].

⁸³ *King v AG & DPP [1981] 257*.

attempt.⁸⁴ Despite this criticism, the police continued to use the Vagrancy Act 1824 for precisely those purposes, as the statute permitted.⁸⁵ The HAC quoted with approval from *R v Dean* and criticised the criminalisation of behaviour which could reveal criminal intent or innocent behaviour as 'not in the public interest'.⁸⁶ The Working Party did note that the 'sus' element was 'peculiar' in so far as it criminalised behaviour that of itself constituted neither a substantive nor an attempted offence but concluded that 'sus' had a 'substantial deterrent value' and a similar offence was still required.⁸⁷

Despite the occasional judicial criticism, 'sus' was never subject to sustained judicial criticism nor limited as a consequence thereof. The Working Party's final recommendation was to retain the 'suspected person' provision and repeal that relating to 'reputed thieves'. Their proposed new offence discarded the term 'suspected person', being limited instead to any person 'whose antecedent conduct in a public place reveals his intent to commit an arrestable offence'.⁸⁸ In contrast the HAC advocated the immediate repeal of 'sus' without replacement, stating that 'the gap created by the repeal of "sus" is [not] one which a civilised community would wish to fill'.⁸⁹ Both proposals were out-paced by the Law Commission's report into the law of attempts, which led to the Criminal Attempts Act 1981 and the repeal of 'sus'.⁹⁰

3.1.4) Riots and a Report

From the late 1960s the police increasingly found themselves in opposition to the society they policed, or sections of the society, from the 'counter-culture', through the 'talking

⁸⁴ *R v Dean* (1925) 18 CrAppR 133, 134. See also: *R v Cadwell* (1928) 20 CrAppR 60.

⁸⁵ Working Party on Vagrancy and Street Offences, 'Working Party on Vagrancy and Street Offences working paper' [196].

⁸⁶ Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* [24].

⁸⁷ Working Party on Vagrancy and Street Offences, 'Working Party on Vagrancy and Street Offences working paper' [195-7].

⁸⁸ *Ibid* 25.

⁸⁹ Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* [44-47].

⁹⁰ Criminal Attempts Act 1981, section 8.

classes' to the working classes at the picket lines.⁹¹ 'Street' policing powers, such as 'sus' and stop and search under the Metropolitan Act 1839, section 66 and similar statutes contributed significantly to the deteriorating relations. 'Sus' and stop and search powers were used by the police as a means of 'assert[ing] control of the streets' and 'controlling 'the problem population', continuing the trend set by earlier anti-vagrancy statutes of pushing the unwanted or 'strangers' to the fringes of society, including now not only the local and migrant poor but also the 'suspect'.⁹² These groups were 'police property': viewed, at best, as being on the cusp of criminality; they were denied 'full 'citizenship' and [bore] the brunt of policing'.⁹³ The 'suspects' were predominantly young 'Black' males from immigrant communities who, like the unemployed and vagrant, tended to live their lives predominantly in public places.⁹⁴

Crime and immigration had long been associated in many policy discourses.⁹⁵ The Vagrancy Acts themselves had previously targeted immigrant communities, many of the 'strangers' having been immigrants, in particular from Ireland.⁹⁶ However, the fact of the increasing size of the class of 'suspects', which expanded rapidly in the economic downturn of the 1970s, combined with an increased 'consciousness of antagonism towards (and from) the police' among the communities politicised the relationship between them and the

⁹¹ Reiner, R, 'A watershed in policing' (1985) 56 the Political Quarterly 122, 126-7.

⁹² Demuth "Sus': a report on the Vagrancy Act 1824' 51; Brogden "Sus' is dead: but what about 'Sas'?' 49.

⁹³ Reiner, R, *The politics of the police* (OUP, Oxford 2000) 78. See also Waddington, P, *Policing citizens: authority and rights* (Routledge, London 1998).

⁹⁴ Blacks were 14 or 15 times more likely to be stopped under 'sus' than whites (Stevens, P and Willis, C, 'Race, crime and arrests' (Home Office HORS (Paper 58), London 1979) 41. See also: Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* 151. Reiner, *The politics of the police* 78.

⁹⁵ Solomos, J, *Race and racism in Britain* (Palgrave & Macmillan, Basingstoke 2003) 118. These discourses were based on false perception not fact, see, for example, the findings of the Select Committee on Race Relations and Immigration, *Police/immigrant relations* (HC 1972, 471) 71. See also Hunte, J, *Nigger-hunting in England?* (West Indian Standing Conference, London 1966).

⁹⁶ Feldman 'Migrants, immigrants and welfare from the Old Poor Law to the Welfare State'; Ribton-Turner, *A history of vagrants and vagrancy and beggars and begging* 64; 148-150; 214; 269-283 *passim*; 305-306.

police.⁹⁷ There was also increasing politicisation surrounding ethnic minorities – in particular ‘Black’ communities – and crime, epitomised by the construction of ‘mugging’ as symptomatic of the disenfranchised, out of control ‘Black’ youth.⁹⁸ The police were involved in this politicisation, with, in a reversal of earlier statements, the Metropolitan Commissioner stating in 1977 that there was a problem of crime among ethnic minorities.⁹⁹ ‘Sus’ ‘acquired a symbolic significance’, becoming short-hand for all policing that was perceived to be motivated by discrimination.¹⁰⁰ Among ‘Black’ and minority ethnic communities there was rising resentment against ‘sus’ and stop and search, which they perceived to be police harassment of their youth motivated by racism which resulted in haemorrhaging levels of confidence in and respect for the police.¹⁰¹ The sporadic urban unrest of the late 1970s intensified in 1981 with a number of riots, including, from 10-12 April, the Brixton riots, which were triggered by stop and search powers.¹⁰²

The Scarman Report into the Brixton riots attributed the high potential for collective violence in Brixton to a conjunction of factors. First, the population had a disproportionate amount of society’s vulnerable and deprived.¹⁰³ Second, Brixton was in an advanced stage of social and economic decay resulting in high unemployment, a depressing environment, pressure on the housing supply and a lack of recreational facilities.¹⁰⁴ Third, these

⁹⁷ Reiner, *The politics of the police* 78.

⁹⁸ Hall, S, *Policing the crisis: mugging, the state and law and order* (Macmillan, London 1978).

⁹⁹ Select Committee on Race Relations and Immigration, *Report on the West Indian community* (HC 1976-7, 180), 182 c.f. Select Committee on Race Relations and Immigration, *Police/immigrant relations*.

¹⁰⁰ Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report* [46].

¹⁰¹ For acknowledgment that harassment did occur see: Lord Scarman, *Brixton disorders 10-12 April 1981* (Cmnd 8427, 1981) [4.3]. Regarding the low levels of confidence in the police see the evidence given to the Select Committee on Race Relations and Immigration, *Report on the West Indian community*; Home Affairs Committee, *Race relations and the "Sus" law: 2nd Report*; and Lord Scarman, ‘The Scarman Report’ [4.65-4.68].

¹⁰² Riots also occurred in London, Liverpool, Manchester and, again, in Brixton (Benyon, J, *Scarman and after: essays reflecting on Lord Scarman's report, the riots and their aftermath* (Pergamon, Oxford 1984) 3.

¹⁰³ Lord Scarman, ‘The Scarman Report’ [2.13].

¹⁰⁴ *Ibid* [2.1-2.20].

deprivations fell most acutely upon the substantial ethnic minority communities due to issues arising from within the communities themselves, for example difficulty in adapting to life in Britain, and from without through racial discrimination.¹⁰⁵ The final factor was the high local incidence of crime and poor police-community relations which had been deteriorating for some time before the riots.¹⁰⁶ These factors combined to ensure that the youth, in particular the 'Black' youths, were 'a people of the street', prime targets under 'sus' and section 66.¹⁰⁷ The catalyst which moved this potential for collective violence to actuality was 'Operation Swamp'.

The police launched 'Operation Swamp' in response to rising street crime, specifically 'mugging'.¹⁰⁸ The streets were flooded with 120 plain-clothes officers who were to carry out stop and searches under section 66.¹⁰⁹ There was no previous discussion or communication with the community nor even with the 'home beat officers'.¹¹⁰ Not only was there a high proportion of ethnic minorities in Brixton – about 36% - but the police were targeting 'Black' youths who were viewed as being disproportionately involved in street crime.¹¹¹ The result was a powder keg waiting to go off. One commentator reported that '[d]uring the week before the riots, 943 people were stopped and searched, 118 people were arrested, 75 charges were made. The result would seem to be 43 people wrongly arrested and 800 indignant citizens frisked – which adds up to one riot.'¹¹²

¹⁰⁵ Ibid [2.21-2.22].

¹⁰⁶ Ibid [4.43].

¹⁰⁷ Ibid [2.23].

¹⁰⁸ Recorded robbery and other violent theft had increased 138% in Brixton between 1976 – 1980 (ibid [4.12]).

¹⁰⁹ Ibid [4.37-4.42].

¹¹⁰ Ibid [4.41].

¹¹¹ Just over half of those stopped were 'Black' while over two-thirds were under 21 (ibid [4.40]). Scarman includes West Indians, Africans, Indians, Pakistanis and Bangladeshis within the 'Black' community (ibid [2.15]).

¹¹² Mount, F, 'From Swing to Scarman' *The Spectator* (London) 4.

The spark came when police attempts to help an injured 'Black' youth were misinterpreted, conflict developed, police reinforcements were called in and the violence escalated.¹¹³ The rioting, which saw bricks, bottles and – for the first time in Britain – petrol bombs thrown, resulted in one day alone in 279 policemen and at least 45 members of the public being injured, 82 people arrested, 61 private and 56 police vehicles destroyed and 145 premises damaged.¹¹⁴

By the time the Scarman Report was published in November 1981, the Criminal Attempts Act 1981 had been passed, repealing 'sus' in England and Wales and partially substituting it with the summary offence of vehicle interference, whereby it became an offence to 'interfere' with a motor vehicle with the intention of theft of the vehicle or anything in it or taking and driving it without consent.¹¹⁵ Given the recent nature of the legislative changes Scarman, while acknowledging that a 'risk does exist that the new offence may prove no better than that which it replaces', advocated a hesitant 'wait and see' policy.¹¹⁶ In relation to the Metropolitan Police Act, section 66 he was again surpassed by events as the Royal Commission on Criminal Procedure (RCCP), headed by Philips and discussed below, had reported on section 66 in January 1981.¹¹⁷ Scarman was convinced of the necessity of stop and search powers, but concurred with the RCCP that 'the state of the law...was 'a mess'', agreeing with their proposals for rationalisation.¹¹⁸

More generally, Scarman called for greater police training, particularly in the areas of community relations and public disorder, increased recruitment from ethnic minorities, more consultation between the police and the community and for increased police

¹¹³ Lord Scarman, 'The Scarman Report' [3.4].

¹¹⁴ Ibid [1.2, 3.74].

¹¹⁵ Criminal Attempts Act 1981, section 9. It was repealed in Ireland (Criminal Justice (Public Order) Act 1994, Schedule 3, para.16. Section 4 was repealed in Scotland by the Civic Government Act 1982 (Commencement Order) 1983, SI 1983/201.

¹¹⁶ Lord Scarman, 'The Scarman Report' [7.5].

¹¹⁷ Sir C Philips, 'The RCCP' [3.12-3.33].

¹¹⁸ Lord Scarman, 'The Scarman Report' [7.3].

accountability.¹¹⁹ He observed that the lack of accountability aggravated perceptions of harassment and racism, noting in particular the detrimental effect caused by the abject lack of public faith in the police complaints system.¹²⁰ He emphasised that the perceptions of the community can have as devastating an effect as the reality.¹²¹ Scarman accepted that harassment and 'racial prejudice does manifest itself occasionally in the behaviour of a few officers on the streets' but firmly rejected the accusations of racism in the MPS as an organisation, or in its policies: there were a 'few bad apples' but no institutional racism.¹²² These categorisations, and discrimination and the criminal justice system more generally, are discussed further in Chapter 6.2.

Although the Scarman Report was broadly welcomed, it has been criticised for failing to 'grasp the nettle' of stop and search.¹²³ In particular his conclusion that the requirement of objective reasonable suspicion was a sufficient safeguard against abuse failed to address the fact that the broad discretion inherent in stop and search powers provided a vehicle for racism – unwitting or not – which was little curbed by the need for reasonable suspicion, itself a slippery concept involving another layer of discretion.¹²⁴ Given this, it is not surprising to find the issues of racism and discrimination in relation to stop and search recurring, as discussed below. The Report has also been criticised for failing to address the reason why the youths were so angry with the police.¹²⁵ Scarman's argument that when faced with a choice between 'the maintenance of public tranquillity' and law enforcement the former should always come first appears to address this issue, albeit obliquely, by arguing against aggressive law enforcement which may bring marginal gains in law enforcement at

¹¹⁹ Ibid [5.16, 5.55-5.71].

¹²⁰ [4.68, 5.43].

¹²¹ Scarman noted in regard to allegations of harassment that '[t]he belief here is as important as the fact' (Lord Scarman, 'The Scarman Report' [4.67]).

¹²² Ibid [4.62-4.68].

¹²³ Bowling, B and Phillips, C, 'Policing ethnic minority communities' in T Newburn (ed) *Handbook of policing* (Willan, Cullompton 2003) 532.

¹²⁴ Lord Scarman, 'The Scarman Report' [7.2, 7.3].

¹²⁵ Gilroy cited in Bowling and Phillips, 'Policing ethnic minority communities' 532; Reiner, *The politics of the police* 122.

the cost of public tranquillity.¹²⁶ That his advice was ignored is evident from the fact that, in 1997, Bernie Grant, MP could write that 'nothing has been more damaging to the relationship between the police and the 'Black' community than the ill judged use of stop and search powers'.¹²⁷

3.2) PACE

3.2.1) The RCCP and the genesis of PACE

Against this background of increased police-community tension the RCCP reported, advocating major changes to the criminal justice system, and providing the genesis of PACE.¹²⁸ Its terms of reference were: 'to examine, having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime, and taking into account also the need for the efficient and economical use of resources, whether changes are needed' in relation to the powers and duties of the police and rights and duties of suspects and accused persons in England and Wales, among other criteria, the rest of which are beyond the scope of this thesis.¹²⁹ This concept of a 'fundamental balance' continues to underpin discussions of the criminal justice system, although its fulcrum has shifted position throughout the intervening years.¹³⁰

The RCCP condemned the powers of stop and search as having 'no common rationale'.¹³¹ Two major problems emerged: first, the reliance on local powers to stop and search for stolen goods, which only existed in some areas;¹³² and, second, that the police lacked the powers they needed in some regards, such as searching football supporters for offensive

¹²⁶ Lord Scarman, 'The Scarman Report' [4.57].

¹²⁷ NACRO, *Policing local communities: the Tottenham experiment* (NACRO, London 1997).

¹²⁸ Sir C Philips, 'The RCCP'.

¹²⁹ *Ibid* [1.11].

¹³⁰ *Ibid*. See, for example, Home Office 'Rebalancing the criminal justice system in favour of the law-abiding majority' (HMSO, London 2006). For criticism of the 'false dichotomy' in the 'fundamental balance' see Sanders, A and Young, R, *Criminal justice* (Butterworths, London 2000) Chapter 2.

¹³¹ Sir C Philips, 'The RCCP' [34.12].

¹³² See above, footnote 51.

weapons.¹³³ The Commission was split on what reforms should be implemented, with the majority advocating that the plethora of powers be subsumed within one power which would allow the police to search for stolen goods or prohibited articles with safeguards to avoid any discriminatory use, while the dissentients argued that extending stop and search powers would aggravate social tensions, especially with regard to ethnic minorities.¹³⁴ The majority conceded that the diversity of situations in which the police must exercise their discretion made it impractical, if not impossible, to develop an agreed set of standards of 'reasonable suspicion' but argued that requiring the officer to notify the suspect of the reason for their search, in writing if requested after the incident, and requiring them to record the search, which should be monitored by supervising officers, would be sufficient.¹³⁵ It is surprising, given the social context, that the RCCP failed to address in greater depth the issue of the discriminatory use of stop and search powers to target minority ethnic communities.

3.2.2) PACE

When PACE was finally introduced, it was 'well received well by the police and tolerably well' by the legal profession although many academics viewed it as vastly expanding police powers.¹³⁶ Most of the RCCP's suggestions were adopted, and they succeeded in ending the nation-wide variation in the power to stop and search for stolen goods. However, they failed to unify the stop and search powers (see tables at 3.4 below), and their suggested safeguard of informing the suspect of the reason for the search was not adopted until after the

¹³³ Sir C Philips, 'The RCCP' [3.51].

¹³⁴ Ibid [3.20-3.21]. The dissenters were Jack Jones, former General Secretary of the transport and General Workers Union and Canon Wilfred Wood, a 'Black' magistrate (Zander, M, *The Police and Criminal Evidence Act 1984* (Sweet & Maxwell, London 1995) 4.

¹³⁵ Sir C Philips, 'The RCCP' [3.25-3.26]. Similarly the earlier Baron J Hunt, *Report of the Advisory Committee on Police in Northern Ireland* (Cmd 535, 1969) failed to define what constituted reasonable suspicion for a stop. For a concurring contemporary argument that it is futile to attempt to define 'reasonable suspicion' see Wilding, B, 'Tipping the scales of justice? A review of the impact of PACE on the police, due process and the search for truth, 1984-2006' in E Cape and R Young (eds) *Regulating policing: the Police and Criminal Evidence Act 1984: Past, present and future* (Hart, Oxford 2008) 45.

¹³⁶ Zander, *The Police and Criminal Evidence Act 1984* xiii. C.f Dixon, D, 'Authorize and regulate: a comparative perspective on the rise and fall of a regulatory strategy' in E Cape and R Young (eds) *Regulating policing: the Police and Criminal Evidence Act 1984: Past, present and future* (Hart, Oxford 2008) 1. See also: Reiner 'A watershed in policing'.

Macpherson Report, discussed below. The majority's faith in reasonable suspicion and the accompanying safeguards in guarding against discrimination also proved to be misplaced.

Under PACE, section 1 the police have the power to search persons or vehicles for stolen items or prohibited articles. The latter are defined as offensive weapons,¹³⁷ fireworks held in contravention of the Fireworks Act 2003 or any articles for use in the course of or in connection with the offence of burglary, theft – including that of a vehicle or other conveyance – or fraud.¹³⁸ In order to combat 'perceived risks of anti-social behaviour in the form of criminal damage', the Criminal Justice Act 2003, section 1 added to the prohibited articles under PACE section 1 any article made or adapted for use in criminal damage or intended by the person who has the article for use for criminal damage.¹³⁹ However, neither threatening nor going equipped for criminal damage were added.¹⁴⁰

The key safeguards in relation to section 1 are the requirement of reasonable suspicion, PACE, Code A, discussed below, and PACE, sections 2 - 3. Section 2 applies to stop and searches, not to stops alone. Section 2(2) and section 2(3) requires officers to identify themselves, with documentary evidence if not in uniform, give their names and the name of their station,¹⁴¹ the object of the search and their grounds for carrying it out. If this information is not given evidence procured in the course of the search may be excluded.¹⁴² This is illustrated by the case of *O (a juvenile) v DPP*, where O successfully appealed

¹³⁷ The Criminal Justice Act (1988), section 140 expanded the definition of 'offensive weapon' to include any article with a blade or point in public, except for a folding pocketknife with a blade of less than 3 inches. It is an offence to carry such an article unless the person can provide a good reason or lawful authority (Criminal Justice Act 1988, section 139).

¹³⁸ Inserted by the Fraud Act (2006), schedule 1 [21].

¹³⁹ Qureshi, F, 'The Impact of Extended Police Stop and Search Powers under the UK Criminal Justice Act 2003' (2007) 30 *Policing: An International Journal of Police Strategies and Management* 466, 467. See also: Qureshi, F and Farrell, G, 'Stop and Search in 2004: A Survey of Police Officers Views and Experiences' (2006) 8 *International Journal of Police Science and Management* 83 c.f. Taylor, R, Wasik, M and Leng, R, *Blackstone's guide to the Criminal Justice Act 2003* (OUP, Oxford 2004) 2.

¹⁴⁰ PACE, sections 7-8 (inserted by the Criminal Justice Act (2003), section 1).

¹⁴¹ This is not applicable to TACT, section 44. See Chapter 5.2.1.

¹⁴² *R v Fennelley* [1989] Crim L.R. 142.

against a verdict of assaulting police officers in the execution of their duty on the basis that the search was unlawful as the officers failed to identify themselves or their station.¹⁴³ All searches must be recorded, detailing the name of the officer involved, the person searched (if known), the grounds for and object(s) of the search, the date, time and place it occurred, what, if anything, was found and any damage that occurred in the course of the search.¹⁴⁴ This must be done on the spot or as soon as practicable.¹⁴⁵

The regulations in PACE Code A govern all stop and search powers, not just those under PACE, albeit with some variation for TACT, sections 43 and 44. They have undergone over twenty revisions to date. One significant change concerned 'voluntary' stops and searches, carried out without recourse to statutory power and therefore outside the PACE Code safeguards. Policing by consent is desirable, but a difficulty arises in defining the level of consent required. While the relationship between the police and suspect in a consensual stop and search is technically one of two (or more) 'private citizens', the lack of knowledge and power on the part of the person stopped, combined with the police reluctance to provide information and their tendency to 'bamboozle' the suspect means that 'consent' in this context is a very relative concept that 'frequently consists of acquiescence based on ignorance' against a background of 'contextual irrelevance of rights and legal provisions'.¹⁴⁶ After 'voluntary' stops were highlighted as problematic by research carried out in the late 1980s Code A was amended to prohibit stop/search by consent for juveniles,¹⁴⁷ persons suffering from a mental disability or persons who in some way seem incapable of giving informed consent.¹⁴⁸ Since 2003, strongly influenced by the Macpherson Report, it is no longer

¹⁴³ (1999) 163 J.P. 725. See also *R v Bristol (Christopher)* [2007] EWCA Crim 3214.

¹⁴⁴ Section 3.

¹⁴⁵ Section 3(2).

¹⁴⁶ Dixon, D, Coleman, D and Bottomley, K, 'Consent and the legal regulation of policing' (1990) *Journal of Law and Society* 345, 346-348.

¹⁴⁷ Dixon, 'Authorize and regulate: a comparative perspective on the rise and fall of a regulatory strategy' 2; Zander, *The Police and Criminal Evidence Act 1984*; Dixon, Coleman and Bottomley 'Consent and the legal regulation of policing', 347-52.

¹⁴⁸ Code A, 15[1E] as inserted by Police and Criminal Evidence Act 1984 (Codes of Practice) (No. 2) Order 1990, SI 1990/2580.

possible to stop and search with consent, save for searches of persons entering sports grounds or other premises where consent is given as a condition of entry.¹⁴⁹

In Code A reasonable suspicion, 'in contrast to mere suspicion, must be founded on fact' and be objective.¹⁵⁰ Annex B of Code A originally stated that reasonable suspicion for the purpose of stop and search 'is no less than the degree or level of suspicion required to effect an arrest without warrant'.¹⁵¹ This was viewed as contradictory and confusing: if the officer had a sufficient level of suspicion to arrest the suspect then why not avail of this option and search the suspect at the police station?¹⁵² However, it reflected the divide between the authority of the police, limited to investigation up to the point where sufficient evidence was obtained for an arrest, and that of the court, which controls all investigation occurring thereafter, including, traditionally, all questioning.¹⁵³ This section was removed in the 1991 Code.

The Race Relations (Amendment) Act 2000 expanded the definition of 'reasonable suspicion' in Code A. Personal factors alone, such as 'a person's colour, age, hairstyle or manner of dress' or previous convictions, cannot be used alone or in conjunction as the basis for a stop or to stop and search without supporting intelligence or information nor can stereotypes relating to the criminal propensity of persons or groups, although gang insignia can provide reasonable suspicion if there is reliable intelligence that the gang habitually carry drugs or knives.¹⁵⁴

Despite Code A, reasonable suspicion remains a slippery concept and one that is subject to substantial variations of interpretation, largely because it involves multiple layers of

¹⁴⁹ Police and Criminal Evidence Act 1984 (Codes of Practice) (Statutory Powers of Stop and Search) Order 2002, SI 2002/3075. See now PACE, Code A [1.5].

¹⁵⁰ Code A [2.2].

¹⁵¹ Code A, Annex B [4].

¹⁵² Wilding, 'Tipping the scales of justice? A review of the impact of PACE on the police, due process and the search for truth, 1984-2006' 45.

¹⁵³ Walker, C, 'Post-charge questioning of suspects' [2008] CrimLR 509.

¹⁵⁴ Code A [2.2, 2.6].

discretion.¹⁵⁵ First, the officer's discretion as to whether given facts amount to reasonable suspicion; second, the discretion whether to proceed against the person or not, given reasonable suspicion; and, third, the discretion afforded by broad definitions of the base crime to which PACE, section 1 refers.¹⁵⁶ Criminal damage provides an example of this final discretion, the definition of which ranges from soiling something in a non-permanent manner so that it requires cleaning,¹⁵⁷ through unlawfully altering data on a computer,¹⁵⁸ to writing graffiti on pavements or walls.¹⁵⁹ Research consistently finds that factors are taken into account that ought to be superfluous according to the Codes, such as whether the person cooperates, whether they are known to the police, or are members of a given class that is viewed as having a high proportion of criminal involvement.¹⁶⁰

The exercise of these discretions are further complicated by the fact that stop and search is part of street policing, which is of 'low visibility', typically characterised by a high level of discretion and low levels of accountability, beyond the review of supervisors where the 'norms and practices of the street level police officer take priority over outside regulation'.¹⁶¹ The final factors in the mix are the under-reporting of stops¹⁶² and the use of stop and search processes as an informal summary justice whereby 'the process becomes the

¹⁵⁵ N Bland et al., 'Upping the PACE? An evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches'.

¹⁵⁶ For a discussion of the first two limbs of discretion see: Williams and Ryan 'Police Discretion'.

¹⁵⁷ *Roe v Kingerlee* [1986] CrimLR 735.

¹⁵⁸ *R v Whitely* [1991] CrAppR 25.

¹⁵⁹ *Hardman v CC of Avon and Somerset* [1986] CrimLR 330.

¹⁶⁰ Bottomley, K, *The impact of PACE: policing in a northern force* (Centre for Criminology and Criminal Justice, University of Hull, Hull 1991); Brown, D, 'PACE ten years on: a review of the research' (Home Office (HORS155), London 1997) 16.

¹⁶¹ Sanders, A and Young, R, 'Police powers' in T Newburn (ed) *Handbook of policing* (Willan, Cullompton 2003) 229; Young, J, *Policing the streets: stops and search in North London* (Centre for Criminology, Middlesex 1994) 14.

¹⁶² This has been attested since at least the RCCP, see above, through the 1990s, see, for example, Skogan, W, 'Contacts between police and public: findings from the 1992 British Crime Survey' (Home Office (HORS 134), London 1994) through to today, see, for example, *R v DPP (Ex p. Kebele)*.

punishment'.¹⁶³ Critics have argued that stop and search cannot be controlled legally because, while these discretions permit excessive leeway, they are nonetheless integral to the functioning of the police.¹⁶⁴ The post-Macpherson 'dip' in stops and searches (discussed below) and the corresponding rise in arrest rates, especially within the MPS, suggests that the problem is not wholly intractable, although how much of the 'dip' was due to under-reporting of stops and searches is unclear.¹⁶⁵

3.2.3) The Macpherson Report

The Macpherson Report into the Stephen Lawrence murder inquiry was deeply critical of stop and search powers, which were identified as one of four factors indicating the existence of institutional racism within the MPS.¹⁶⁶ Institutional racism, discussed further in Chapter 6.2, was defined by Macpherson as

‘the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people’.¹⁶⁷

Macpherson found that stop and search was an 'area of complaint which was universal'.¹⁶⁸ This criticism rested predominantly upon the disproportionate numbers of ethnic minorities against whom stop and search was used.¹⁶⁹

Macpherson's main recommendation in relation to stop and search was that all encounters,

¹⁶³ Young, R, 'Street Policing after PACE' in E Cape and R Young (eds) *Regulating policing: the Police and Criminal Evidence Act 1984: Past, present and future* (Hart, Oxford 2008) 151.

¹⁶⁴ Smith, D and Gray, J, *Police and people in London: the PSI Report* (Gower, Aldershot 1985).

¹⁶⁵ A Sanders and R Young 'Police Powers' 237. On the under-recording of stop and searches during the pilot study see: N Bland et al., 'Upping the PACE?' 32-7.

¹⁶⁶ Sir W Macpherson, *The Stephen Lawrence Inquiry* (Cm 4262, 1999) [6.45].

¹⁶⁷ *ibid* [6.34].

¹⁶⁸ *ibid* [6.45], [45.8].

¹⁶⁹ *ibid* [45.8-45.10].

including 'voluntary' ones, be recorded.¹⁷⁰ The record was to include the reason for the stop, the outcome and the self-defined ethnic identity of the person stopped.¹⁷¹ A series of pilot schemes were subsequently run by the Home Office alongside research into the use of stop and search and views of the public on it.¹⁷² The outcome of these studies were mixed, with Bland et al. suggesting that while the recording might have a 'symbolic value' it did not significantly improve the recording of searches, while Stone and Pettigrew recorded mixed views among the communities to the new form.¹⁷³ Despite the equivocal tone of the reports, PACE was amended in 2004 to require that stop and search forms be completed for all stops and searches, although not stop and account encounters.¹⁷⁴

Figure 3.1 below highlights the 'Macpherson dip', whereby the number of stops and searches under PACE reduced significantly after the publication of the Macpherson Report. However, the resumption of the upward trend in overall stops and searches is also evident. Figures 3.2 and 3.3 reveal the continuing discrepancy in terms of ethnic minorities stopped relative to 1,000 of the population, with Black persons being substantially more likely to be stopped than any other ethnic group, followed by Asians and finally Whites. Again, the 'Macpherson dip' is notable. Figures 3.4 and 3.5 show the percentage of stops which end in arrest. The overall total is low, currently around 10% for England and Wales and slightly lower for the MPS. It has been falling since 2001/02. The most notable discrepancy in terms of ethnicity relates to Asians who are less likely to be arrested following a stop and search since 2001/02. Black people are also slightly less likely to be arrested across England and Wales, although the difference is negligible for the MPS.

¹⁷⁰ *ibid* Recommendation 61. See Appendix A for an example of a stop and search form used in the pilot study.

¹⁷¹ *ibid*.

¹⁷² N Bland, J Miller and P Quinton 'The impact of stops and searches on crime and the community' (Home Office (PRS 127) London 2000); N Bland et al., 'Upping the PACE?'; V Stone and N Pettigrew 'The views of the public on stops and searches'; P Quinton, N Bland and J Miller 'Police stops, decision making and practice'; Miller 'Profiling populations available for stop and searches'; N Bland, J Miller and P Quinton 'Managing the impact of searches: a review of force interventions' (Home Office (PRS 132) London 2000).

¹⁷³ N Bland et al., 'Upping the PACE?'; V Stone and N Pettigrew 'The views of the public on stops and searches'.

¹⁷⁴ Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2004, SI 2004/1887.

Figure 3.1: Stop and searches under PACE, section 1 and other powers: England and Wales and the MPS,¹⁷⁵ 1997/98 – 2008/09

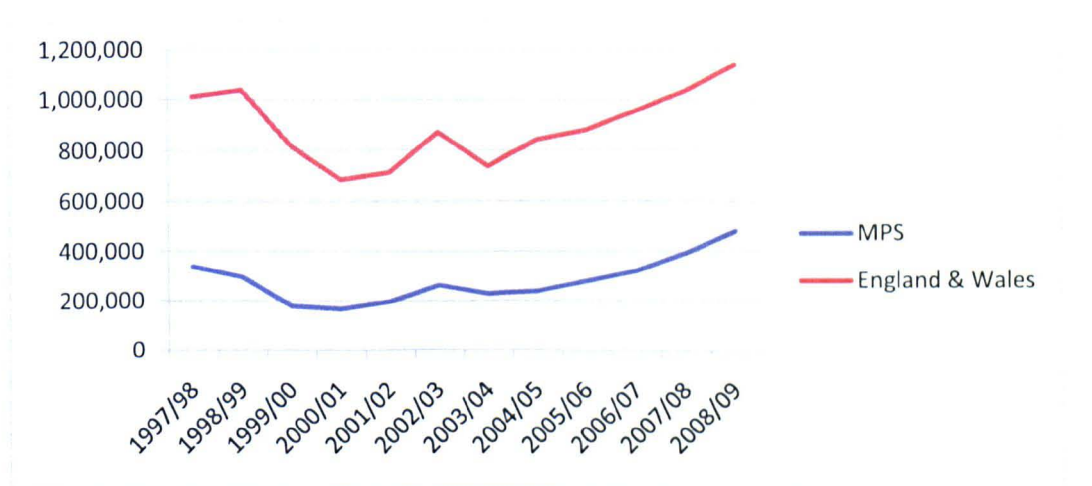
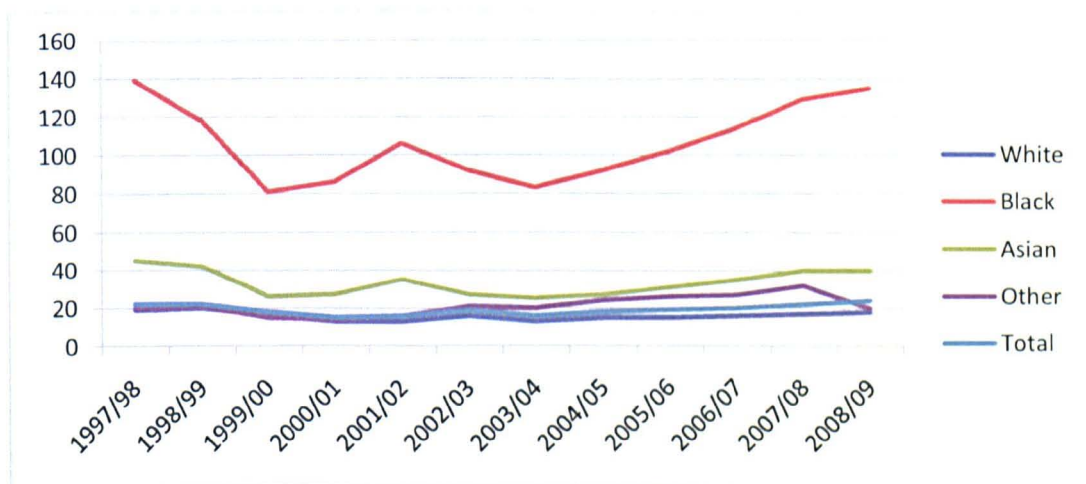


Figure 3.2: Stop and searches under PACE, section 1 and other powers, per 1000 population, by self-defined ethnicity: England and Wales 1997/98 – 2008/09¹⁷⁶



¹⁷⁵ This includes all other stop and search powers except CJPO, section 60 and TACT, section 44. Source: Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2008/09'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2007/08'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System 2006/07'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2006'; Home Office, 'Statistics on Race and the Criminal Justice System - 2005'; Home Office, 'Statistics on Race and the Criminal Justice System - 2004'; Home Office, 'Statistics on Race and the Criminal Justice System - 2003'; Home Office, 'Statistics on Race and the Criminal Justice System: 2002'; Home Office 'Statistics on Race and the Criminal Justice System: 1999/00' (Home Office, London 2001); Home Office 'Statistics on Race and the Criminal Justice System: 1999' (Home Office, London 2000); Home Office 'Statistics on Race and the Criminal Justice System: 1998' (Home Office, London 1999).

¹⁷⁶ Note that a 'Mixed' was added to the 2008/09 statistics, which may explain the dip in the 'Other' category for that year (See: Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2008/09' Table 3.02b).

Figure 3.3: Stop and searches under PACE, section 1 and other powers, per 1000 population, by self-defined ethnicity: MPS, 1997/98 – 2007/08¹⁷⁷

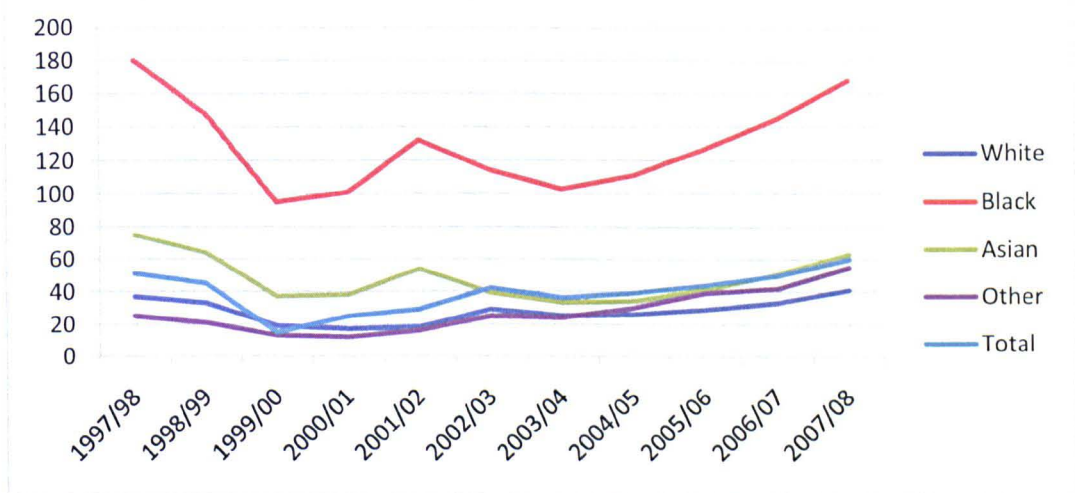
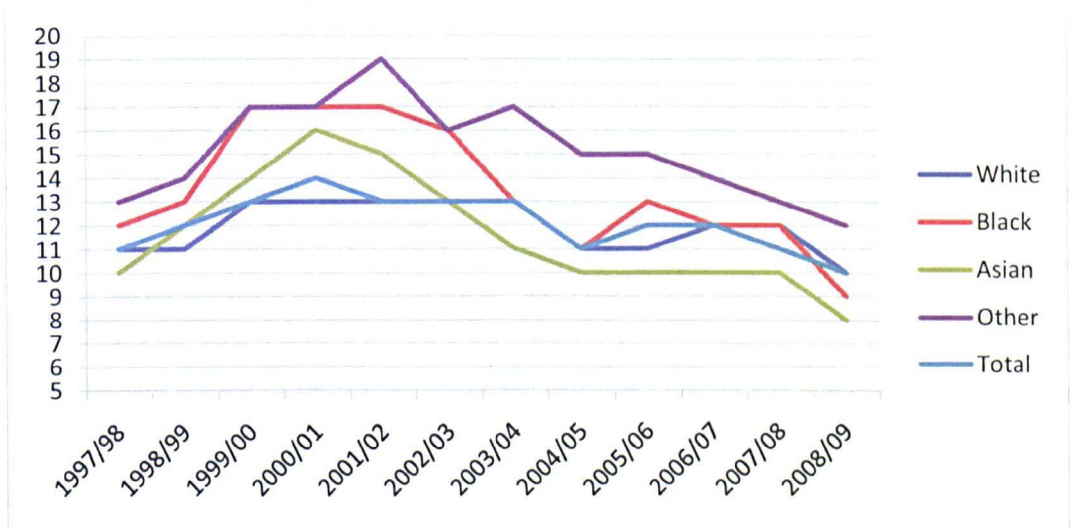


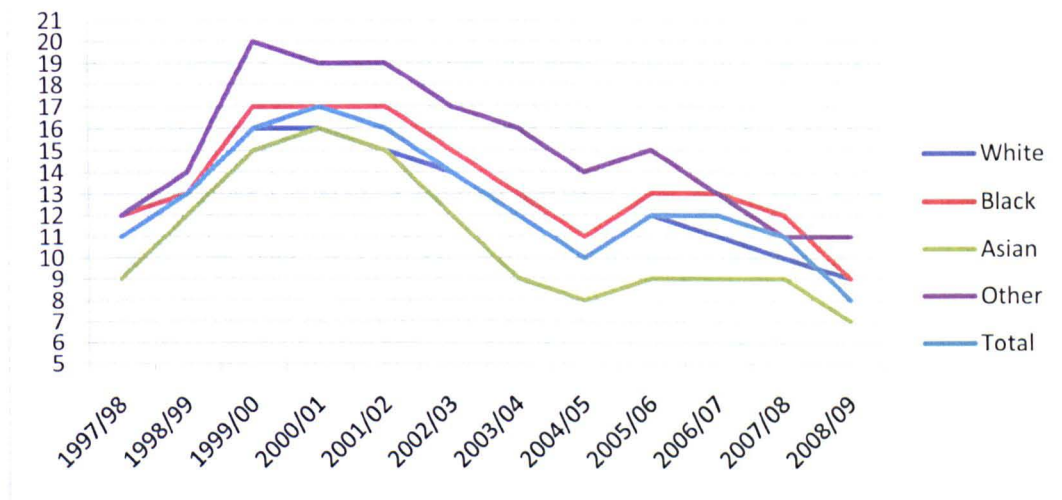
Figure 3.4: Percentage of stop and searches under PACE, section 1 resulting in an arrest: England and Wales¹⁷⁸



¹⁷⁷ No breakdown for the MPS is provided in the 2008/09 statistics (See: *ibid* Table 3.02b).

¹⁷⁸ Source: *ibid*.

Figure 3.5: Percentage of stop and searches under PACE, section 1 resulting in an arrest: MPS¹⁷⁹



3.2.4) PACE since the Macpherson Report

Despite Macpherson's warning that 'it is pointless for the police service to justify the disparity in these figures', the debates around discrimination attempt just that, including efforts to counter conclusions of discrimination on the basis of the 'available population' thesis and the 'outcome test'.¹⁸⁰ These approaches seek to justify apparent statistical discrimination on the basis of the difference between the population 'available' to the police at the time of the stop compared with the 'resident' population against whom the statistics are ordinarily judged or on the basis that the 'hit rate', that is, the number of searches that lead to an arrest, is comparable across ethnicities. These approaches have in turn been criticised, with commentators suggesting that the available statistics fail to capture fully the discrimination imposed by the exercise of stop and search, pointing to the fact that national statistics do not distinguish multiple stops of one person, nor do they indicate the numbers searched after a stop – indeed, the quantity of 'stops' is notoriously difficult to ascertain, though research in the 1990s suggested that ethnic minorities were disproportionately

¹⁷⁹ Source: *ibid.*

¹⁸⁰ C.f. Sir W Macpherson, 'The Macpherson Report' [45.10].

targeted.¹⁸¹ The merit of these theses is assessed in Chapter 6. What is clear, however, is that the perception of discrimination among those stopped and search has alienated them from the police, reduced trust and increased feelings of antagonism.¹⁸²

In terms of discretion, the most significant development since Macpherson has been the move by successive Governments, and some academics, towards the view that policing in general is over-burdened by bureaucracy and that stop and search is prime example of this.¹⁸³ Wilding, then Chief Constable of South Wales, argued that Code A creates 'a hugely bureaucratic process almost designed to deter police from using the stop account/stop search power at all'.¹⁸⁴ Referring to the period after the Macpherson Report, she stated that '[a]lmost overnight stop and search practically ceased, we lost the streets and crime shot up'.¹⁸⁵ The Flanagan Report advocated replacing the current 'stop and account' forms with a receipt, such as a business card, combined with the recording of the event on 'Airwave', the intra-police radio communications systems, that was to be 'dip-sampled' by supervisors.¹⁸⁶ This was implemented on a trial basis and then rolled out nationally.¹⁸⁷ The Home Secretary, Teresa May, told the Police Federation in the summer of 2010 that she would scrap 'stop forms' and 'reduce the burden of 'stop and search' procedures'.¹⁸⁸ This reflects, in part, the societal movement from an individual-focused liberal democracy, with its

¹⁸¹ Bland, N, Miller, J and Quinton, P, 'The impact of stops and searches on crime and the community' (Home Office (PRS 127), London 2000) 46-7.

¹⁸² Skogan 'Contacts between police and public: findings from the 1992 British Crime Survey' 251, Waddington, *Policing citizens: authority and rights* 892.

¹⁸³ Home Office, 'Rebalancing the criminal justice system in favour of the law-abiding majority'; Home Office 'PACE Review: Summary of responses to the public consultation on the Review of the Police and Criminal Evidence Act 1984' (Policing and Protection Unit, London 2010); Home Office, *Policing in the 21st Century: Reconnecting police and the people* (Cm 7925, 2010). See also: Cape, E and Young, R, *Regulating policing: the Police and Criminal Evidence Act 1984: Past, present and future* (Hart, Oxford 2008).

¹⁸⁴ Wilding, 'Tipping the scales of justice? A review of the impact of PACE on the police, due process and the search for truth, 1984-2006' 48-9.

¹⁸⁵ *ibid.*

¹⁸⁶ Sir R Flanagan 'Independent Review of Policing' (Home Office, London 2008) Recommendation 24.

¹⁸⁷ PACE, Code A, paragraphs 4.12 – 4.12A.

¹⁸⁸ May, T 'Speech to the Police Federation' (Police Federation, Bournemouth, 19 May 2010)

emphasis on rights and safeguards, towards a risk society with its acceptance of crime as normal and with a focus on pre-emption.¹⁸⁹

3.3) Non-PACE stop and search powers

This section will analyse the powers to stop and search which are not found in PACE.

3.3.1) Public order

The Criminal Justice and Public Order Act 1994, section 60 is the only non-counter-terrorist power that permits stop and search without any requirement of reasonable suspicion.¹⁹⁰ It is similar to TACT, section 44 in so far as it applies in a geographical area following an authorisation.¹⁹¹ Initially an officer of the rank of superintendent or higher had to make the authorisation, with an inspector or chief inspector permitted to give the authorisation if he believed violence to be imminent and no superintendent was available.¹⁹² The Knives Act 1997, section 8(2) amended this so that an inspector could give the authorisation, although he must tell an officer of the rank of superintendent or above as soon as practicable.¹⁹³ This change was justified on the basis of operational necessity, the superintendents being involved more at divisional rather than operational level.¹⁹⁴ The authorisation must be given in writing, as soon as practicable, specifying the grounds on which it was given.¹⁹⁵ The period authorised should be no longer than necessary to prevent incidents of serious violence up to a maximum of twenty-four hours.¹⁹⁶ If the officer who gave the authorisation or a chief inspector reasonably believes it to be expedient the authorisation may be extended by a

¹⁸⁹ Dixon, 'Authorize and regulate: a comparative perspective on the rise and fall of a regulatory strategy' 11-13.

¹⁹⁰ The Serious Crime Act 2007, sections 87 amends section 60.

¹⁹¹ See TACT sections 44-6.

¹⁹² CJPO, section 60(2).

¹⁹³ Section 60(1), (3A).

¹⁹⁴ Jason-Lloyd, L, 'Section 60 of the Criminal Justice and Public Order Act 1994: Its Current Provisions and Future Changes' (1998) 162 *Justice of the Peace* 837.

¹⁹⁵ CJPO, sections 60(5)-(6),(9).

¹⁹⁶ CJPO, sections 60(1), (4). Initially they could be extended by only six hours (amended by Knives Act 1997, section 8(4)(c)).

further twenty-four hours.¹⁹⁷

Initially the trigger for authorisation was the reasonable belief that serious violence may occur in the locality.¹⁹⁸ The Knives Act 1997, section 8(2) substantially extended this to include the reasonable belief 'that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason',¹⁹⁹ to facilitate dealing with persons carrying offensive weapons who were planning violence in a different police area, for instance football hooligans en route to a match.²⁰⁰ The grounds were further extended by section 87(1) to include the reasonable belief that an incident involving serious violence has occurred in the police area and that a dangerous instrument or offensive weapon used in the incident is being carried in the police area and that it is expedient to give an authorisation in order to find the weapon.²⁰¹ This is repetitious: such conduct would come already within the grounds of section 60(1)(b). It is also questionable whether the use of stop and search without reasonable suspicion should be permitted to search for weapons or instruments used in a violent crime. This moves away from the pre-emptive motivations evident initially in section 60 which are at least rationally linked to the justification for no reasonable suspicion: there is a likelihood of serious violence in an area but the police are uncertain of where it will come from so the risk is moved from people to the location.

Following authorisation uniformed officers may stop and search any persons or vehicles for offensive weapons.²⁰² They may remove any item believed to be worn wholly or partially to conceal the person's identity.²⁰³ This targets persons who seek to conceal their identity from CCTV cameras and the like. Failure to stop or remove an item that is worn is an offence

¹⁹⁷ CJPO, section 60(3).

¹⁹⁸ CJPO, section 60(1)(a).

¹⁹⁹ CJPO, section 60(1)(b).

²⁰⁰ Jason-Lloyd 'Section 60 of the Criminal Justice and Public Order Act 1994: Its Current Provisions and Future Changes', 837.

²⁰¹ CJPO, section 60(1)(aa).

²⁰² CJPO, section 60(4).

²⁰³ CJPO, section 60(4A), 60(5) (inserted by the Crime and Disorder Act 1998, sections 25(1)-(2)).

punishable by up to one month imprisonment and/or a fine of up to £1,000.²⁰⁴ Searches under section 60 are governed by PACE, s2(2)(b) and (3).²⁰⁵

There has been a development in the use of section 60 in the MPS where it has been used to target knife crime under Operations Blunt and Blunt II.²⁰⁶ There are mixed reports as to its efficiency. However, it is questionable whether section 60 is an appropriate power for Operations which originally started in 2004.²⁰⁷ The temporal limit to the authorisation suggests that this power was not envisaged as one which should be constantly renewed, even in specific areas, over such an extended period of time. As will be discussed in Chapter 4.1, the MPS's approach to section 44 is quite similar, with a rolling authorisation in place from 2001 until 2009.

Figure 3.6 below shows the total number of stops and searches carried out under section 60 since 1998/99. These have increased rapidly since 2006/07. In 2008/09 there were 149,995 section 60 stops, a 280% increase from 2007/08.²⁰⁸ In 2008/09 the MPS accounted for 76% of all section 60 stops while the MPS and Merseyside accounted for 91% of the total.²⁰⁹ As with the other stop and search powers, ethnic minorities are disproportionately targeted by section 60. This disproportionality has, in general, been increasing since the introduction of the power, as evidenced in Figures 3.7 and 3.8 below. Note that these Figures depict the total number of stops per ethnic group, rather than the number per 1,000 of the population as given for PACE, section 1 above as this is how they are broken down in the 'Section 95' statistics. The MPS statistics reveal a notable spike in the numbers of ethnic minorities stopped since 2007/08, with a 160% increase in the number of Asians stopped and a 169%

²⁰⁴ CJPO, section 60(8).

²⁰⁵ *Osman v DPP* (1999) 163 JP 725.

²⁰⁶ Metropolitan Police Service MPS, 'We launch the next phase of Operation Blunt' (2006).

²⁰⁷ *ibid.*

²⁰⁸ Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2008/09' tables 3.05b.

²⁰⁹ *ibid.*

increase in the number of ‘Black’ persons stopped.²¹⁰ This is likely to coincide, at least in part, with Operation Blunt I and II.

Figure 3.6: Number of stops and searches under section 60: England and Wales and the MPS²¹¹

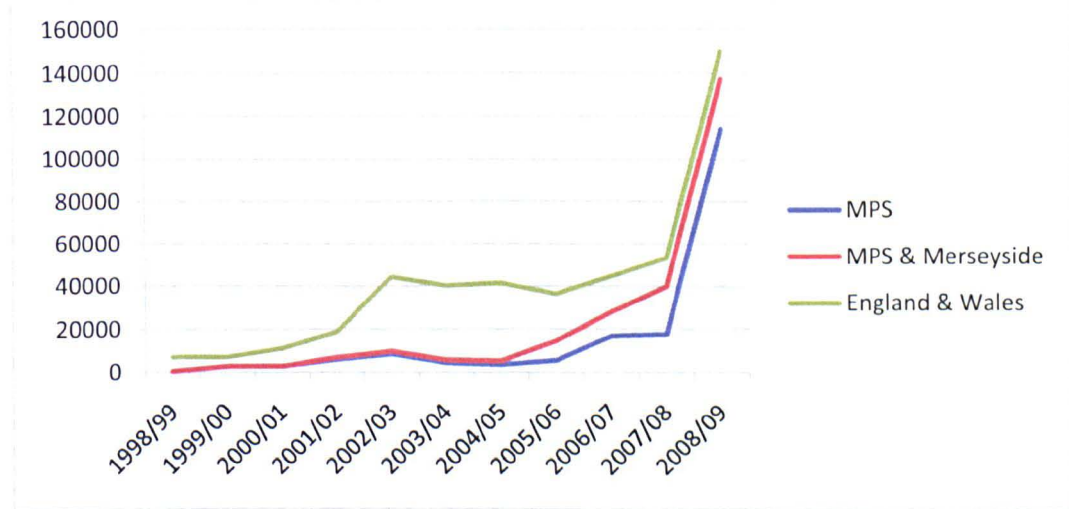
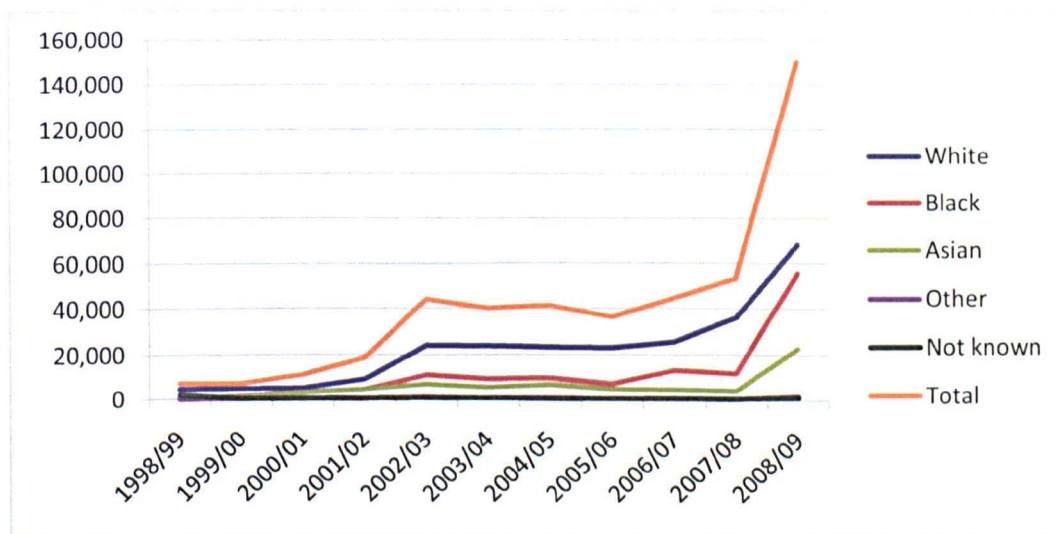


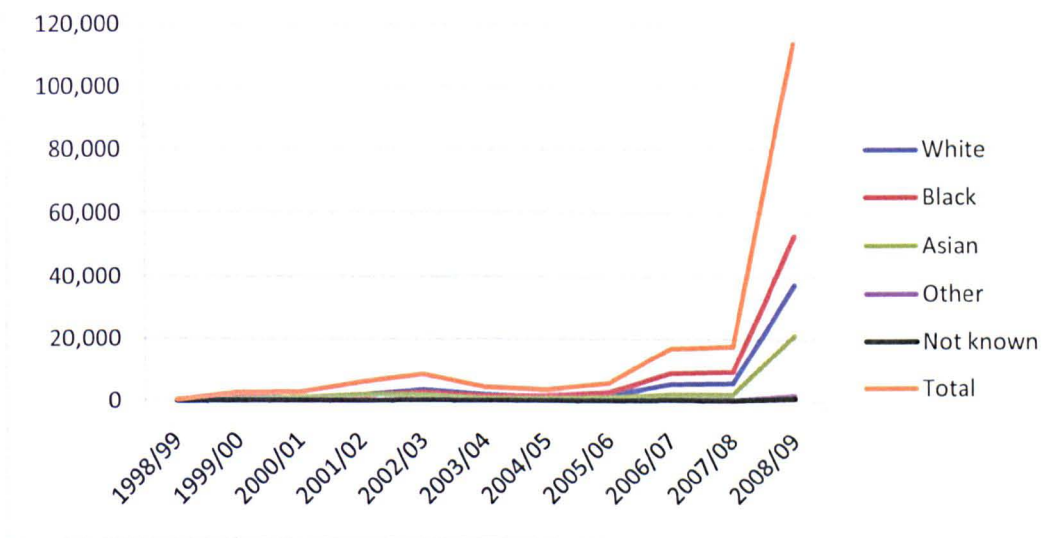
Figure 3.7: Number of stops and searches under section 60, broken down by ethnic group: England and Wales²¹²



²¹⁰ *ibid.*

²¹¹ Source: see above, footnote 415.

²¹² Source: see above, footnote 415.

Figure 3.8: Stops and searches under section 60, breakdown by ethnic group: MPS²¹³

Statewatch published an analysis of stop and search under section 60 and section 44, TACT, in which it concluded that some police forces ‘are recording “anti-terrorist” stops and searches of pedestrians and vehicles using the 94 Act’ rather than TACT.²¹⁴ It pointed to the sharp increase in the number of section 60 stops since 2001 among forces who had a correspondingly low number of section 44 stops, citing stop and search statistics for the West Midlands and Greater Manchester police forces, among others, as evidence of its conclusions. The number of section 60 stops carried out by the West Midlands police increased from 4,718 section 60 stops in 2000/01 to 19,036 in 2002/03, while it recorded only 36 section 44 stops in 2002/03. The Greater Manchester police carried out 7,878 section 60 stops in 2002/03 compared with 1,910 in 2000/01, and 509 section 44 stops in 2002/03.²¹⁵ It is not possible to conclude definitively that these forces were using section 60 ‘in place of’ section 44 on the basis of these statistics alone. Moreover, the trend over the past seven years seems less anomalous than for the years Statewatch focused on, particularly in relation to Greater Manchester, as shown in Figures 3.10 and 3.11 below. While both forces have particularly high usages of section 60, which may justify concerns over the

²¹³ Source: see above, footnote 415.

²¹⁴ Statewatch, 'Anti-terrorist stops & searches target Muslim communities, but few arrests' (Statewatch) <<http://www.statewatch.org/analyses/no-23-uk-stop-and-search.pdf>> accessed 10 June 2009.

²¹⁵ *ibid.*

usage of the power and warrant a detailed explanation by the forces, it is simply not possible to assert on the mere basis of the statistics that one power is being used in place of the other. If properly used, the powers speak to different needs. For example, both cities have a number of major football clubs, the policing of which, in certain circumstances, may warrant a section 60 authorisation, although it should be noted that section 44 authorisations have been given for football grounds in London.²¹⁶

Figure 3.9: West Midlands section 44 and section 60 totals²¹⁷

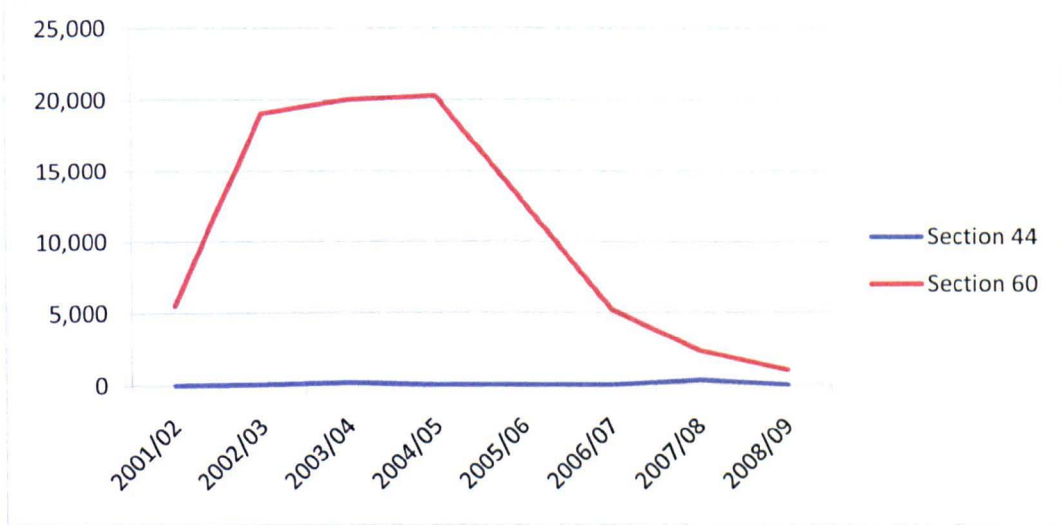
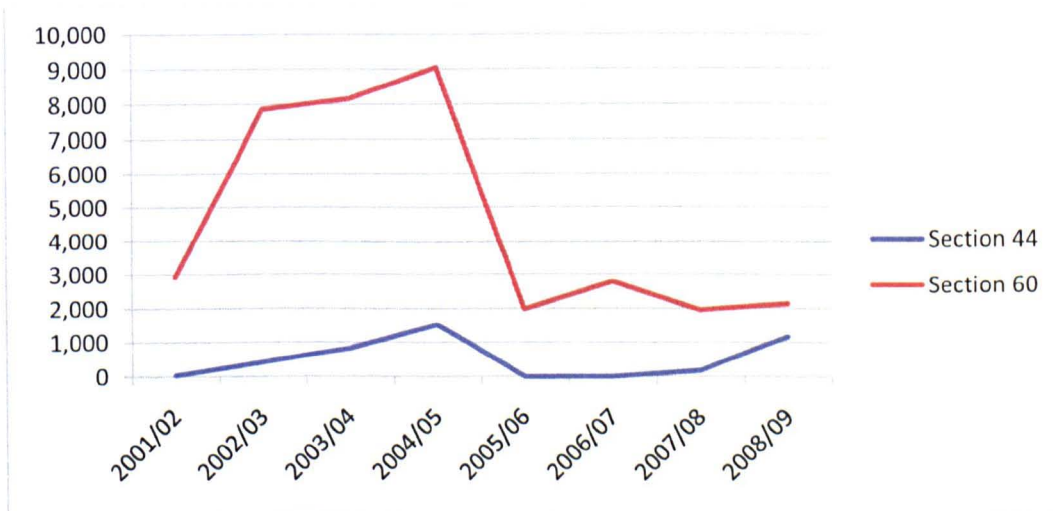


Figure 3.10: Greater Manchester section 44 and section 60 totals²¹⁸



²¹⁶ MPSSNR03; BTPFL04.

²¹⁷ Source: see above, footnote 415.

²¹⁸ Source: see above, footnote 415.

3.3.2) Breach of the peace

The powers governing breach of the peace are a mixture of common law and statute which enable the police to take various actions, including the powers to stop, search and arrest to prevent a breach of the peace.²¹⁹ They may intersect with other powers, such as a section 30 dispersal order under the Anti-social Behaviour Act 2003.²²⁰ Breach of the peace was defined in *Howell* as 'an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done',²²¹ although there is no requirement of a public element to the disturbance.²²² The ECtHR has held that 'breach of the peace' is sufficiently defined for the purposes of ECHR, Article 5(1)(c).²²³

The House of Lords in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* held that the breach of the peace must be imminent.²²⁴ This clarified the law, which had become somewhat muddled following a number of 'miners cases', in particular *Moss v McLachlan*, which seemed to indicate that imminence was not a requirement.²²⁵ In *Moss* Justice Skinner argued that there was no difference between the requirement that the officer believes there is 'a real, not a remote, possibility' of a breach of the peace and that the officer believes that a breach of the peace will occur in the 'immediate future' and that if there was a difference between the two the former was to be preferred.²²⁶ *Laporte* also clarified that the Human Rights Act 1998 had introduced the 'constitutional shift' foreshadowed in *Redmond-Bate v DPP*,²²⁷ so that, in contrast to the previous law,²²⁸ the right to freedom of speech and

²¹⁹ PACE, section 17(6); Card, R, *Public order law* (Jordans, Bristol 2000).

²²⁰ See *R (on the application of Singh) v Chief Constable of the West Midlands* [2006] 1 WLR 3374.

²²¹ [1982] QB 416, 426.

²²² Bowling and Phillips, *Racism, crime and justice*.

²²³ *Steel v United Kingdom*.

²²⁴ [2006] UKHL 55.

²²⁵ [1985] IRLR 76. *Moss* was disapproved but not overruled by *Laporte*.

²²⁶ *Moss v McLachlan* [1985] IRLR 76, 78-9.

²²⁷ *Redmond-Bate v DPP* (1999) 163 JP 789.

²²⁸ See, for example, *Duncan v Jones* [1936] 1 KB 218.

peaceful assembly were now recognised, although these may still be restricted if the activity is illegal or the conduct disturbs public order.²²⁹ There is a continuing willingness on the part of the court to accept the interpretation of the officer on the ground, as evident in Lord Rodger's speech.²³⁰

3.3.3) Offensive weapons

In addition to the power to search for offensive weapons in PACE, section 1 there are a number of statutes that permit stop and search for specific weapons.

The Firearms Act 1968, section 47(3) provides that the police may stop and search anyone in a public place whom they reasonably believe to be have a firearm, with or without ammunition, or anyone elsewhere than a public place whom they reasonably suspect to be committing or about to commit an offence under sections 18(1), 18(2) or section 20. The offences under sections 18(1), 18(2) and 20 are: carrying a firearm (real or imitation) with criminal intent or trespassing with a (real or imitation) firearm. An offence will also be committed if the person does not hand over the firearm when required.²³¹ As well, the police have the power to search any vehicle they reasonably suspect contains a firearm or will be used in connection with the commission of an offence under section 18(1)-(2) or section 20.²³²

If the police reasonably suspect that a person under the age of eighteen, and not under the supervision of someone over twenty-one, has a crossbow capable of discharging a missile or parts of a crossbow which can be assembled to form a crossbow capable of discharging a missile they may stop and search that person or any vehicle they reasonably suspect to be

²²⁹ [2006] UKHL 55 [34-37]; see also *Chorherr v Austria* (1993) 17 EHRR 358, app.no.13308/87; *Ezelin v France* (1991) 14 E.H.R.R.362 app.no.11800/85.

²³⁰ *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55 [71]. See also *Piddington v Bates* [1961] 1 WLR 162.

²³¹ Section 47(2). The requirement to hand over the firearm is contained in section 47(1).

²³² Section 47(4).

connected with the offence.²³³ Any article suspected of being a crossbow, or part of one, may be retained.²³⁴ This power applies in all areas except in a dwelling house.²³⁵

The police may enter school premises and search any person on those premises for articles with a blade or point or any offensive weapon²³⁶ if they have reasonable grounds for suspecting that a person has such an article.²³⁷ Folding pocketknives with a blade of up to three inches are excluded from this power.²³⁸ It will be a defence for the person to have the article with a blade or point for the purposes of work, religious reasons or as part of a national costume.²³⁹ Any person found guilty of having an article with a blade or point is liable upon summary conviction for up to six months imprisonment and/or a fine.²⁴⁰ Any person found guilty of having an offensive weapon is liable upon conviction on indictment for up to four years imprisonment and/or a fine.²⁴¹

The headmaster of a school or a member of staff authorised by the headmaster who has reasonable grounds for suspecting pupils have an article with a blade or point, any offensive weapon, alcohol, controlled drugs, stolen articles or articles of a kind specified by in regulations may search pupils and their possessions and seize any of the aforementioned items.²⁴² The pupils and member of staff must be on school premises or somewhere the member of staff has lawful control over the pupils.²⁴³ There are a number of safeguards on this power, reflecting the fact that it is not a member of the police who carries out the

²³³ Crossbows Act 1987, section 4.

²³⁴ Section 4(3).

²³⁵ Section 4(4).

²³⁶ Defined by the Prevention of Crime Act 1953, section 1.

²³⁷ Criminal Justice Act 1988, section 139B.

²³⁸ Criminal Justice Act 1988, section 139(3).

²³⁹ Criminal Justice Act 1988, section 139(5).

²⁴⁰ Criminal Justice Act 1988, section 139B(5)(a).

²⁴¹ Criminal Justice Act 1988, section 139B(5)(b).

²⁴² Education Act 1996, section 550ZA, 550ZB 500ZC.

²⁴³ Education Act 1996, section 550ZB(4).

search.²⁴⁴ A similar power is available to members of staff at further education institutions under the Further and Higher Education Act 1992, section 85AA and members of staff at attendance centres,²⁴⁵ under the Violent Crime Reduction Act 2006, section 47. The Education Bill 2010-2011 details some changes to these powers.²⁴⁶

3.3.4) Miscellaneous statutes

The police may search any person attending a designated sporting event whom they reasonably suspect to have a firework or flare, alcohol, be drunk, or be carrying a container for liquid which is capable of causing injury to another person.²⁴⁷ The power also extends to entering a public service vehicle or train when police reasonably suspect it is carrying passengers who have alcohol in their possession, are drunk or have permitted alcohol to be carried on the vehicle.²⁴⁸ An officer who reasonably suspects persons are consuming, or intend to consume alcohol in a designated public place may stop and search them for alcohol.²⁴⁹

There is a plethora of statutes which permit the police to stop and search for endangered or protected birds, animals, fauna or flora. These follow the format of permitting the police to stop and search persons or vehicles if they reasonably suspect an offence under the particular statute is being or is about to be committed.²⁵⁰ The relevant animals thus protected are:

²⁴⁴ See Education Act 1996, section 550ZB(5)-(8).

²⁴⁵ Defined by the Criminal Justice Act 2003, section 221 as 'a place at which offenders aged under 25 may be required to attend and be given under supervision appropriate occupation or instruction in pursuance of...relevant orders, or...under section 60 of the Sentencing Act'.

²⁴⁶ The Education Bill 2010-2011, sections 2-3.

²⁴⁷ Sporting Events (Control of Alcohol etc.) Act 1985, sections 2, 2A, 7.

²⁴⁸ 'Public service vehicle' is defined by Public Passenger Vehicles Act 1981, section 1 as a vehicle which carries passengers for hire or reward. Sporting Events (Control of Alcohol etc.) Act 1985, section 1.

²⁴⁹ Criminal Justice and Police Act 2001, section 12. A designated public place is one so identified by a local authority in an order under section 13(2) of the Criminal Justice and Police Act 2001.

²⁵⁰ Deer Act 1991, section 12(1), Marine (Scotland) Act 2010, section 126, Protection of Badgers Act 1992, section 11(a), Poaching Prevention Act 1862, section 2, Wildlife and Countryside Act 1981, section 19.

deer,²⁵¹ seals,²⁵² badgers,²⁵³ game,²⁵⁴ and a variety of birds, plants and other animals under the Wildlife and Countryside Act 1981.²⁵⁵ The offences include poaching,²⁵⁶ killing, including killing or taking off season,²⁵⁷ killing by a prohibited method,²⁵⁸ cruelty to the animal,²⁵⁹ interfering with habitats,²⁶⁰ and selling or buying live or dead animals or birds.²⁶¹

3.4) Summary of non-counter terrorist stop and search powers

Below is a table detailing the non-counter terrorist stop and search powers currently in force, divided into those that require reasonable suspicion and those that do not..

Table 3.1: Non-counter terrorist stop and search powers which require reasonable suspicion

Power	Object of search	Extent of search	Where exercisable
PACE, section 1 (as amended by CJA 2003, section 1(2))	Stolen goods, articles for the use in certain Theft Act offences; offensive weapons, including blades or sharply-pointed articles (except folding pocket knives with a bladed cutting edge not exceeding 3 inches), articles for the use in the offence of criminal damage.	Persons and vehicles	Where there is public access

²⁵¹ Deer Act 1991.

²⁵² Marine (Scotland) Act 2010.

²⁵³ Protection of Badgers Act 1992.

²⁵⁴ Defined by the Poaching Prevention Act 1862, section 1 as: hares, pheasants or pheasants or their eggs, woodcocks, snipes, rabbits, grouse, black or moor game, or the eggs of grouse, black or moor game. Rabbits and hares also enjoy certain protections under the Wildlife and Countryside Act 1981, schedule 8.

²⁵⁵ See Wildlife and Countryside Act 1981, schedules 1 – 9 for the extensive lists of protected species.

²⁵⁶ Deer Act 1991, section 1, Poaching Prevention Act 1862, section 1.

²⁵⁷ Deer Act 1991, section 2; Conservation of Seals Act 1970, section 3; Protection of Badgers Act 1992, section 1, Wildlife and Countryside Act 1981, section 1.

²⁵⁸ Conservation of Seals Act 1970, section 1, Wildlife and Countryside Act 1981, sections 5, 11.

²⁵⁹ Protection of Badgers Act 1992, section 2.

²⁶⁰ Protection of Badgers Act 1992, section 3, Wildlife and Countryside Act 1981, section 1.

²⁶¹ Protection of Badgers Act 1992, section 4, Wildlife and Countryside Act 1981, section 6.

Power	Object of search	Extent of search	Where exercisable
Firearms Act 1968, Section 47	Firearms	Persons and vehicles	A public place or anywhere in the case of reasonable suspicion of offences of carrying firearms with criminal intent or trespassing with firearms
Misuse of Drugs Act 1971, Section 23	Controlled drugs	Persons and vehicle	Anywhere
Aviation Security Act 1982, Section 27 (1)	Stolen or unlawfully obtained goods	Airport employees and vehicles carrying airport employees or any vehicle in a cargo area whether or not carrying an employee	Any designated airport
Sporting Events (Control of Alcohol etc.) Act 1985, Section 7	Intoxicating liquor	Persons, coaches and trains	Designated sports grounds or coaches and trains travelling to or from a designated sporting event
Crossbows Act 1987, Section 4	Crossbows or parts of crossbows (except crossbows with a draw weight of less than 1.4kgs)	Persons and Vehicles	Anywhere except dwellings
Public Stores Act 1875, (c.25) section 6	Stolen goods belonging to Her Majesty's Stores[2]	Persons, vessels, boats and vehicles	Public places
The Vagrancy Act 1824	'Rogues and vagabonds'	Persons and vehicles	Public places

Power	Object of search	Extent of search	Where exercisable
Poaching Prevention Act 1862, section 2	Poached game, guns, nets or engines.	Persons and vehicles	Highway, street or public place
Wildlife and Countryside Act 1981, section 19	Evidence of an offence under the Act (killing, injuring or taking a wild bird or its eggs, or wild animal listed in Schedule 5, mammal listed in Schedule 7, or plant listed in Schedule 8)	Persons and their possessions	Anywhere except dwellings
Customs and Excise Management Act 1979, s.163	Goods: (a) on which duty has not been paid; (b) being unlawfully imported, exported or removed; (c) otherwise liable to forfeiture to HMS Customs and Excise	Vehicles and vessels	Anywhere except dwellings
Criminal Justice Act 1988, section 139B	Offensive weapons, including blades or sharply-pointed articles	Persons	School premises
Education Act 1996, sections 550ZA-550ZC	Articles with a blade or point, any offensive weapon, alcohol, controlled drugs, stolen articles or articles of a kind specified by in regulations	Persons	School Premises ²⁶²
Deer Act 1991, section 12(1)	Evidence of an offence under the Act	Persons and vehicles	Anywhere except dwellings
Criminal Justice and Police Act 2001, section 12	Passengers who are drunk, or have alcohol in their possession, or have permitted alcohol to be carried on board	Persons	Public service vehicles or trains
Protection of Badgers Act 1992, section 11(a)	Evidence of an offence under the Act	Persons and vehicles	Anywhere except dwellings

²⁶² Note this search must be carried out by a headmaster or authorised member of staff.

Table 3.2: Non-counter terrorist stop and search powers which do not require reasonable suspicion

Criminal Justice and Public Order Act 1994, section 60	Offensive weapons or dangerous instruments to prevent incidents of serious violence or to deal with the carrying of such items	Persons and Vehicles	Anywhere within a locality authorised
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3.5) Stop and Search under counter-terrorist legislation

This section will detail the history of stop and search powers under 'emergency' legislation, relating to Northern Irish-related terrorism. This thesis is on the practice of TACT, section 44 in England. However, it is necessary to consider the development of 'emergency' powers in Northern Ireland as these strongly influenced the shape that counter-terrorist powers took in England.

The Northern Ireland situation made 'normal' policing, based on the 'citizen in uniform' model, impossible due to three key factors: first, the virtual non-existence of police-community relations, primarily in relation to the nationalist community; second, the militarization of the police; and, third, the security situation. These will be explained and then the counter-terrorist powers to stop and search will be critically assessed. The security situation will be woven into the discussion of the first two factors and into the analysis of the powers. In the following the terms 'nationalist' and 'unionist' will be used to describe the minority and majority populations in Northern Ireland. The usage is not meant to imply two homogeneous communities but is simply short hand for ease of reference. Similarly, the terms 'republican' and 'loyalist' will be used to refer to the militant groups within each community, while again recognising the limitations of these terms.

3.5.1) Police and Community Relations in Northern Ireland

Northern Ireland came into being on the 7th December 1921 when the Northern Irish bicameral Parliament at Stormont seceded from the Free State under the Anglo-Irish Treaty 1921, Article 11. The Stormont Government and the majority unionist community it represented faced opposition towards partition from the Free State, the Liberal Party and a substantial nationalist minority within their borders who aspired to a united Ireland.²⁶³ The nationalist community feared discrimination and were largely excluded from Government and public employment.²⁶⁴

The fact that the vast majority of unionists were Protestant and the vast majority of nationalists were Catholic aggravated these political cleavages and contributed to the communities' separate identities. Given the fears of subversion and invasion on the one side and of expulsion and persecution on the other, coupled with diametrically opposed political objectives – union or unity – it is not surprising that from its inception Northern Ireland was mired in sectarian and political violence.²⁶⁵

The socio-political background of a divided society wherein State institutions lacked legitimacy in the eyes of the nationalist community made it almost inevitable that nationalist-police community relations would be contentious. However, the composition of the police forces, the fact that the Inspector-General (later termed the Chief Constable) was accountable to the (Unionist) Minister for Home Affairs and the uneven application of the law ensured that the security forces were viewed with suspicion by members of the nationalist community.

²⁶³ Ewing, K and Gearty, C, *The struggle for civil liberties: political freedom and the rule of law in Britain, 1914-1945* (Clarendon, Oxford 2000) 370. For a general history of Northern Ireland see Hennessey, T, *A history of Northern Ireland, 1920-1996* (Palgrave, Basingstoke 1997).

²⁶⁴ Whyte, J, 'How much discrimination was there under the unionist regime, 1921-68?' in T Gallagher and J O'Connell (eds) *Contemporary Irish Studies* (MUP, Manchester 1983).

²⁶⁵ Buckland, P, *The factory of grievances: devolved government in Northern Ireland, 1921-39* (Gill & Macmillan, Dublin 1979) 196.

In terms of composition, Catholics were initially meant to constitute one-third of the Royal Ulster Constabulary (RUC).²⁶⁶ Their numbers peaked at between 19 and 21 per cent in 1922-3,²⁶⁷ declining to 11% by 1969 and 7% by the late 1980s.²⁶⁸ The 'Ulster Special Constabulary', an auxiliary force, were initially drawn almost exclusively from the ranks of the UVF – a loyalist paramilitary groups which sprang up in opposition to the Home Rule movement,²⁶⁹ and in 1969 were (still) drawn exclusively from the Protestant population.²⁷⁰ The Ulster Special Constabulary, originally comprised the 'A', 'B' and 'C' 'Specials'.²⁷¹ The 'A' and 'C' 'Specials' were disbanded in 1925.²⁷²

Another source of friction with the nationalist community was the uneven application emergency powers with, for example, the Special Powers Act 1922, discussed below, being enforced virtually exclusively against Catholics.²⁷³ This resulted in the RUC being perceived by nationalists as a partisan force who carried out the commands of their (Protestant) masters in Stormont. The application of, in particular, the Flags and Emblems Act 1954 and the Special Powers Act 1922, Regulation 3, which permitted the banning of

²⁶⁶ Guelke, A, 'Policing in Northern Ireland' in B Hadfield (ed) *Northern Ireland: politics and the constitution* (OUP, Buckingham 1992) 95.

²⁶⁷ Guelke gives a peak of 21.1% in 1923 (ibid 95) while Farrell gives a peak of 19.2% in 1923 (Farrell, M, *Arming the Protestants: the formation of the Ulster Special Constabulary and the Royal Ulster Constabulary, 1920-7* (Pluto Press, London 1983) 234).

²⁶⁸ Baron J Hunt, 'The Hunt Report' 29; Ryder, C, *The RUC 1922-2000: a force under fire* (Arrow, London 2000) 368.

²⁶⁹ Ryder, *The RUC 1922-2000: a force under fire* 39. See also: Farrell, *Arming the Protestants: the formation of the Ulster Special Constabulary and the Royal Ulster Constabulary, 1920-7* 1-54.

²⁷⁰ Baron J Hunt, 'The Hunt Report' 40.

²⁷¹ For more see: Farrell, *Arming the Protestants: the formation of the Ulster Special Constabulary and the Royal Ulster Constabulary, 1920-7*.

²⁷² Buckland, *The factory of grievances: devolved government in Northern Ireland, 1921-39* 181.

²⁷³ ibid 215-220.

processions and marches, was noted by some Republicans as a source of their antagonism.²⁷⁴

The relationship between the nationalist community on the one hand and the RUC and the B Specials on the other was further aggravated by accusations of criminality, collusion and shoot-to-kill policies.²⁷⁵ The abolition of the 'Specials' was one of the civil rights movement's objectives from the start, although it was not until the violence of 1968 that reform of the RUC became an objective.²⁷⁶ The mistreatment of prisoners, both Republican and Loyalist, in particular in the 1970s, also reinforced communities' distrust of the police.²⁷⁷

Aggravating these factors was the perennially ineffective systems of accountability over the police which ensured that the suspicion with which the police were held by parts of the community festered, in turn lowering morale among the police.²⁷⁸ Initially, the Governor of Northern Ireland could remove or appoint any officer but the Inspector-General of the RUC had control over day-to-day operations and the issuance of regulations, subject to approval

²⁷⁴ For example, Gerry Adams cited the riots subsequent to the removal of tricolour from Divis Street by the RUC as a catalyst in his politicalisation (Adams, G, *The politics of Irish freedom* (Brandon, Dingle 1986) 30-32). Boyle, K, Hadden, T and Hillyard, P, *Law and state: the case of Northern Ireland* (Robertson, London 1975) 29.

²⁷⁵ Ryder, *The RUC 1922-2000: a force under fire* 55; Farrell, *Arming the Protestants: the formation of the Ulster Special Constabulary and the Royal Ulster Constabulary, 1920-7* 51-2, 114. On collusion see: Judge Cory 'The Cory Collusion Inquiry: Lord Justice Gibson and Lady Gibson; Chief Superintendent Breen and Superintendent Buchanan; Billy Wright; Patrick Finucane; Rosemary Nelson and Robert Hamill' (HMSO, London 2003-04). On shoot-to-kill see Stalker, J, *Ireland, 'Shoot to kill' and the 'Affair'* (Penguin, Harmondsworth 1988); Punch, M, *Police corruption: deviance, accountability and reform in policing* (Willan, Cullompton 2009) 143-9; Punch, M, *Shoot to kill: Exploring police use of firearms* (Policy Press, Bristol 2010).

²⁷⁶ Ó'Dochartaigh, N, *From civil rights to Armalites: Derry and the birth of the Irish Troubles* (Palgrave Macmillan, Basingstoke 2005) 292; Lord Scarman, *Violence and civil disturbances in Northern Ireland in 1969: report of tribunal of inquiry* (Cmd 566, 1972).

²⁷⁷ On the mistreatment of prisoners see: *Ireland v United Kingdom*; Lord Parker, *Report of the Committee of Privy Counsellors appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism* (Cmd 4901, 1972); Amnesty International 'Report of an Amnesty International Mission to Northern Ireland (28 November 1977 - 6 December 1977)' (Amnesty, London 1978).

²⁷⁸ Dickson, B, 'The police authority for Northern Ireland' (1988) 39 NILQ 277, 277; Dickson, B, 'The Administration of Justice in Northern Ireland' (1986) 75 *Studies: An Irish Quarterly Review* 56, 59-60.

by the Minister for Home Affairs.²⁷⁹ The Hunt Report (1969), discussed further below, recognised the damaging impact of the lack of independent oversight over the police on community relations.²⁸⁰ Baron John Hunt recommended the creation of a Police Authority and that the RUC be subject to inspection by HMIC.²⁸¹ This recommendation was implemented but the Police Authority for Northern Ireland failed to carve out a role for itself as an independent body providing effective oversight of the police, failing to 'acquire the respect any such body needs if it is to be influential on the RUC'.²⁸²

In addition, Hunt singled out changing the complaints procedure as the 'one essential condition to the improvement of relations between the R.U.C. and the public'.²⁸³ At the time the complaints system consisted of the right of the Inspector-General, or any person nominated by the Minister for Home Affairs, to investigate any complaint against an officer. Hunt advocated the introduction of a system similar to that of Britain, a system, which as discussed in the first part of this Chapter, was itself flawed and subjected to strong criticism by Lord Scarman following the Brixton riots.²⁸⁴ It is telling that the Northern Irish system was reformed in 1970,²⁸⁵ reformed again in 1977,²⁸⁶ was criticised by the Bennett Inquiry in 1979,²⁸⁷ reformed again in 1987,²⁸⁸ criticised by the Hayes Report in 1997,²⁸⁹ before the

²⁷⁹ Constabulary Act 1922, section 1(2). Dickson 'The police authority for Northern Ireland', 277.

²⁸⁰ Baron J Hunt, 'The Hunt Report' [84-86].

²⁸¹ *ibid* [87-94].

²⁸² Dickson 'The Administration of Justice in Northern Ireland' 59. See also: Smyth, J and Ellison, G, *The crowned harp: policing in Northern Ireland* (Pluto Press, London 2000).

²⁸³ Baron J Hunt, 'The Hunt Report' [139-40].

²⁸⁴ Above Chapter 3.1.4.

²⁸⁵ Police Act (NI) 1970.

²⁸⁶ Police (NI) Order 1977, SI 1977/531.

²⁸⁷ H.G. Bennett, QC, *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Cmnd. 7497, 1979) [66].

²⁸⁸ Police (NI) Order 1987, SI 1987/938. See further Dickson 'The police authority for Northern Ireland', 277; CAJ, 'Complaints against the police: a working party report' (CAJ, Belfast 1982); CAJ, 'Procedures for handling complaints against the police' (CAJ, Belfast 1983); CAJ, 'Cause for Complaint: the system for dealing with complaints against the police in Northern Ireland' (CAJ, Belfast 1990); CAJ, 'A fresh look at complaints against the police' (CAJ, Belfast 1993).

entire force was overhauled in 2000 following the Patten Report.²⁹⁰

A final point on community-police relations is to note the distinction between 'ordinary' and public order and counter-terrorist policing. Surveys in 1987 and through the 1990s revealed relatively high public satisfaction with the police in Northern Ireland.²⁹¹ Indeed, the later surveys indicated a higher level of satisfaction than in Britain.²⁹² Similarly, while there are differences between each community's trust in the police, indicated by their willingness to report a crime, only 5% of Catholics (and 2% of Protestants) would not report a crime to the police.²⁹³

3.5.2) Northern Ireland: militarization

Both the RUC and the 'Specials' were armed from the outset.²⁹⁴ The latter were essentially an armed militia raised to protect the interests of the Stormont Government which had no competence over military matters. A 1922 memo to the British Cabinet noted that the 'Specials' had 'assumed the military functions specifically reserved to the British government simply by calling their forces police'.²⁹⁵ This was in response to Unionist fears that the British army, under the control of, initially, Dublin Castle, and, latterly Westminster,

²⁸⁹ Hayes, M, 'A police ombudsman for Northern Ireland?' (NIO, Belfast 1997).

²⁹⁰ Police (NI) Act 2000; Patten, C, *A new beginning: policing in Northern Ireland* (HMSO, London 1999).

²⁹¹ 72% satisfaction with police performance was recorded in 1987 (Walker, C, 'Police and community in Northern Ireland' (1990) 40 NILQ 105, 106).

²⁹² 25% satisfaction in Northern Ireland compared with 19% in Britain (Stringer, P and Robinson, G, *Social attitudes in Northern Ireland: the second report 1991-1992* (Blackstaff Press, Belfast 1992)). See also Patten Chapter 3.

²⁹³ Stringer and Robinson, *Social attitudes in Northern Ireland: the second report 1991-1992*.

²⁹⁴ Smyth and Ellison, *The crowned harp: policing in Northern Ireland*²⁰; Ryder, *The RUC 1922-2000: a force under fire* 39.

²⁹⁵ Memo from Assistant Cabinet Secretary cited in Farrell, *Arming the Protestants: the formation of the Ulster Special Constabulary and the Royal Ulster Constabulary, 1920-7*, 97-8.

would be withdrawn leaving them to fend for themselves against militants inside and outside their borders.²⁹⁶

There was, in addition to the police forces, the British army which was occasionally called to assist in quelling serious disorder, for example in 1935 and 1957, before becoming a permanent fixture following their entry into Londonderry in August 1969.²⁹⁷ Their numbers peaked at 21,800 in 1972, gradually reducing to between 10,000 and 11,900 through the 1980s.²⁹⁸ Several characteristics make the army ill-suited for extended civil duties: their aggressive training and lack of community policing experience made friction with the community almost inevitable and Walker has argued that their lack of experience in forensic evidence collection contributed to the introduction of internment.²⁹⁹ Their presence also led to conflicts over jurisdiction between the police and the army especially over reluctance to share intelligence, although relationships improved rapidly under Sir John Hermon, who became Chief Constable of the RUC in 1980.³⁰⁰

In the light of their inability to control the escalating civil disorder a review of the Northern Irish police was carried out by the Hunt Committee in 1969.³⁰¹ Hunt made a series of recommendations, most of which were implemented by the Joint Security Committee, comprising the NI Prime Minister and various colleagues, the army GOC, RUC Chief Constable and a number of civil servants.³⁰² On the whole he ignored or refuted allegations of discrimination within the forces, although noting the large discrepancy in community

²⁹⁶ *ibid.*

²⁹⁷ Ó'Dochartaigh, *From civil rights to Armalites: Derry and the birth of the Irish Troubles*; Walker, C, 'The role and powers of the Army' in B Hadfield (ed) *Northern Ireland: politics and the constitution* (OUP, Oxford 1992).

²⁹⁸ Walker, 'The role and powers of the Army' 112.

²⁹⁹ *ibid* 112.

³⁰⁰ Taylor, *Provos: the IRA and Sinn Fein* 129, 255.

³⁰¹ Baron J Hunt, 'The Hunt Report'.

³⁰² Donohue, L, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* (Irish Academic Press, Dublin 2001) 117.

representation in the forces.³⁰³ Hunt focused on the need for 'normalisation' of the forces, moving them from a quasi-military footing to a civil one, arguing that 'any police force, military in appearance and equipment, is less acceptable to minority and moderate opinion than if it is clearly civilian in character'.³⁰⁴ He advocated a police force which served the community and was free from political influence.³⁰⁵ This was to prove an impossible task and the RUC were destined to be one of the political footballs tossed between the various parties. The Anglo-Irish Agreement 1985 is a case in point: Article 7(c) called for reform of the RUC to make it more acceptable to the nationalist community while providing for input from the Irish Government, which was clearly at odds with RUC autonomy from political interference.

Hunt's central recommendation was to remove all military duties from the RUC while abolishing the 'Specials', replacing them with the Ulster Defence Regiment (UDR), a new locally-raised regiment, which would form a reserve force for the army, under the command of General Officer Commanding – and Westminster – rather than the RUC and Stormont. The sole contribution towards State security by the police would be the gathering of intelligence and maintenance of the law.³⁰⁶ This recommendation was implemented by the Ulster Defence Regiment Act 1969. Hunt also recommended that the RUC be disarmed, with the exception of small calibre revolvers and rifles,³⁰⁷ which were to be kept 'under strict security conditions at selected police stations for issue as required'.³⁰⁸ This

³⁰³ Baron J Hunt, 'The Hunt Report' 35.

³⁰⁴ *ibid* 21.

³⁰⁵ *ibid* 43.

³⁰⁶ *ibid* 21.

³⁰⁷ No larger than .38 mm revolvers or .303mm rifles.

³⁰⁸ Baron J Hunt, 'The Hunt Report' 25.

recommendation, echoed within the RUC ranks, was implemented but was short-lived.³⁰⁹

The RUC were rearmed in 1971 due to the on-going violence and a rise in RUC fatalities.³¹⁰

In 1976 the Ministerial working party paper, 'The Way Ahead', called for the normalisation of the criminal-justice system, advocating a policy of 'criminalization', 'normalisation' and 'Ulsterization'.³¹¹ The policy, often termed simply 'Ulsterization', was implemented by a Joint Directive issued in 1977. 'Criminalization' referred to the policy of de-politicising insurgent activity by treating political violence as a matter of law and order and included the removal of political status from prisoners. Ideologically this was an attempt to present Northern Ireland as a normal part of the UK and those who opposed its legitimacy as common criminals. It was a policy which would inevitably be opposed by violent Republicans who were never going to accept a designation of themselves as criminals. The policy led directly to the dirty protests and hunger strikes in 1980-1981, contributing to the rise of Sinn Féin as a political force.³¹² 'Normalisation' referred to the desire to 'normalise' the criminal-justice system, with a re-emphasis on criminal prosecutions. 'Ulsterization' denoted shifting the security burden from the British army to the Ulster security forces, both the RUC and UDR, which perforce involved the re-militarization of the RUC. One outcome was less British Army (excluding the UDR) deaths which reduced the political impact of the Troubles within Britain since most of the soldiers who had previously died had come from the mainland.³¹³ Ulsterisation also led to an increase in the size of the RUC to a peak of 8,259, with an average of just below 8,000 throughout the 1980s,³¹⁴ while the UDR, full and

³⁰⁹ Weitzer, R, 'Policing a divided society: obstacles to normalization in Northern Ireland' (1985) 33 *Social Problems* 41, 49-55.

³¹⁰ Walker 'Police and community in Northern Ireland', 113.

³¹¹ Ryder, *The RUC 1922-2000: a force under fire* 140-142.

³¹² Coogan, *The IRA* 486-512.

³¹³ On average 15 soldiers were killed each year between 1976 – 1986, compared with an average of 27 a year between 1969 – 1975 (McKittrick and others, *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles* table 1).

³¹⁴ Guelke, 'Policing in Northern Ireland' 99.

part-time, peaked at 6,531 in 1987 and averaged just over 3,000 between 1985 and 1994.³¹⁵

There is an evident tension between 'Ulsterization' on the one hand and Hunt's recommendations and 'normal' policing where the force is 'publicly acceptable, accountable, politically neutral, ethnically representative, impartial, demilitarized, committed to the use of minimum force, and primarily concerned with enforcing the ordinary criminal law' on the other.³¹⁶ It is difficult to impose perceptions of normality when the police wear flak jackets, carry automatic guns, travel in armoured cars and routinely use CS gas and plastic bullets.³¹⁷ The shift of responsibility over security matters away from the army meant that through the mid-1980s the RUC dedicated about 80% of their time to 'security' tasks.³¹⁸ The number of RUC deaths also increased with 'Ulsterization', rising from 108 between 1969 and 1977 to 144 between 1978 and 1987 before falling to 51 between 1988 and 2001.³¹⁹

3.5.3) The Special Powers Acts

In response to the high level of violence,³²⁰ the Stormont Government passed the Civil Authorities (Special Powers) Act (NI) (SPA) 1922, which, drawing heavily on the Defence of the Realm Act 1914,³²¹ 'became the cornerstone of Unionist security policy'.³²² During the bill's passage Robert Megaw, Permanent Secretary in the Ministry of Home Affairs, stated: 'This is an exceptional time and requires exceptional measures. We may require stronger measures still'.³²³ The SPA sought to establish law and order, in contrast to the later acts which targeted terrorism specifically. It had a sunset clause of a year, subject to

³¹⁵ CAIN 'Strength (number) of RUC and, the UDR/ RIR, 1985 to 2001-02' <cain.ulst.ac.uk/ni/security/ni-sec-01-police-strength.rtf> accessed May 1 2008.

³¹⁶ Weitzer 'Policing a divided society: obstacles to normalization in Northern Ireland' 41.

³¹⁷ Patten [9.1].

³¹⁸ Weitzer 'Policing a divided society: obstacles to normalization in Northern Ireland' 48.

³¹⁹ McKittrick and others, *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles*, table 1.

³²⁰ See above Chapter 3.5.1.

³²¹ Campbell, C, *Emergency law in Ireland, 1918-1925* (Clarendon Press, Oxford 1994), Appendix 3.

³²² Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 16.

³²³ HC Decs NI, 21 March 1922, Vol. II, col. 87.

renewal, which occurred annually until the introduction of the SPA 1928.³²⁴ The SPA 1928 extended the 1922 Act by a further five years and was itself superseded by the SPA 1933, which made the 1922 Act permanent. The SPA 1922 remained in force until 1972.

The SPA 1922 gave the Minister of Home Affairs, as the 'Civil Authority', virtual *carte blanche*.³²⁵ In addition to the powers within the Act, section 1(3) permitted him to vary, revoke or make further regulations 'for the preservation of peace and maintenance of order'. This was nominally subject to a veto by either house of Parliament, although in reality Stormont acted as a rubber stamp.³²⁶ The Minister was also permitted to delegate any or all of his powers to any officer of the police.³²⁷ The police powers were comprehensive and draconian. Particularly contentious were the powers to ban processions and public demonstrations,³²⁸ and the powers of proscription³²⁹ and internment.³³⁰ Despite the breadth of the provisions there were few legal challenges, for two main reasons. First, the IRA, and other militant republicans, did not recognise the courts.³³¹ Second, early judicial reactions seemed to confirm the minority's distrust in the legal system,³³² for example, *R (O'Hanlon) v Governor of Belfast Prison*,³³³ condemned by Campbell as 'judicial abdication'.³³⁴

³²⁴ Section 12.

³²⁵ Section 1(2).

³²⁶ Section 4. Ewing and Gearty, *The struggle for civil liberties: political freedom and the rule of law in Britain, 1914-1945* 374; National Council for Civil Liberties 'Report of a Commission of Enquiry Appointed to Examine The Purpose and Effect of the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 and 1933' (NCCL, London 1936).

³²⁷ Section 2.

³²⁸ Regulations 3 and 4 SPA 1922.

³²⁹ Regulation 24 SPA 1922.

³³⁰ Regulation 23 SPA 1922.

³³¹ Boyle, Hadden and Hillyard, *Law and state: the case of Northern Ireland* 7.

³³² For more on the judiciary and the Northern Ireland conflict see: *ibid* Chapter 2; Livingston, S, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 MLR 333; Dickson, B, 'The House of Lords and the Northern Ireland Conflict - a sequel' (2006) 69 MLR 383.

³³³ [1922] 56 ILTR 170.

³³⁴ Campbell, *Emergency law in Ireland, 1918-1925* 337.

Under the SPA, regulation 3, the Civil Authority could make an order prohibiting or restricting in any area the carrying, having or keeping of arms, munitions, explosives or weapons or articles capable of being used as such.³³⁵ The Civil Authority could also prohibit or restrict the keeping, having or using, without a permit, cars, motorbikes or bicycles.³³⁶ A constable, soldier, the Civil Authority or anyone authorised by him in writing could stop and search any person suspected of carrying arms, munitions or explosives in contravention of such an order, or otherwise held unlawfully.³³⁷ Once the search power was triggered the constable, soldier, Civil Authority or authorised person could then seize not only the objects of the search but also any other item prohibited by the order or otherwise unlawfully.³³⁸ The regulation also gave a power to search premises or property where it was suspected that articles or objects were being held in contravention of an order or otherwise unlawfully.³³⁹

The requirement of suspicion without more provides little protection against discriminatory application. It is subjective, merely requiring an honest and genuinely held suspicion, as opposed to the objective standard of 'reasonable suspicion'. The only additional procedural safeguard was that a soldier had to be on duty to exercise the power, although there is no corresponding requirement for a police constable. The power to stop and search in Regulation 3 is not limited to circumstances when an order has been issued under the Regulation; rather, it was exercisable in any circumstance where it was suspected that firearms etc. were being unlawfully held. Years later, the Newton Committee warned against this blending of legislation relating to 'ordinary' and 'emergency' powers,³⁴⁰ which carries the danger that extraordinary powers are 'ghosted' aboard emergency legislation without justification and that powers, justified by and for extraordinary circumstances, are

³³⁵ Regulation 3, para. 3(1)(c)-(d).

³³⁶ Regulation 3, para. 3(1)(e).

³³⁷ Regulation 3, para. 3(b).

³³⁸ Regulation 3, para. 3(c).

³³⁹ Regulation 3, para. 3(a).

³⁴⁰ Lord Newton, *Anti-terrorism, crime and security Act 2001 Review: Report* (HC 2003, 100) [11-15].

used in 'ordinary' encounters. A similar decoupling is evident in Regulation 22a, under which it was a summary offence to refuse to answer 'reasonable' questions when stopped by a soldier on duty or a constable.³⁴¹ However, there is no requirement of a connection between the questioning and a (suspected) offence under the Act, or even for a connection with some criminal offence.

Regulation 21 permitted a constable to stop and search any vehicle travelling along any public road if he had 'reason to suspect' that it 'is being used for any purpose or in any way prejudicial to the preservation of the peace or maintenance of order, or otherwise unlawfully' and to seize the vehicle or anything found within it he suspected was being used for such a purpose.³⁴² The potential breadth of activity for which the person searched may be suspected gives the police substantial lee-way, largely undermining any positive effect from the objective requirement of a 'reason to suspect'. Again, there is no requirement that the constable be on duty, or in uniform or produce any form of identification. Given the fact that, in particular, the 'Specials' gained their notoriety from criminal activities off-duty, a requirement that the officer be on duty and provide identification could have been a valuable safeguard. Although no statistics were kept on the usage of the SPA contemporary reports indicate that the search powers were among the most frequently exercised.³⁴³

Its provisions aside, the fundamental problem with the SPAs was their application. The SPAs were 'rigorously enforced' against the nationalist minority, whereas 'in the case of Protestants and Unionists political considerations were allowed to operate and ministers were willing to use powers of discretion'.³⁴⁴ The disproportionate application of the SPAs led to a deepening sense of alienation amongst the minority community and contributed to

³⁴¹ Regulation 22a.

³⁴² Regulation 21.

³⁴³ National Council for Civil Liberties, 'Report of a Commission of Enquiry Appointed to Examine The Purpose and Effect of the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 and 1933' 27.

³⁴⁴ Buckland, *The factory of grievances: devolved government in Northern Ireland, 1921-39* 219, see also generally 206-220; Ewing and Gearty, *The struggle for civil liberties: political freedom and the rule of law in Britain, 1914-1945* 375.

the civil rights movement, which in 1968 demanded, inter alia, the repeal of the SPA.³⁴⁵ The following year, the Hunt Report advocated the repeal of the SPA, noting that a 'number of police officers with first-hand experience of dealing with riots and extremists, told us that they considered that the powers given to them under the [SPA] Acts were unnecessary, and that the relationship between police and public would be improved if the Acts were repealed'.³⁴⁶ In April 1971 Gerry Fitt, the leader of the SDLP, warned that 'serious consequences' would follow if the powers continued to be used exclusively against Catholics in Belfast.³⁴⁷ As it transpired, both the SPA and Stormont's days were numbered.

3.5.4) The Northern Ireland (Emergency Provisions) Acts

1972 marked a turning point in the history of Northern Ireland. It was to be the bloodiest year of the Troubles and signalled the first imposition of direct rule. The year began with the shooting dead of thirteen unarmed people by paratroopers during a civil rights march,³⁴⁸ 'none of whom was posing a threat of causing death or serious injury'.³⁴⁹ This 'Bloody Sunday' led to 'increased nationalist resentment and hostility towards the Army and exacerbated the violent conflict of the years that followed'.³⁵⁰ There was also a rising tide of resentment and shock, both domestically and internationally, at the use of the 'five techniques' on detainees and prisoners.³⁵¹ The SDLP had walked out of Stormont in 1971, depriving it, in Edward Heath's view, of 'any remaining legitimacy' and there was no

³⁴⁵ NICRA "'We shall overcome"... The history of the struggle for civil rights in Northern Ireland 1968-1978' (NICRA, Belfast 1978).

³⁴⁶ Baron J Hunt, 'The Hunt Report' [35].

³⁴⁷ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 72.

³⁴⁸ A fourteenth died later from injuries.

³⁴⁹ Lord Saville 'Report of the Bloody Sunday Inquiry: Volume I' (IIMSO, London 2010) [5.5].

³⁵⁰ Lord Saville 'Report of the Bloody Sunday Inquiry: Volume I' (IIMSO, London 2010) [5.5].

³⁵¹ See for example, the ECHR's ruling on the use of the '5 techniques' in *Ireland v United Kingdom* App. no. 5310/71, (1979-1980) 2 EHRR 25; Murray, R, *State violence: Northern Ireland 1969-1997* (Mercier, Cork 1998); Lord Parker, 'The Parker Report'; Sir E Compton, *Report of the enquiry into allegations against the Security Forces of physical brutality in Northern Ireland, arising out of the events of 9th August, 1971* (Cm 4823, 1971); H.G. Bennett, QC, 'The Bennett Report'.

indication of any political rapprochement.³⁵² On the 30th March 1972, in the face of escalating violence, Stormont was suspended and direct rule imposed from Westminster in an attempt to enforce control over the security forces and progress the political situation.³⁵³ The measure was intended to be temporary – lasting until a cross-community power-sharing executive could be devised, but was to endure, with brief interludes, until 1998. Direct rule proved to be no silver bullet and the violence continued to mount. In July, in what came to be known as 'Bloody Friday', the IRA set off 22 bombs in Belfast city centre over a period of 45 minutes, killing 9 and injuring around 300.³⁵⁴ By the end of 1972 500 people had been killed and almost 5,000 injured by the 2,000 explosions and 10,000 shootings that had occurred.³⁵⁵

Against this backdrop the British Government was unwilling to discard internment, introduced in August 1971, but ordered the Diplock Commission to inquire into alternatives.³⁵⁶ The Northern Ireland (Emergency Provisions) Act (EPA) 1973 was introduced to codify, in the main, Diplock's recommendations. The repeal of the SPAs failed to placate the nationalist community, largely because the EPA was 'Special Powers re-named'.³⁵⁷ The EPA introduced the 'Diplock courts',³⁵⁸ reversed the burden of proof regarding the admissibility of statements, continued the tradition of proscription,³⁵⁹ and, again, permitted the Secretary of State to make such regulations as he saw fit 'for promoting the preservation of the peace and the maintenance of order'.³⁶⁰ Although nominally

³⁵² Quoted in McKittrick, D and McVea, D, *Making sense of the Troubles* (Blackstaff Press, Belfast 2000) 78.

³⁵³ *ibid* 78, 80.

³⁵⁴ Coogan, *The IRA* 384.

³⁵⁵ *ibid* 78.

³⁵⁶ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 122-3.

³⁵⁷ Repealed by EPA 1973, section 31(2). See *ibid*, Chapter 3.

³⁵⁸ EPA 1973, sections 2-7.

³⁵⁹ EPA 1973, sections 19-23.

³⁶⁰ This is a near carbon-copy of the SPA 1922, section 3.

temporary and subject to a yearly renewal clause,³⁶¹ it remained in force, through several iterations, for almost three decades, until its repeal by TACT.³⁶² Except where explicitly stated to the contrary, the following discussion will refer to the EPA 1978, as it is this statute that was the subject of the Baker and Colville Reports. The EPA 1978 re-enacted unmodified the powers to stop and search as found in the EPA 1973, with the exception of a cosmetic change combining the power to search for munitions and radio transmitters.³⁶³

The EPA 1973 was the second specifically counter-terrorist legislation introduced in the UK, the first being the Prevention of Violence (Temporary Provisions) Act 1939. The EPA defined 'terrorism' as 'the use of violence for political ends...includ[ing] any use of violence for the purpose of putting the public or any section of the public in fear'.³⁶⁴ Despite there being no offence of 'terrorism', it has been accepted as such by the ECtHR for the purposes of the ECHR, Article 5.³⁶⁵ A 'terrorist' is defined, in the EPA 1973, as 'a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism'.³⁶⁶ These definitions remained static until TACT, section 1.³⁶⁷ The EPA definition is wider than TACT, section 1, discussed in Chapter 1.3.2.1, in so far as it refers to 'violence' rather than 'serious violence'. It is narrower in so far as it requires the actual use of violence, or associated inchoate offences, rather than the 'threat' of violence. In terms of required 'motivation' for the act or threat of violence, TACT, section 1 casts the net wider by including, alongside the intimidation of the public, or a section thereof, which is very similar to the EPA's requirement of 'putting the public...in fear,' the intention to influence the government.

³⁶¹ Section 30.

³⁶² Schedule 16(1), paragraph 1.

³⁶³ EPA 1978, section 15.

³⁶⁴ EPA 1973, section 28(1) (later EPA 1978, section 31).

³⁶⁵ *Brogan v United Kingdom* (1989) 11 EHRR 539.

³⁶⁶ EPA 1973, section 28(1).

³⁶⁷ See: PTA 1974, section 9(1).

Despite these and other more minor differences, 'the changes in the 2000 Act to the terms of the definition are not tremendously significant'.³⁶⁸

The police and army powers under the EPA were comprehensive, although fragmented across several sections, broadly divided according to the purpose of the search or arrest. Any power to search any person or enter and/or search premises or other place included the power to stop and search any vehicle or vessel or aircraft which was not airborne and search any container, which was be exercisable, if need be, by force.³⁶⁹ Section 18 empowered a constable or an on-duty member of the armed forces to stop and question any person to ascertain their identity, movements, or knowledge concerning recent incidents which killed, injured or endangered life. Failure to stop or answer to the best of their knowledge and ability any questions posed was a summary offence punishable by imprisonment for up to six months and/or a fine not exceeding £400.³⁷⁰ Despite the slight restriction on the nature of the questions that can be asked when compared to its forbearer, Regulation 22a SPA, the power is exceedingly broad.³⁷¹ The lack of a requirement of suspicion, whether objective or subjective, gave an extraordinarily wide discretion to officers. There is, again, in this and in all the other sections discussed no requirement that the constable be on duty or in uniform. It is arguable that the section would today violate the right to liberty under Article 5(1) ECHR, because of the coercive nature of the power and the absence of controlling requirements, such as reasonable suspicion.³⁷²

Section 15 provided on-duty soldiers and the police with the power to stop and search any person in a public place with a view to ascertaining whether the person possessed any munitions or radio transmitters and to search a person in a private place who is suspected of having munitions or radio transmitters. Under section 16 all inspectors appointed under the

³⁶⁸ Walker 'The legal definition of terrorism in United Kingdom law and beyond' 6.

³⁶⁹ EPA 1973, sections 18(1)-(2), 18(5).

³⁷⁰ EPA 1973, section 16(2).

³⁷¹ Walker, 'The role and powers of the Army' 120.

³⁷² *Gillan v United Kingdom* (2010) 50 EHRR 45 app.no.4158/05. See Chapter 5.4.

Explosives Act 1875, section 53 had the power to stop and search persons in a public place to ascertain whether they unlawfully had any explosives or explosive substances.³⁷³ The lack of a requirement of suspicion again affords officers nearly unfettered discretion in relation to searches in public places. This is exacerbated by the fact that in the context of section 16 the Secretary of State could appoint anybody as inspector; the only requirement being that they were 'fit'.³⁷⁴ It seems unlikely, given the absence of any coercive penalties, that a routine stop and search under either section would pass the threshold from 'restriction of movement' to 'deprivation of liberty' so as to engage ECHR Article 5(1).³⁷⁵

The police and on-duty members of the armed forces were empowered, under section 15(1), to enter and search any premises, except dwelling-houses, to ascertain the unlawful presence of munitions.³⁷⁶ The absence of any suspicion afforded the police and army an unfettered discretion. Dwelling-houses where it was suspected that there were unlawful munitions could be searched only upon authorisation by a commissioned officer or RUC officer not below the rank of chief inspector.³⁷⁷ Soldiers and police also had powers to enter and search premises and places for the purpose of arrest. These sections were a development of Regulation 21 SPA, with greater breadth and specific reference to terrorism. The police could enter and search any premises or other place for the purpose of arresting a suspected terrorist, under section 11(2), or a person suspected of committing or being about to commit a scheduled offence or an offence under the Act that was not scheduled, under section 13(2). The army's power was similar in relation to terrorist, explosives or firearms offences, requiring suspicion that the persons were terrorists or had or were about to commit an offence related to explosives or firearms, and suspicion that they were on the premises or other place.³⁷⁸ In relation to all other offences, soldiers could only enter and search

³⁷³ EPA 1973, section 14.

³⁷⁴ Explosives Act 1875, section 53.

³⁷⁵ *Gillan (ECtHR)*. These terms are discussed in depth in Chapter 5.4.1.

³⁷⁶ EPA, Section 13(1).

³⁷⁷ EPA, Section 13(2).

³⁷⁸ Section 14(3)(b).

premises or a place where the persons suspected of committing or being about to commit the offence actually were present.³⁷⁹ Again, the requirement for these powers was merely 'suspicion', with no objective requirement of reasonableness. When arresting a terrorist an officer did not need to have a specific offence in mind, which commensurately broadened the power to search for a suspected terrorist.³⁸⁰ The armed forces' power to enter and search premises or any place with a view to arresting persons for *any* offence was consequently extremely broad. Using the army to assist the civilian security forces is a deviation from the norm; it cannot be proportionate that they then become involved in arresting persons for offences which are not directly linked to the emergency which justified their deployment.

The first review of the EPA to address stop and search powers was carried out by Sir George Baker in 1984.³⁸¹ Baker's major innovation was the recommendation that the requirement of 'suspicion' for the purpose of arrest by the police, in sections 11 and 13, be raised to that of 'reasonable suspicion' on the grounds that an objective standard was preferable and because the police used a constant standard of suspicion when dealing with all terrorist related offences.³⁸² He also recommended raising the standard in relation to the armed forces' power to search for the purpose of arresting suspected terrorists.³⁸³ Baker strongly criticised the army's power to arrest for any offence, stating that it 'must be too wide'.³⁸⁴ He recommended that it be amended to refer to 'any act of terrorism or violence or of rioting or an offence involving the use of an explosive, explosive substance or firearm, or of making or possessing a petrol bomb'.³⁸⁵ His discussion of the armed forces' powers highlighted the added difficulty in ensuring any meaningful curb on their discretion through legal rules. He

³⁷⁹ Section 14(3)(a).

³⁸⁰ *R v Officer in charge of Police office, Castlereagh, Belfast, ex parte Lynch* [1980] NI 126. On a similar point, in relation to the SPAs see *Re McEduff* [1972] NI 1.

³⁸¹ Sir G Baker, *Review of the operation of the Northern Ireland (Emergency Provisions) Act 1978* (Cmnd 9222, 1984).

³⁸² *ibid* [280 - 283]. Implemented by the EPA 1987, section 6 and Schedule 1, paragraph 1.

³⁸³ *ibid* [346].

³⁸⁴ EPA 1978, section 14 (formerly section 12, EPA1978).

³⁸⁵ Sir G Baker, 'The Baker Report' [349].

conceded that raising the standard of suspicion to reasonable suspicion would probably make no difference in practice and noted that the GOC had argued against the change because of the ‘enormous training difficulties’ it would pose.³⁸⁶ Baker questioned whether soldiers could distinguish between a scheduled offence and non-scheduled offence under the Act.³⁸⁷

Baker raised the level of suspicion in relation to searching dwelling houses for munitions to reasonable, but did not add any requirement of reasonableness to the power to search non-dwelling houses, despite acknowledging it as a ‘very wide and unfettered power’.³⁸⁸ In relation to the power to stop and question, Baker noted the tension that its use, particularly by soldiers, caused in community relations, but argued that it could not ‘in the prevailing circumstances in Northern Ireland be exercised only with reasonable cause’.³⁸⁹ Therefore, although he criticised the vagueness of the term ‘recent’, he did not recommend any alteration.³⁹⁰ These recommendations were implemented by the Northern Ireland (Emergency Provisions) Act 1987,³⁹¹ which otherwise updated rather than radically changed the powers of stop and search, inserting a reference to arresting a person under the PTA 1984,³⁹² and including scanning receivers alongside munitions and wireless receivers as objects of searches.³⁹³

By the time of Viscount Colville’s report on the EPA, PACE had been implemented in Northern Ireland, with corresponding safeguards over police stop and search powers.³⁹⁴ Only one, however, was extended to searches under the EPA: if persons or vehicles are

³⁸⁶ *ibid* [346].

³⁸⁷ *ibid* [348].

³⁸⁸ *ibid* [362, 363, 365].

³⁸⁹ *ibid* [384 – 390, 393].

³⁹⁰ *ibid* [382-384].

³⁹¹ Section 6; Schedule 1, paragraphs 1-3.

³⁹² EPA 1987, section 6.

³⁹³ EPA 1987, section 7.

³⁹⁴ The Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341.

stopped with a view to searching them and it subsequently appears that a search is not required or is impractical then the search need not be carried out.³⁹⁵ This added little by way of oversight, merely extending to officers the option not to search. The duty of officers to make a record of each stop and search explicitly excluded the EPA powers.³⁹⁶

Colville opened his Report by noting that '[a]part from the statistics, nothing much has changed' since the Baker Report six years previously.³⁹⁷ Three deficiencies were put to him by the security forces, of which two are relevant here.³⁹⁸ First, that soldiers in 'hot pursuit' usually lack the requisite authorisation by an RUC officer of the rank of chief inspector or above to search for munitions and transmitters in a dwelling house.³⁹⁹ Second, that the power under EPA 1978, section 15 to search for munitions and transmitters would benefit from being widened to include, for example, documents and the like.⁴⁰⁰ Colville rejected both requests, pointing in particular to the sensitivity of private documents as a reason to refuse expansion of section 15. He questioned the difficulty in acquiring the requisite authorisation to search a dwelling house in practice, and the appropriateness of soldiers conducting 'impromptu' searches without authority and without police presence whose skills 'were required'.⁴⁰¹ He also predicted that civil actions would be brought in all but the most straightforward cases arising from issues over the definition of 'in hot pursuit'.⁴⁰²

Colville rejected calls for the repeal of the EPA and reliance on PACE on the basis that soldiers would be able to act only as ordinary citizens, thus rendering 'the armed forces almost entirely impotent', noting that training police to fill the hiatus would be a lengthy

³⁹⁵ The Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, section 4(1).

³⁹⁶ The Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, section 5.

³⁹⁷ Viscount Colville, *Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987* (Cmd 1115, 1990) [2.1].

³⁹⁸ *ibid* [2.7].

³⁹⁹ *ibid* [2.7.1].

⁴⁰⁰ *ibid* [2.7.2].

⁴⁰¹ *ibid* [2.9.1].

⁴⁰² *ibid* [2.9.2].

process.⁴⁰³ The on-going reliance on the army underlined the limitations of the Ulsterisation policy, which specifically aimed to reduce the reliance on the army. It was, however, somewhat peculiar that a raft of measures, only some of which apply to the army, should have been retained simply because of the army's need. Could not a new bill have been drafted which provided exclusively for army powers to stop and search in Northern Ireland while 'normalising' police powers? This was never considered. Rather Colville argued that the focus should be on the exercise of the powers rather than the powers themselves.⁴⁰⁴ Unfortunately he provided no recommendations on how this should be done and no additional safeguards were added to the Act.

3.5.5) The Prevention of Terrorism Acts

On the 21st of November 1974 bombs exploded in two public houses in Birmingham killing 21 and injuring over 180 people.⁴⁰⁵ Eight days later, forty-two hours after the Bill was introduced, the Prevention of Terrorism (Temporary Provisions) Act (PTA) 1974 was passed through Parliament.⁴⁰⁶ This was the second piece of British legislation, not restricted to Northern Ireland, which sought to counter Northern-Ireland related violence, the first being the Prevention of Violence (Temporary Provisions) Act 1939, also passed through Parliament with exceptional speed in only two days.⁴⁰⁷ The 1939 Act was passed in response to the IRA's mainland campaign which it waged through 1939, in which there were 127 terrorist incidents between January and July alone.⁴⁰⁸ The Act empowered the Secretary of State to make expulsion and prohibition orders,⁴⁰⁹ and permitted extended pre-charge

⁴⁰³ *ibid* [2.14].

⁴⁰⁴ *ibid* [2.16].

⁴⁰⁵ Lord Shackleton, *Review of the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976* (Cmnd 7324, 1978).

⁴⁰⁶ Hall, P, 'The Prevention of Terrorism Acts' in B Hadfield (ed) *Northern Ireland : politics and the constitution* (OUP, Buckingham 1992) 143-190.

⁴⁰⁷ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 209.

⁴⁰⁸ *ibid* 208.

⁴⁰⁹ Prevention of Violence (Temporary Provisions) Act 1939, section 1.

detention⁴¹⁰ but contained no powers of stop and search, only search under warrant.⁴¹¹ It was subject to a two-year sunset clause but was renewed until 1953 and repealed in 1973.⁴¹²

The PTA 1974 covered the old ground of proscription,⁴¹³ exclusion orders,⁴¹⁴ and extended pre-charge detention.⁴¹⁵ The definition of 'terrorism' was the same as in the EPA.⁴¹⁶ As indicated by its title, it was nominally 'Temporary', with a sunset clause of six months, yet remained in force, with amendments, until repealed by TACT. The power to stop and search, excluding that exercisable at borders, was contained in Schedule 3, paragraph 7, which empowered a constable to stop and search persons in any circumstances where they could exercise the power to arrest under section 7 so as to ascertain whether they had any documents or other articles which may constitute evidence that they were a person liable to arrest. Those circumstances were when a constable reasonably suspected the person to be subject to an exclusion order, guilty of an offence relating to proscription or exclusion orders, or concerned in the commission, preparation or instigation of acts of terrorism.⁴¹⁷ The PTA uses the same language as EPA 1973, section 11 but relates the power to acts of terrorism rather than scheduled offences and is thus somewhat broader. In contrast, the reference to reasonable suspicion is a higher standard than the mere suspicion required initially under the EPA 1973 and 1978. It was, as noted by Donohue, on the whole neither 'new [n]or innovative'.⁴¹⁸ The subsequent embodiment, the PTA 1976, largely mirrored the previous Act except for a minor change in the arrest powers which were extended to cover a

⁴¹⁰ Prevention of Violence (Temporary Provisions) Act 1939, section 4.

⁴¹¹ Prevention of Violence (Temporary Provisions) Act 1939, section 4(3)-(4). For more on the provisions in this act and its exercise see Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 208-216.

⁴¹² *ibid* 216.

⁴¹³ PTA 1974, sections 1-2.

⁴¹⁴ PTA 1974, sections 3-6.

⁴¹⁵ PTA 1974, section 7.

⁴¹⁶ PTA 1974, section 9(1).

⁴¹⁷ PTA 1974, section 7.

⁴¹⁸ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 225.

person 'who is or has been concerned' in the preparation, instigation or commission of acts of terrorism as opposed to 'a person concerned' in the commission etc.⁴¹⁹

Lord Shackleton headed the first review of the PTAs 1974 and 1976.⁴²⁰ There was no specific reference to stop and search powers, the focus in terms of police powers being on arrest and detention under section 12, specifically the absence of a requirement that the officer have a particular offence in mind, and seven day pre-charge detention.⁴²¹ The subsequent inquiry was carried out by Earl Jellicoe in 1983.⁴²² He again focused on pre-charge detention under section 12 and made no reference to powers of stop and search. Jellicoe's recommendation that 'Temporary', which 'rings increasingly hollow', be removed from the title was not implemented when the next iteration, the PTA 1984 was passed.⁴²³ The PTA 1984 again provided the power to search without warrant in circumstances where the constable could arrest a person under section 12 of the Act.⁴²⁴ It also introduced another of Jellicoe's recommendations: that the power of arrest under section 12 be limited to acts of terrorism 'connected with the affairs of Northern Ireland' or acts of international terrorism unrelated to the affairs of Britain.⁴²⁵

The IRA launched a car bombing campaign in London in 1992, aimed mainly at financial targets, which resulted in huge economic costs; the first bomb, at the Baltic Exchange caused £800 million worth of damage.⁴²⁶ The MPS responded by imposing a 'ring of steel',

⁴¹⁹ Section 12(1)(b).

⁴²⁰ Lord Shackleton, 'The Shackleton Report'.

⁴²¹ *ibid*, Chapter 6.

⁴²² Lord Jellicoe, *Review of the operation of the prevention of terrorism (temporary provisions) act, 1976* (Cmnd 8803, 1983).

⁴²³ *ibid* [18].

⁴²⁴ Schedule 6, paragraph 6(1).

⁴²⁵ Section 12(3). Lord Jellicoe, 'Jellicoe Report' [77].

⁴²⁶ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* 256.

largely facilitated by random stops and searches.⁴²⁷ In order to strengthen the dubious legal base of these responses the PTA 1989 was amended by the Criminal Justice and Public Order Act 1994.⁴²⁸ The amendment, section 13A, permitted an ACPO rank officer to give an order authorising any constable in uniform to stop and search any vehicle, driver, passenger or pedestrian for articles which could be used for a purpose connected with the commission, preparation or instigation of acts of terrorism.⁴²⁹ Any person failing to stop or wilfully obstructing a constable in the exercise of the power was guilty of an offence and liable to imprisonment for up to six months or a fine not exceeding level 5.⁴³⁰ The authorisation could last up to twenty-eight days with a possible renewal of up to twenty-eight days and related to any place or specified locality within the authorising officer's area.⁴³¹ The section specifically states that the power may be exercised 'whether or not [the constable] has any grounds for suspecting the vehicle or person is carrying articles of that kind'.⁴³² The Prevention of Terrorism (Additional Powers) Act 1996 inserted a new section into the PTA 1989, which provided the same powers as section 13A except it related only to pedestrians and required the authorisation to be confirmed by the Secretary of State.⁴³³ It also provided that only headgear, footwear, outer coat, jacket or gloves may be required to be removed in public.⁴³⁴ The section appears superfluous as pedestrians were already included in section 13A.

It is notable that these powers were broader than those introduced under the SPA or the EPA, for although the absence of reasonable suspicion is common with section 16 of the

⁴²⁷ For more on the 'ring of steel' see Coaffee, J, 'Recasting the "Ring of Steel": Designing Out Terrorism in the City of London?' in S Graham (ed) *Cities, War and Terrorism: Towards an Urban Geopolitics* (Blackwell, Oxford 2004).

⁴²⁸ Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000*.

⁴²⁹ PTA 1989, sections 13A(1)-(3).

⁴³⁰ PTA 1989, sections 13A(6)-(7).

⁴³¹ PTA 1989, sections 13A(1), 13A(8).

⁴³² PTA 1989, section 13A(4).

⁴³³ PTA 1989, section 13B(9).

⁴³⁴ PTA 1989, section 13B(4A).

EPA, sections 13A and 13B confer the power to search as well as stop. Section 13A is virtually identical to TACT, section 44, which adopts the same structure, temporal and geographical restrictions, and very similar language. Given the extensive analysis of section 44 in the following Chapters, it suffices to say that section 13A's only safeguard is the requirement that it appears to the officer making the authorisation that 'it is expedient to do so in order to prevent acts of terrorism', which does little to fetter officers' exceptionally broad discretion.⁴³⁵

A desire, in the wake of the peace process in Northern Ireland, to review counter-terrorist law prompted the Lloyd 'Inquiry in Legislation against Terrorism', which resulted in the Terrorism Act 2000 and the repeal of the EPA and PTA.⁴³⁶ There have been further Northern Ireland specific legislation since TACT, however, as this thesis focuses on the use of section 44 in England and Wales it will not discuss these in detail, although reference will be made to the powers where relevant.

3.6) Conclusion

Despite the vastly different socio-political contexts in which non-counter-terrorist and counter-terrorist powers developed, two major themes emerge across the divide: the use of stop and search to control sections of society, whether poor, 'suspect' or terrorist, and the detrimental effect this can have on police-community relations more broadly. Interwoven into these themes are two perennial criticisms regarding the use of stop and search power: excessive discretion and discrimination. The Scarman and Macpherson Reports singled out stop and search as undermining police-community relations. In terms of counter-terrorist powers: the discriminatory application of 'emergency' and public order laws against nationalists in Northern Ireland was one of the causes of radicalization.⁴³⁷ Although stop and search powers rarely get specific mention, the focus being internment, the Flags and

⁴³⁵ Section 13A(1).

⁴³⁶ Lord Lloyd, 'Lloyd Report'.

⁴³⁷ See e.g. Adams, *The politics of Irish freedom* 30-1; Holland, J, *Too long a sacrifice: life and death in Northern Ireland since 1969* (Penguin, Harmondsworth 1982); Moloney, E, *A secret history of the IRA* (Penguin, London 2003).

Emblems Act 1954 and SPA 1922, Regulation 3, one must take account of the extraordinary circumstances in Northern Ireland – the decades of emergency legislation, the militarization of the police and the intense levels of violence from 1968. In a different situation they might prove to be a sufficient trigger for radicalisation. The potential of stop and search powers to cause violent confrontations with the police is certain, as witnessed in the Brixton riots.

Integral to these issues is the high level of discretion inherent in stop and search powers which makes supervision and accountability extremely difficult. What is notable from this historical survey is that often the discretion afforded to officers is greater than that required. Notwithstanding the criticism concerning the increased bureaucracy post-Macpherson, stop and search continued to be a power widely used by the police despite the increased accountability of the stop and search forms. The fact that stop and search continues to be highlighted as evidence of police disproportionality towards ethnic minorities underlines the on-going friction it engenders in police-community relations and demonstrates the importance of ensuring whatever curbs on discretion are possible are implemented even if, as with the stop forms, these offer only accountability in terms of 'giving an account', rather than offering any real curb on officer discretion.

Beyond these recurring debates around discretion and discrimination lies the fundamental question of whether stop and search 'works'? The answer depends on its perceived objectives. If the aim is the detection of crime the statistics clearly reveal its ineffectiveness. If the aim is the detection, prevention and deterrence of crime, the success or otherwise is more difficult to measure. Intrinsicly linked to prevention is the idea of control and the need to control certain areas or groups deemed to be high risk. Opponents of using stop and search as a preventative or deterrent power argue that it is unlawful for the police to use stop and search for such ends.⁴³⁸ Perhaps a better question is whether the police need some form of powers to stop and search prior to arrest? It is submitted that they do, although it is questionable whether all the current powers are needed. These issues are discussed fully in relation to section 44 in Chapters 4, 5 and 6.

⁴³⁸ Bowling, B and Phillips, C, 'Disproportionate and discriminatory: reviewing the evidence on police stop and search' (2007) 70 MLR 936.

Chapter 4) The Authorisation of Section 44

This chapter analyses the authorisation process governing section 44, addressing the research questions: how is section 44 used and how ought it be used? It begins by considering the objectives of section 44, as articulated by the police sample and Lord Carlile during the fieldwork, and how these interact with CONTEST. The focus then turns to the limitations and safeguards imposed upon the authorisation process, in terms of the systems imposed by TACT, Code A, 'soft' regulations, such as the NPIA's practice guide and accountability to the community, and human rights. The Chapter concludes with an assessment of the authorisation process in terms of the framework principles of accountability, utility and adherence to human rights, considering how it could be improved.

It is worth recapping at the outset what section 44 and section 43 permit the police to do. Under section 43 an officer can stop and search any person he reasonably suspects of being a terrorist. Under section 44, a uniformed officer may stop and search any person in an authorised area for articles of a kind which could be used in connection with terrorism. There is explicitly no requirement of reasonable suspicion for section 44.

4.1) Objectives

This section will outline the objectives behind the police authorisation of section 44 and the patterns of usage in the field samples.

Two key objectives emerged from the fieldwork with the police sample: first, disruption and deterrence;¹ and, second, intelligence gathering.² The use of section 44 as part of high-visibility policing in and around iconic and high risk locations, which aims to deter terrorists from targeting those areas, fits within the objective of disruption and deterrence:³ 'if [would-be terrorists] see us there at transport hubs they're going to be less likely to carry anything

¹ MPSSNR01; MPSFL02; MPSFL01; MPSFL04; MPSSNR04; BTPFL01; BTPFL03; BTPFL04; BTPSNR02; BTPSNR05.

² MPSSNR01; MPSFL02; MPSFL01; MPSSNR04; BTPFL01; BTPFL03; BTPPC03; BTPFL04.

³ BTPFL10.

on them'.⁴ This is underlined by the occasional use of signs explaining why section 44 is being used there and chimes with the 'all-risks' policing focus on location rather than people as the source of the risk calculation.⁵ The fact that random stops of persons and vehicles are carried out reinforces the deterrent aspects as there is a chance that a would-be terrorist will be randomly stopped. However, most officers conceded that it was 'very unlikely' that an officer would catch a terrorist attempting to deliver a bomb,⁶ although this would be 'the ultimate – if you could stop that big thing happening'.⁷

The second major objective is to obtain intelligence.⁸ Some frontline and almost all senior officers viewed this as secondary to the objective of disruption and deterrence.⁹ Others saw it as dependent on the type of operation that was being carried out.¹⁰ A few saw it as the primary objective.¹¹ One officer, as a personal opinion, said 'I don't think the legislation is necessarily written for intelligence gathering purposes'.¹² Tied to disruption and deterrence was the lesser noted objective of public reassurance, again primarily achieved through high-visibility policing.¹³ The issue of arrests is discussed in more detail in the next Chapter, but it is worth noting at this stage that several officers specifically disavowed the use of section 44 as an 'arrest tool'.¹⁴ Apart from section 44 not being an 'arrest tool', these objectives may explain the extremely low hit-rate – 320 terrorism-related arrests from a total of

⁴ MPSFL01.

⁵ MPSSNR01.

⁶ MPSSNR01.

⁷ BTPFL04.

⁸ MPSSNR04; MPSSNR01; BTPFL01; BTPPC03; BTPFL04.

⁹ BTPFL02; BTPFL03; BTPFL04; BTPSNR02; BTPSNR01; MPSSNR01; MPSSNR03; MPSSNR05; MPSSNR06. C.f. MPSSNR04.

¹⁰ BTPFL01.

¹¹ MPSSNR04; MPSFL01.

¹² BTPFL07.

¹³ MPSSNR03; MPSSNR04; MPSSNR01; BTPFL01; BTPFL03; BTPPC03; BTPFL04.

¹⁴ MPSSNR01; MPSSNR04; MPSFL01; BTPFL04.

355,993 stops, or 0.09 per cent, between 2001/02 and 2008/09, according to the Section 95 statistics.¹⁵

These key objectives interact primarily with CONTEST's 'Protect' stream, which highlights the protection of CNI and crowded places.¹⁶ Many of the CNIs, notably transport hubs, are both CNIs and crowded places. The nine listed CNIs – government, finance, transport, communications, health, emergency services, energy, food and water – can all be found within the MPS force area, which is a key hub for government, finance, communications and transport. In addition, there is a large concentration of iconic sites within London. The BTP's purview is the rail network which obviously falls within the CNI. The 'Pursue' stream may also be engaged, intelligence gathering being one of its explicit objectives.¹⁷ Disruption is also mentioned,¹⁸ specifically in terms of arrests, although one officer noted this would not happen 'unless we're really, really lucky'.¹⁹ It seems arguable that the broader meaning of disruption, encompassing the prevention of terrorist reconnaissance may also come under 'Pursue'. A related issue is the requirement that the exercise of section 44 does not impact negatively upon 'Prevent'. This was acknowledged by MPS officers, although they knew of no instance when authorisation was not applied for because of such concerns.²⁰

4.1.1) The Approach of the MPS

The MPS, from April 2001 through to mid-2009, had in place a 'rolling', force-wide authorisation of section 44. In July 2009 a pilot scheme was carried out in four boroughs

¹⁵ Lord Carlile 'Report on the operation in 2008 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006' (HMSO, London 2009) [147]; Lord Carlile 'Report on the operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006' (HMSO, London 2008) [129]; Lord Carlile 'Report on the operation in 2006 of the Terrorism Act 2000' (HMSO, London 2007); Lord Carlile 'Report on the operation in 2005 of the Terrorism Act 2000' (HMSO, London 2006).

¹⁶ CONTEST, section 10.

¹⁷ CONTEST, section 8.

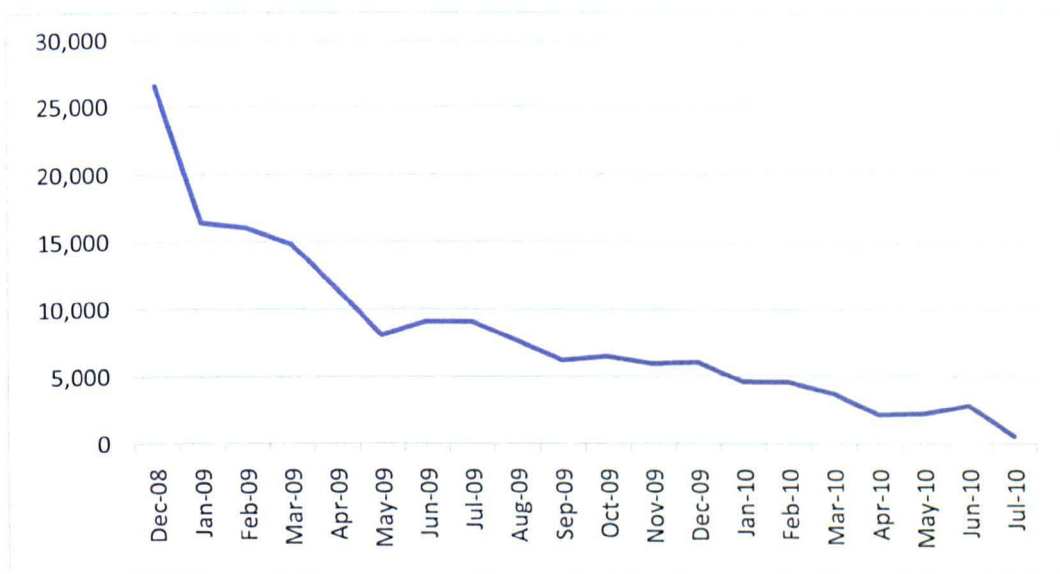
¹⁸ CONTEST, section 8.16.

¹⁹ BTPSNR04.

²⁰ MPSSNR05; MPSSNR06.

before being rolled out force-wide in late August 2009. The scheme aimed to respond to the annual criticisms in Lord Carlile's Reports, centred in particular on the MPS's refusal to tailor the authorisation more narrowly to specific boroughs or parts thereof by introducing a 'patchwork' authorisation.²¹ It was also a response to the NPIA's 'Practice Advice on Stop and Search in Relation to Terrorism'.²² The number of section 44 stops was 'drastically reduced' following the implementation of the pilot scheme in the sampled borough and has fallen dramatically MPS-wide since the 'patchwork' authorisation has come into force, as shown in Figure 4.1 below.²³

Figure 4.1: number of persons stopped by the MPS, December 2008 – June 2010²⁴



The patchwork authorisation divides each borough into three 'levels'.²⁵ Level 1 areas are

²¹ Lord Carlile, 'Report on the operation in 2005 of the Terrorism Act 2000'.

²² NPIA, 'Practice Advice on Stop and Search in Relation to Terrorism' (NPIA, Bedfordshire 2008).

²³ MPSSNR02.

²⁴ Source: MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: Jan 2009' (MPS, London 2009); MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: Feb 2009' (MPS, London 2009); MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: March 2009' (MPS, London 2009); MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: Apr 2009' (MPS, London 2009); MPS Sample Borough 'Police and Community Safety Board: Annual Report 2009-2010' (London 2010) MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: Jun 2010' (MPS, London 2009); MPS 'Borough Breakdown of Stops and Searches Under the Terrorism Act: July 2010' (MPS, London 2009).

where section 44 is in force all the time. These continue to be covered by 'rolling' authorisations.²⁶ These were referred to as 'security zones', raising memories of the 'Ring of Steel',²⁷ although the distinction was made that unlike in the early 1990s there is no 'target hardening' nor any obvious sign that one is entering a 'security zone'.²⁸ In the borough surveyed, level one areas primarily surrounded 'iconic' and 'high risk' targets, including CNIs such as major transport systems, although one area which was significant in terms of the night-time economy was also included.²⁹ 'Level 2' areas are where section 44 is invoked in response to a specific incident, such as a large social event. In order to use section 44 in these areas the borough had to apply to Scotland Yard in advance. 'Level 3' are areas where an officer may use section 43. Section 43 is in force permanently nationwide – and this was recognised – however, it appears that these areas were designated within the scheme for section 44 for a 're-education' of officers which emphasised the difference between the two powers and when and where each one was appropriate.³⁰

There is an inconsistency in this use of section 44 around the night-time economy. While the attempted attack on a London nightclub in 2007 reinforced the fear,³¹ particularly evident since the Bali bombing, that the night-time economy could be a 'soft' target for terrorists, the officers stated that section 44 was not widely used at night. A 'few' evening patrols were run, with the latest lasting until two o'clock in the morning, although these were as much intended to disrupt through hi-visibility policing as to actually exercise section 44.³² This suggests that a 'Level 2' authorisation would be more appropriate. Indeed, the argument could be made that high-visibility policing as a deterrent coupled with section 43

²⁵ MPSSNR02.

²⁶ MPSSNR05.

²⁷ Coaffee, 'Recasting the "Ring of Steel": Designing Out Terrorism in the City of London?'.

²⁸ MPSSNR02.

²⁹ MPSSNR02.

³⁰ MPSSNR02.

³¹ Gardham, D, 'Glasgow bomb plot: NHS doctor found guilty of terror attack on airport' *The Telegraph* (London, 16th December 2008).

³² MPSSNR02.

should be used, although there are two difficulties with section 43 in this situation. First, section 43 provides the power to search persons only, not cars. Though the need to stop cars is most likely to occur in response to specific information, in which case the area could be designated 'Level 2', this is a significant gap in the section 43 power. Second, if someone appears to stand out, perhaps because of carrying a large bag while entering a nightclub or pub late at night, this will be insufficient to constitute reasonable suspicion for section 43 while section 44, if authorised, could be exercised in such circumstances. When questioned on this point Lord Carlile suggested that is a better argument for section 44 in an area 'where there were lots of nightclubs cheek by jowl' and 'narrow streets' rather than in areas such as Tiger Tiger in Haymarket, 'which is in a very public area, there is a wide road, well lit and so on' where section 43 should be sufficient.³³

4.1.2) The BTP's approach

The BTP also reviewed their procedures surrounding the authorisation and exercise of section 44, in light of the NPIA's guidance.³⁴ Previously their authorisations covered the entire railway network, but since February 2009 they have adopted a 'three strand' approach.³⁵ The first strand focuses on suspicious activity which falls short of the grounds required in section 43. This may be informed by the use of explosives dogs and/or behavioural assessment techniques such as BASS (behaviour assessment screening system), discussed in Chapter 5. The second strand is a directed patrol, which is pre-planned and intelligence led where the officers are looking for something or someone in particular. Risk and community impact assessments are carried out in advance. The third strand is 'visible search activity', which 'is not about who you stop, it's about just stopping people'.³⁶ This strand clearly chimes with the objectives of both deterrence and public reassurance through high visibility policing and fits within the 'all-risks' policing framework. One officer distinguished the second and third strands in terms of 'intelligence based selection and

³³ Lord Carlile.

³⁴ BTPSNR05. NPIA 'Practice Advice on Stop and Search in Relation to Terrorism'.

³⁵ BTPFL08; BTPSNR03; Lord Carlile.

³⁶ BTPSNR05.

intuitive selection'.³⁷ The 'three strand' approach is more focused than the previous pan-force, rolling authorisation. It appeared that in practice some areas remain under rolling authorisations, due to the inherent vulnerability of the infrastructure, while other areas come under an authorisation in relation to intelligence or in order to ensure a hostile environment on the railway network, by, for example, running 'strand 3' patrols.³⁸ In addition to the 'three strands' procedure, the BTP also removed all reference to 'random' stops with officers instead referring to 'routine' stops, although the precise distinction between these is not entirely clear, as acknowledged by some officers.³⁹ A final difference is that there appeared to be more diversity in terms of the times at which section 44 was exercised.⁴⁰

4.2) The Authorisation Process

There are two key stages to the authorisation process: first, the application for authorisation; and, second, the granting of the authorisation subsequent to ministerial approval. Straddling these is the 'trigger' for authorisation. Each of these will be discussed in turn, starting with the 'trigger' for authorisation.

4.2.1) The 'trigger'

Section 44 provides, in part, that:

(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—

- (a) the vehicle;
- (b) the driver of the vehicle;
- (c) a passenger in the vehicle;
- (d) anything in or on the vehicle or carried by the driver or a passenger.

³⁷ BTPFL10.

³⁸ BTPSNR03; BTPSNR05; BTPSNR01.

³⁹ BTPSNR02; BTPFL04.

⁴⁰ BTPSNR01.

(2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—

(a) the pedestrian;

(b) anything carried by him.

(3) An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.

Thus the legal ‘trigger’ for authorisation is that the person making the authorisation considers it ‘expedient’ for the prevention of acts of terrorism.⁴¹ During the Bill’s passage, Simon Hughes MP proposed an amendment inserting ‘strictly necessary’ in place of ‘expedient’.⁴² He argued that, coupled with the lack of reasonable suspicion, the threshold of ‘expedient’ would violate Article 5 of the ECHR.⁴³ He pointed to the subjective nature of the test and the fact that it was ‘difficult to challenge the validity of that authorisation’, concluding that it gave ‘carte blanche to the police officer’.⁴⁴ The then Home Secretary, Charles Clarke, contested these views, arguing the section was Convention compliant and that the term ‘expedient’ was required so that authorisations could be given when it was ‘advantageous or suitable...even when it may not be strictly necessary’.⁴⁵ The amendment was defeated by 12 to 1.⁴⁶ Adding further breadth to authorisation power is the reliance on the definition of ‘terrorism’ in TACT, section 1 which, as discussed in Chapter 1.3.2.1, is exceptionally broad.

⁴¹ Section 44(3) TACT.

⁴² HC Standing Committee D, 6th Sitting, 1st February 2000, am, part 4 (amendment no. 112).

⁴³ HC Standing Committee D, 6th Sitting, 1st February 2000, am, part 4.

⁴⁴ HC Standing Committee D, 6th Sitting, 1st February 2000, am, part 4.

⁴⁵ HC Standing Committee D, 6th Sitting, 1st February 2000, am, part 4.

⁴⁶ HC Standing Committee D, 6th Sitting, 1st February 2000, am, part 4.

Lord Bingham, giving the leading judgment in *Gillan (HL)*, refused to read ‘expedient’ as meaning ‘necessary and suitable, in all the circumstances’ on the grounds that ‘expedient’ is distinct from ‘necessary’ and Parliament chose the former.⁴⁷ This is clearly correct, although it was regrettable that Lord Bingham failed to provide any definition of ‘expedient’. The Criminal Justice and Public Order Act 1994, section 60, discussed in Chapter 3.3, has a similar trigger, but the scant case-law on section 60 does not include the interpretation of ‘expedient’.⁴⁸ The question of definition was addressed by the ECtHR in *Gillan (ECtHR)*, which held ‘expedient’ to mean ‘no more than “advantageous” or “necessary”’.⁴⁹ As the ECtHR noted, this threshold is so low as to preclude any consideration of proportionality.⁵⁰ This was a factor contributing to the ECtHR’s ruling that section 44 was not in accordance with the law.⁵¹ Although not considered in *Gillan (HL)*, there is a question whether HRA, section 3 would permit or require words to be ‘read in’ or ‘read down’ to ensure proportionality.⁵² Given the ECtHR’s ruling, discussed further below, the point is now moot.

4.2.2) Application for authorisation

Leaving aside for now the human rights issues raised by the ‘trigger’, the next topic to consider is the limitations and safeguards around the process of applying for an authorisation.

⁴⁷ R (*Gillan*) v Commissioner of Police of the Metropolis [2006] UKHL 12 [13-14].

⁴⁸ In addition to references in *Gillan (HL)*, which is properly concerned with section 44, the only cases which discuss section 60 in any depth are: *Austin v Commissioner of Police of the Metropolis* [2007] EWCA Civ 989, *DPP v Avery* [2001] EWHC Admin 748 (which focuses on section 60(4A)), *O (A Juvenile) v DPP* 1999 WL 477793, and *R. (on the application of Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

⁴⁹ *Gillan v United Kingdom* (2010) 50 EHRR 45 app.no.4158/05 [80].

⁵⁰ *Gillan (ECtHR)* [80].

⁵¹ *ibid* [80-87].

⁵² Edwards, R. ‘Reading down legislation under the Human Rights Act’ (2000) 20 LS 354; Clayton, R. ‘The limits of what’s “possible”: statutory construction under the Human Rights Act’ (2002) 5 EHRLR 559.

The authorisation must be made in writing and if made orally must be confirmed in writing as soon as reasonably practicable.⁵³ There were no oral authorisations in the MPS according to the officers interviewed.⁵⁴ This is unsurprising given that the pan-London 'rolling' authorisation was in place until July 2009. The authorisation must be given by an ACPO rank officer and it must be limited to a police area, including waters which are internal or adjacent to the specified area, and does not need to extend that far.⁵⁵ If the internal waters are adjacent to more than one force then an authorisation from each is required.⁵⁶ The authorisation may last 28 days and need not last so long.⁵⁷ Each MPS authorisation, between 19/2/2001 and 22/4/2009, lasted on average 26.38 days, with the shortest being 20.5 days and each authorisation following directly after the other.⁵⁸ The possibility of renewing the authorisation by writing indicates that repeated authorisations were in the mind of the drafters.⁵⁹ This was reinforced by the approval of the MPS' rolling authorisations as lawful in *Gillan (HL)*.⁶⁰ Both the HO Circular and the NPIA's Practice Advice advise using less than the maximum geographical limit, requiring 'detailed' explanations to be given explaining why the option of a designated area was rejected, but are silent on the question of whether the maximum temporal limit should be used.⁶¹ As the ECtHR noted in *Gillan (ECtHR)*, the MPS practice of a 'rolling', force-wide authorisation for over eight years highlights the failure of these restrictions to act as effective limitations.⁶² Moreover, the

⁵³ Section 44(5).

⁵⁴ MPSSNR05; MPSSNR06.

⁵⁵ Sections 44(4), (4A), 44(4B) and 44(4ZA) TACT.

⁵⁶ Home Office 'Circular 08/2006: Terrorism and Organised Crime' (Home Office, London 2006), section 74.

⁵⁷ Section 46(2).

⁵⁸ MPS 'Section 44 Authorisation Data' (MPS, London 2010).

⁵⁹ Section 46(7).

⁶⁰ *Gillan (HL)* [18].

⁶¹ Home Office 'Circular 027/2008: Authorisations of Stop and Search Powers under Section 44 of the Terrorism Act' (Home Office, London 2008); NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' [3.1.4].

⁶² *Gillan (ECtHR)* [81].

opacity surrounding the authorisations, discussed below, precludes any assessment of whether the guidelines in the Practice Advice and HO Circular are being adhered to.

In both forces, the application is prepared by a dedicated team.⁶³ All authorisation applications must be completed on pro-formas issued by the NPIA (see Appendix B).⁶⁴ These forms, in circulation since late 2008 are very similar to the old forms, 'just underlin[ing] some of the initially broader...questions, particularly about implementation'.⁶⁵ In the MPS most of the authorisations were signed around three days before the preceding authorisation expires, to allow for any delays.⁶⁶ Because the form is submitted to the National Joint Unit (NJU) and Home Secretary for approval there is no reference to the 'levels' or 'strands' in the MPS' or BTP's authorisations or other 'internal jargon' as these may not be known to the NJU or Home Secretary.⁶⁷ The NJU operates within the MPS' SO12 (the counter-terrorist 'special branch'), and provides a point of contact for all matters relating to TACT.⁶⁸ The MPS team completed each separately using the previous one as a base.⁶⁹ While there was a degree of content which remained constant, it was subject to scrutiny before each new authorisation.⁷⁰

A copy of each application with an audit trail is retained, so for each statement in the application there is 'the equivalent of footnotes'.⁷¹ There is no collation of the applications. Such collation, by theme or by the section in the application to which the information pertains, could add an extra layer of accountability, subject to a time-lag, and may be useful in terms of internal analysis for best practice and perhaps even for intelligence. The officers

⁶³ MPSSNR02; MPSSNR04; BTPSNR03.

⁶⁴ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' Appendix 8.

⁶⁵ MPSSNR05.

⁶⁶ MPSSNR05.

⁶⁷ MPSSNR05; BTPSNR03.

⁶⁸ MPS, 'Special Branch introduction and summary of responsibilities' (MPS, London 2004).

⁶⁹ MPSSNR05.

⁷⁰ MPSSNR05.

⁷¹ MPSSNR05.

interviewed highlighted the 'think trial' approach, by which they anticipated defending each authorisation in court: 'everyone always says...remember you could be standing in a witness box in case of unlawful searches or any other legal challenge'.⁷² In terms of the detail, some sections are more 'pro forma', for instance in relation to the reason for exercising section 44 powers, one officer stated: 'we generally say what we mean, it's to keep the public safe and secure and it's generally words to that effect in so few words'.⁷³

The Practice Advice's pro-forma sheds some further light on the reasons for authorisation. The notes to the pro-forma imply that a high state of alert in itself may be enough to justify an authorisation but the relationship between the state of alert and the decision to authorise must be detailed.⁷⁴ That this is likely to be one of the more static areas is underlined by the fact that the pro-forma has a separate section for details of new information relating to recent events specific to the authorisation.⁷⁵ Any reference to JTAC or Security Services reports are referenced and cited as appropriate and must be to current reports.⁷⁶ Additional information may refer to reports of suspected hostile reconnaissance.⁷⁷ The prompt to authorise section 44 in a particular area arises from intelligence from the central agencies, fed through the relevant special branch in conjunction with the counter-terrorism unit, although it must be noted that for the two forces sampled, despite their move to the patchwork and three strand authorisation respectively, many of the areas under authorisation remain constant due to underlying vulnerabilities or sensitivities.⁷⁸ A senior BTP officer commented that 'for BTP in particular I think it's more about the vulnerability of the infrastructure rather than any specific intelligence...if you're getting into the realms of

⁷² MPSSNR05.

⁷³ MPSSNR05.

⁷⁴ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism'.

⁷⁵ *ibid*, Explanatory Notes.

⁷⁶ MSPSNR05; BTPSNR03.

⁷⁷ BTPSNR03.

⁷⁸ BTPSNR03.

specific intelligence then you are perhaps looking at a section 43'.⁷⁹ This underlines the broad discretion afforded by the trigger of 'expedient' and also the consequences of all-risks policing: the threat is generalised by being focused on a location rather than persons and therefore often cannot be supported by specific intelligence.

The pro forma requires the authorising officer to justify specifically why section 43 or other PACE powers are insufficient.⁸⁰ Details of the briefing and training provided to officers using section 44 must also be provided. Both forces posted details of where section 44 is active on their intranets,⁸¹ which was crucial for officers who 'self-briefed' from the intranet.⁸² The issue of self-briefing is discussed further in Chapter 6.3.5. In the MPS, the daily briefing includes a counter-terrorist slide which provides details of where section 44 is in force.⁸³ At the beginning of each authorisation an additional slide is included giving the details of the authorising officer and the dates of the authorisation.⁸⁴ Lastly, details are provided of the practical implementation of the powers, in terms of the type of operations that will use the power, e.g. armed patrols, road checks, security of a vulnerable site, including arrangements for review procedures where applicable.⁸⁵

4.2.3) Ministerial approval of the authorisation

In relation to the second stage of the authorisation process, the ministerial approval of the authorisation, the NJU should be contacted by telephone once an authorisation has been given, and a copy of the authorisation forwarded immediately. They then inform the Home Office. The Secretary of State may confirm or cancel the authorisation or amend its duration.⁸⁶ The fact that the Home Secretary will be familiar with current intelligence

⁷⁹ BTPSNR03.

⁸⁰ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism', Section 10.

⁸¹ MPSSNR05; BTPSNR03.

⁸² BTPFL07.

⁸³ MPSSNR05.

⁸⁴ MPSSNR05.

⁸⁵ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism', Explanatory Notes.

⁸⁶ TACT, section 46(5-6).

reports prompted one officer to comment, as a personal view, that ‘the signing or otherwise of the authority is not necessarily contingent on the quality of the application because the application itself states facts that are known to the Minister’.⁸⁷ Some BTP authorisations were queried, but it was not recently and ‘they were more about the detail...and methodology than the overall strategy’.⁸⁸ Similarly, some MPS authorisations have been queried, but only in relation to specific points that require greater details, with, for example, the Home Office phoning the MPS to query a specific point which needed ‘reinforcement’,⁸⁹ although on one occasion, a number of years ago, the need for the authorisation was questioned.⁹⁰ The MPS authorisation data reveals that one application was refused, however, an application was authorised the following day suggesting that there were issues with the particulars rather than the underlying justifications.⁹¹ Lord Carlile affirmed that ‘there have been very few refusals, however, a number of forces have stopped asking for authorisations in the context of discouragement from the Home Office’,⁹² although in his 2010 Report he criticises several of the authorisations made in 2009.⁹³

The fact that at least some authorisations have been rejected or queried is encouraging, however, the nub of the issue is the near-total lack of transparency. It is now ACPO policy for forces to acknowledge whether or not they have an authorisation in force, although no further details are provided, although this has not translated into forces actively notifying the public when an authorisation is in force.⁹⁴ There is no routine publication of data relating to the number of authorisation applications, nor the number rejected, modified or approved, nor whether they tend towards the maximum or minimum in terms of the geographical and

⁸⁷ MPSSNR04.

⁸⁸ BTPSNR03.

⁸⁹ MPSSNR05.

⁹⁰ MPSSNR06.

⁹¹ MPS, ‘Section 44 Authorisation Data’.

⁹² Lord Carlile.

⁹³ Lord Carlile ‘Report on the operation in 2009 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006’ (HMSO, London 2010).

⁹⁴ MPS ‘Section 44 Authorisation Data’ (MPS, London 2010).

temporal limits. The sum total is a brief commentary in Lord Carlile's annual reports and occasional disclosures resulting from freedom of information requests.⁹⁵ This opacity effectively undercuts the effectiveness of the Practice Advice and IIO Circular and the accountability the Home Secretary's role purports to embody. Without such information, it is impossible to discern whether the power is being abused or not. Being given only the bald number of section 44s which have been carried out without knowing whether they relate to one or multiple authorisations makes it very difficult to assess the exercise of the power and provides no hint as to whether the power is being used in a targeted or indiscriminate manner. The recent disclosure that thirty-five authorisations purported to run for over twenty-eight days,⁹⁶ with thousands of unlawful section 44 stops carried out subsequently, highlights this accountability deficit.⁹⁷

Any authorisation not confirmed within 48 hours lapses, but this does not affect the lawfulness of any action taken in the interim.⁹⁸ Therefore, 'short term' authorisations may be made which do not require Ministerial confirmation. In such circumstances a copy of the authorisation should be forwarded to the NJU immediately, with details forwarded to the Home Office within two hours.⁹⁹ If it is not possible to forward a copy of the authorisation within that time period, the details should be provided to the NJU over the telephone and they will alert the Minister.¹⁰⁰ The NPIA Advice recognises that 'short term' authorisations do not require Ministerial approval while underlining that the Minister should be informed in such cases. One positive that could be drawn is that they encourage forces to use the power

⁹⁵ Lord Carlile, 'Report on the operation in 2008 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006'; Lord Carlile, 'Report on the operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006'; Lord Carlile, 'Report on the operation in 2006 of the Terrorism Act 2000'; Lord Carlile, 'Report on the operation in 2005 of the Terrorism Act 2000'; MPS, 'Section 44 Authorisation Data'.

⁹⁶ HC vol 511 cols 24WS-28WS 10 June 2010 (Herbert, Nick MP).

⁹⁷ See the distinction between 'unlawful' and 'illegal' stop and search highlighted in B. Bowling, & C. Phillips, 'Disproportionate and Discriminatory: Reviewing the evidence on Police Stop and Search' (2007) 70(6) MLR 936, 939.

⁹⁸ Section 46(4).

⁹⁹ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' 26.

¹⁰⁰ *ibid* 27.

for a short period, however, as they evade oversight they potentially constitute a loop-hole in the legal framework. In terms of best practice, they should be avoided and it is disappointing that the NPIA did not discourage their use. Neither the MPS nor the BTP had, according to the interviewees, used such authorisations, which is unsurprising given that both had, until shortly before the interviews, rolling force-wide authorisations in place.¹⁰¹ Due to the absence of information regarding authorisations, it is unclear how often such 'short term' authorisations have been used or by which forces.

4.3) Community accountability

The NPIA's Practice Advice puts community issues front and centre. The first section, titled 'Community Engagement', concerns issues such as the role of and engagement with Police Authorities and community / police organisations.¹⁰² This approach is reflected in the authorisation pro-forma, under which forces *should* provide details of the Community Impact Assessment (CIA).¹⁰³ The MPS produced a section 44 impact assessment in 2008, which remains in date until 2012.¹⁰⁴ The assessment notes that the Asian community 'perceive they are being unfairly targeted' and that Asian and Black men are disproportionately targeted.¹⁰⁵ While this type of general, force-wide assessment is to be welcomed, it must be reviewed more regularly –the MPA recommended it be updated annually – and there should also be a CIA for each authorisation, at the borough level.¹⁰⁶ The Practice Advice highlights neighbourhood policing teams (NPTs), who should 'where possible...be involved in all stages of terrorism stop and search operations' and Independent Advisory Groups (IAGs) who should be 'fully engaged when section 44 applications are

¹⁰¹ MPSSNR02; MPSSNR04; BTPSNR03.

¹⁰² NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' [1.1-1.5].

¹⁰³ *ibid*, Annex A, section 13.

¹⁰⁴ MPS 'Equality Impact Assessment on the use of Section 44 Terrorism Act 2000 Stop and Search Powers' (MPS, London 2008).

¹⁰⁵ *ibid*.

¹⁰⁶ MPA 'Review of police use of counter-terrorism Stop and Search powers in London' (MPS, London 2007).

being considered', being briefed prior to an operation if appropriate.¹⁰⁷ In addition, forces 'should' provide information to IAGS regarding the use of section 44 and 'may' invite them to observe operations.¹⁰⁸ During the fieldwork a BTP IAG member observed a BTP force carrying out stops under section 44. The Practice Advice also refers to engaging with a 'Prevent' lead officer, if available, which indicates a recognition of the potentially negative effective section 44 may have on PREVENT.¹⁰⁹ The term 'engage' is, however, open to a variety of interpretations, ranging from close involvement in the authorisation process, to simply informing the Prevent lead officer in general terms that section 44 is likely to be authorised.

The acknowledgement of the importance of police / community engagement around section 44 is to be welcomed but it is undermined by the highly conditional nature of the engagement: the force *may* invite an observer, it *should* prepare a CIA, the NPT *should* be involved *if possible*. To be effective these optional sections should be codified in a schedule to section 44, as discussed further below at 4.5. Ideally the schedule should include imperatives rather than merely the option to engage. Clearly, operational needs will mean that CIAs cannot always be carried out in advance, nor can the community, via Crime and Disorder Reduction Partnerships (CDRPs) or IAGs, always be informed in advance, however, sufficient operational flexibility could easily be provided for by giving the option, in case of operational necessity, to carry out the CIA or inform the community after the operation. The authorisation merely permits the use of section 44 and does not necessarily mean that any operations using the power will in fact occur. During this second, operational phase additional CIAs may need to be carried out. One senior BTP officer noted that while issues around community tension would not stop him signing an authorisation, 'if there was a community issue which made section 44 difficult or problematic to use it simply wouldn't

¹⁰⁷ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' [1.1, 1.3].

¹⁰⁸ *ibid*, 7.

¹⁰⁹ *ibid*, 6.

be deployed there'.¹¹⁰ This issue is considered further in the next Chapter, although it is worth noting that the regulations around section 44 concern its authorisation and the encounter itself, not its deployment.

Police Authorities (PAs) stand as an obvious route of community accountability, although it must be noted that a Bill has been tabled by the Government which would replace them with elected 'Police and Crime Commissioners', as discussed in Chapter 6.3.3. Focusing on the current system, PAs offer a conduit for community accountability because of their statutory role whereby their main function is to 'secure the maintenance of an efficient and effective police force' and to 'hold the chief officer of police of that force to account for the exercise of his functions and those of persons under his directions and control'.¹¹¹ That section 44 raises issues of efficiency was underlined by Lord Carlile who has stated that 'poor or unnecessary use...of section 44...is not a good use of precious [police] resources'.¹¹² There must be a degree of transparency regarding the authorisation and deployment of section 44 if the PA is to ensure that resources are being used efficiently. One of the PA interviewees indicated that there was no communication regarding section 44 before or after an authorisation, to the point where the force refused to clarify whether or not there was an authorisation in force, although the situation had ameliorated.¹¹³

The Practice Advice highlights the 'essential role' of PAs and states that, where section 44's are carried out regularly, the PA 'may review the use of these powers'.¹¹⁴ The Practice Advice suggests that such a review 'may focus on supervision, briefing, training and general awareness as well as an analysis of any statistics used'; in short, the exercise of the power, not its authorisation.¹¹⁵ The MPA's review of section 44, within their wider examination of

¹¹⁰ BTPSNR03.

¹¹¹ Police Act 1996, Section 6(1-2). The proposal to replace PAs with 'Crime and Police Commissioners' is discussed in Chapter 6.3.3.

¹¹² Carlile 09 [177].

¹¹³ PA01.

¹¹⁴ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' 7-8.

¹¹⁵ *ibid* 8.

counter-terrorism in 'The London Debate',¹¹⁶ contributed to the MPS' review of section 44 and is testimony to the potential impact of such oversight.¹¹⁷

In addition to scrutinising the effectiveness of the force, the PA is one of the two major organisations to which a member of the public can make a complaint or query regarding the police, the other being the IPCC. They cannot serve this purpose if they are unaware whether or not there is an authorisation in place. One of the areas where judicial review in relation to section 44 is likely to be successful – and was likely to be successful pre-*Gillan* (ECtHR) – is when the stop is carried out when there is no authorisation in place. As noted above, this has already occurred on at least thirty-five occasions with thousands of unlawful stops being carried out, and the potential for its occurrence since the 'patchwork' authorisation has been acknowledged by the MPS.¹¹⁸ If the relevant PA is unaware of whether or not there is in fact an authorisation in place how can they advise a member of the public who queries the legality of a section 44 stop?

One point which was particularly contentious with the PA/APA interviewees was that non-Home Office forces were carrying out large numbers of section 44s but not informing the local force or the PA.¹¹⁹ When asked about this point, one BTP officer said: 'there's a clamour for our data now by forces across the country and...I recommended that we don't [give it] because otherwise all we'll spend our time doing is servicing the needs of forty-three forces in England and Wales'.¹²⁰ This reference is clearly to more detailed statistics and, contrary to one of the other interviewee's statements, a senior BTP officer stated that they do always inform the local force when an authorisation is in place.¹²¹ Other BTP

¹¹⁶ MPA, 'Counter-terrorism: the London debate' (MPA, London 2007).

¹¹⁷ MPSSNR01.

¹¹⁸ HC vol 511 cols 24WS-28WS 10 June 2010 (Herbert, Nick MP). MPS, 'MPS Use of section 44 TACT in London - 2009 Update'. See also: Lord Carlile, 'Report on the operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006'.

¹¹⁹ PA01; PA02.

¹²⁰ BTPSNR04.

¹²¹ BTPSNR03. C.f. PA01.

officers emphasised that they co-ordinated with the local forces in advance.¹²² The apparent contradiction here may arise from the distinction between the authorisation and the actual exercise of section 44. It may also be that some members of a Home Office force are informed but that this information is not disseminated, in particular it may not be disseminated to the relevant PA. Suggested methods for resolving this difficulty are discussed below at 4.5.

A problem underlying community accountability in relation to section 44 is the fact that many of those impacted by the power are part of a transient community. Leaving aside for the moment level 2 and strand 3, the focus of both police forces is on transport-hubs, iconic and high risk sites and – in the sampled borough – the night-time economy, which are primarily populated by a transient community consisting of commuters, workers, tourists, whether domestic or foreign, and revellers. This has a two-fold effect. First, it makes it incredibly difficult to identify, let alone communicate with the affected community by traditional means which focus on communities as identified by reason of religion or ethnicity or gender or sexuality. The other traditional identifier, geographic location, is equally flawed as while some people may be stopped in their home areas, others are stopped near work or a night-club or bar or while traversing the city or country. Therefore, the traditional routes of accountability via PAs, NPTs, CDRPs, IAGs, etc. on the whole do not provide a voice to the affected communities. An exception to this are businesses who operate within a high risk area or near an iconic site and participate on stop and search teams / boards at PA level, as by including the businesses the difficulty of identifying employees or customers who do not live locally is side-stepped. However, businesses are likely to focus on security needs for their business rather than acting as a conduit between their customers or employees and the police, or PA. This was certainly the case with one security manager who was interviewed.¹²³

¹²² BTPFL08; BTPFL04; BTPFL01. C.f. PA01.

¹²³ COMMG.

One officer suggested that this meant that section 44 can be seen as having a ‘light footprint’.¹²⁴ The officer explained: ‘in relative terms, section 44 has a very light footprint and so in London where you have over 150,000 stops in a year, London will have a resident population of 8 million and an operational population of at least twice that...it is very unlikely, especially because of the spread of the searches, to affect any individual more than once or maybe twice...so it has actually got a very diffused actual experience...Most people aren’t affected at all by it’.¹²⁵ While accepting this might be true in certain cases, Mike Franklin of the IPCC rejected the general depiction of a ‘light footprint’.¹²⁶ In relation to some of the transient communities affected by section 44, such as foreign tourists, it is clearly correct. The fact that section 44 impacts upon these transient communities may in fact diffuse the negative perceptions of the power more widely beyond the area when the stop has taken place. This should not be taken as an indication that no efforts need to be made to ensure accountability to these groups but, in conjunction with the disparate nature of these transient communities, it goes towards explaining perhaps why their voices have not been heard. It is notable that the Practice Code to section 47A, which replaced section 44 in January 2011 and is discussed in Chapter 7, makes reference to sections of the community ‘with whom channels of communication are difficult or non-existent’, stating that in such cases channels of communication ‘should be identified and put in place’.¹²⁷ This appears to be an acknowledgment of the impact of the power upon transient communities.

4.4) Human rights

Before discussing the application of human rights on the authorisation process, it is necessary to outline the doctrines of the ‘margin of appreciation’ and ‘deference’, as these impact upon how human rights are applied by the courts in the context of section 44. The

¹²⁴ MPSSNR05 (said in relation to London).

¹²⁵ MPSSNR05.

¹²⁶ IPCC.

¹²⁷ Home Office ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ (HMSO, 2011) [6.1.2].

precise operation of these doctrines in relation to each specific right will be highlighted when discussing the relevant rights under the ECHR, in this and following Chapters.

4.4.1) The 'margin of appreciation'

The 'margin of appreciation' originates from the jurisprudence of the ECtHR, specifically Article 15 cases,¹²⁸ rather than the Convention itself, which may account for some of the confusion surrounding its definition and application.¹²⁹ It has been criticised as contradicting the basic tenants of human rights, with its implied relativism and subjectivity seen by some critics as opposing human rights' foundational base of universality.¹³⁰ The 'margin of appreciation' describes the discretion accorded by the ECtHR to States to balance for themselves conflicting public goods which necessitate the limiting of one or more Convention rights.¹³¹ It contains the 'substantive' doctrine, which addresses the balancing of individual and collective rights, and the 'structural' doctrine, which refers to the level of deference the ECtHR, as an international court, should accord domestic authorities on the basis of institutional competence and, in some of the case-law, the subsidiary role of the ECtHR, articulated in Article 1.¹³² The 'substantive' element is most commonly invoked when the rights under issue are 'limited', whereby the State may interfere with their exercise to pursue a legitimate aim, necessary in a democratic country. Of the ECHR Articles relevant to this research, Articles 8, 10 and 11 are 'limited' in this manner, as is the right to a

¹²⁸ *Lawless v Ireland (No. 3)*. Its origins before the Commission go back even further to *The Cyprus Case* [1958-59] 2 YB ECHR 174. See also the *Greek Case*.

¹²⁹ Letsas, G, 'Two concepts of the margin of appreciation' (2006) 26 OJLS 705, 705.

¹³⁰ See, e.g. Judge De Meyer's dissent in *Z v Finland* (1998) 25 EHRR 371 app.no.2209/93; Sweeney, J, 'Margins of appreciation: cultural relativity and the European Court of Human Rights in the post Cold War period' (2005) 54 ICLQ 459; Teson, F, 'International human rights and cultural relativism' (1985) *Virginal JIL* 869; Lavender, N, 'The problem of the margin of appreciation' (1997) 4 *E.H.R.L.R.* 380 and Benvenisti, E, 'Margin of appreciation, consensus, and universal standards' (1999) 31 *NYUJ Int'l L & Pol.* 843.

¹³¹ Sweeney 'Margins of appreciation: cultural relativity and the European Court of Human Rights in the post Cold War period', 462.

¹³² Letsas 'Two concepts of the margin of appreciation', 706, 721-22. *Handyside v United Kingdom* (1979-80) 1 EHRR 737 app.no.5493/72 [48]; *Belgian Linguistic Case* (1968) 1 EHRR 252 app.nos.1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

public trial under Article 6(1). The ECtHR has traditionally afforded States a wide margin of appreciation in cases concerning terrorism, often melding the arguments for the 'substantive' and 'structural' aspects.¹³³ However, the margin of appreciation is not unlimited in any circumstances; rather it goes 'hand in hand with European supervision'.¹³⁴ This is evident even in national security cases, as emphasised in *Lawless*, where the ECtHR, while finding the derogation justifiable, specifically reserved their right to scrutinise the case for a national emergency.¹³⁵

A core problem with the doctrine is that it is 'as slippery and elusive as an eel'.¹³⁶ Its operation varies 'according to the circumstances, the subject-matter and its background'.¹³⁷ The nature of the aim of the restriction and the nature of the activities involved will also affect the scope of the margin of appreciation,¹³⁸ with positive obligations being accorded a wider margin.¹³⁹ Further muddying the waters, the ECtHR has reached contradictory conclusions in similar situations,¹⁴⁰ often without specifying its methods, which results in seemingly arbitrary decisions and casuistic reasoning.¹⁴¹ The variation these approaches engenders has led one commentator to refer to the 'standardless doctrine of the margin of appreciation'.¹⁴²

¹³³ *Aksoy v Turkey* (1997) 23 EHRR 553 app.no.21987/93; *Lawless v Ireland (No. 3)*.
Lavender 'The problem of the margin of appreciation'.

¹³⁴ *Lawless v Ireland (No. 3)* [49].

¹³⁵ *ibid*, 55. In the 'Greek Case' the ECtHR found that there was no emergency warranting the invocation of Article 15 ([1969] 12 Y.B. ECHR).

¹³⁶ Lester, L, 'Universality versus subsidiarity: a reply' (1998) 6 EHRLR 73, 75.

¹³⁷ *Rasmussen v Denmark* (1984) 7 EHRR 371 app.no.8777/79.

¹³⁸ *Dudgeon v United Kingdom* (1981) 4 EHRR 149 app.no.7525/76 [52]. See also, *Handyside v United Kingdom*; *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 app.no. 6538/74.

¹³⁹ P van Dijk and Y Arai, *Theory and practice of the European Convention on Human Rights* (4th edn Intersentia, Oxford 2006) 349 c.f. Wildhaber's judgement in *Stjerna v Finland* (1997) 24 EHRR 195 app.no.18131/91.

¹⁴⁰ van Dijk and Arai *Theory and practice of the European Convention on Human Rights*.

¹⁴¹ Shelton, D, 'The boundaries of human rights jurisdiction in Europe' (2003) 13 Duke Journal of Comparative and International Law 95, 134.

¹⁴² Lester 'Universality versus subsidiarity: a reply', 76.

The principle of deference is, baldly, the level of discretion afforded by domestic courts to the Government. It is justified on two main grounds. First, the constitutional competence argument: judges are unelected and should therefore defer to the (elected) politicians on sensitive topics such as national security, questions of morality,¹⁴³ or how to deal with certain social problems.¹⁴⁴ Second, the 'institutional competence' argument: the Government has greater competence in certain matters.¹⁴⁵ This ties in with the courts' reluctance to review factual or evidential questions on appeal.¹⁴⁶ The relevant competence for this thesis is national security which Lord Diplock described as being 'par excellence a non-justiciable question'.¹⁴⁷ This comment requires some tempering, and the situation is better described by Lord Steyn who, while noting that it is 'self-evidently right that national courts must give great weight to the views of the executive on matters of national security', stated that 'issues of national security do not fall beyond the competence of the courts'.¹⁴⁸ As Lord Atkins stated: 'In this country, amid the clash of arms, the laws are not silent'.¹⁴⁹ That this is so was demonstrated clearly in the case of *A v Secretary of State for the Home Department*.¹⁵⁰

Against these justifications for broad deference, the separation of powers doctrine, the fact that judges argue rationally from legal authority and the (usually) public nature of legal

¹⁴³ *R (on the application of Countryside Alliance) v AG* [2007] UKHL 52 [125].

¹⁴⁴ *Secretary of State for the Home Department v Rehman* [2001] UKIIL 47 [50-54] (Lord Hoffman). Leigh, I, 'The standard of judicial review after the Human Rights Act' in II Fenwick, G Phillipson and R Masterman (eds) *Judicial reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 179. See, e.g. *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; *R v Lichniak* [2002] UKHL 47.

¹⁴⁵ Jowell, J, 'Judicial deference: servility, civility or institutional capacity?' [2003] Win PL 592, 598-99. See also *A v Secretary of State for the Home Department*, [29, 39-42] (Lord Bingham) c.f. [107] (Lord Hope).

¹⁴⁶ Leigh, 'The standard of judicial review after the Human Rights Act', 183-188.

¹⁴⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 412 (Lord Diplock). See also *Chandler v DPP* [1964] AC 763.

¹⁴⁸ *Secretary of State for the Home Department v Rehman* [31-32].

¹⁴⁹ *Anderson v Liversidge* [1942] AC 206 244.

¹⁵⁰ [2004] UKHL 56.

judgements may be invoked to justify narrow deference.¹⁵¹ In addition, the HRA has weakened the constitutional competence reasoning, as it may be argued that Parliament, with its democratic competence, has set the judiciary as guardians of human rights, albeit while preserving Parliamentary sovereignty.¹⁵² To similar effect is the designation of human rights as a universal value or 'higher order' law, which wrests competence from Parliament, placing human rights 'above' Parliament's democratic competence, with judges tasked to ensure Parliament's adherence to this 'higher order' law.¹⁵³ The existence of 'qualified rights' in the ECHR are a key reason why the HRA has not resulted in the death of deference in relation to issues concerning human rights. Absolute rights cannot be overridden by Parliament,¹⁵⁴ although primary legislation may infringe them, thereby giving rise to a declaration of incompatibility,¹⁵⁵ however, qualified rights reintroduce the issues of relative competence between Parliament and the judiciary. The precise interplay between these competing principles is drawn out in the analysis of the specific human rights discussed below and in the next Chapter

4.4.2) Is the authorisation of section 44 prescribed by law?

Turning again to the application of human rights to the authorisation of section 44, there are two issues which intersect: whether the authorisation process adheres to the requirement, under the ECHR, Article 5(1), that a procedure be prescribed by law and whether the process adheres to the common law principle of legality. The latter requires the court to 'where possible, interpret a statute in such a way as to avoid encroachment on fundamental

¹⁵¹ Feldman, D, 'Human rights, terrorism and risk: the roles of politicians and judges' [2006] PL 364.

¹⁵² *R (on the application of Countryside Alliance) v AG* [125], although note that Baroness Hale considers this applicable only if the matter does not fall within the margins concept. See also *A v Secretary of State for the Home Department*, discussed below.

¹⁵³ Jowell, J, 'Judicial Deference and Human Rights' in P Craig and R Rawlings (eds) *Law and Administration in Europe* (OUP, Oxford 2003); *Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158; *Thoburn v Sunderland City Council* [2002] EWHC Admin 934.

¹⁵⁴ *R (on application of Alconbury Developments Ltd) v Secretary of State for the Environment and the Regions* [2001] 2 WLR 1389 [70] (Lord Hoffman).

¹⁵⁵ HRA, section 4.

rights',¹⁵⁶ especially in cases where broad discretion is conferred on the decision maker.¹⁵⁷

The right that is engaged is the right to liberty, which is protected under the ECHR, article 5 as well as being a common law fundamental right. Given this overlap, the following discussion will focus on the requirement that the authorisation process be prescribed by law.

The ECtHR discussed the requirement that a procedure is prescribed by law in *Malone v United Kingdom*, which concerned the legality of intercept evidence.¹⁵⁸ The Court held that, although the requirement of foreseeability cannot mean that an individual should be able to foresee when their communications are likely to be intercepted, 'the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.'¹⁵⁹ The ECtHR noted in particular the dangers of arbitrary interference by public authorities with the rights of the individual when a power is exercised in secret.¹⁶⁰ In *Gillan (HL)*, Lord Bingham argued that an officer is not free to act arbitrarily, as to do so would open himself to a civil suit, and that, although no reasonable suspicion is required, people who do not appear to be terrorist suspects would not be stopped as this 'would be futile and time-wasting'.¹⁶¹ Here Lord Bingham appears to confuse the object of section 43, stopping and searching a person who is reasonably suspected of being a terrorist, with that of section 44: searching for articles that could be used in connection with terrorism. The fieldwork indicated that, particularly when the objective is high visibility reassurance,

¹⁵⁶ *R (Youssef) v HM Treasury* [2010] UKSC 2 [111] (Lord Philips). See also Laws, LJ's discussion of 'constitutional or fundamental' statutes in *Thoburn v Sunderland City Council* [62-3].

¹⁵⁷ *R v Home Secretary of State for the Home Department, Ex p. Pierson* [1998] AC 539, 574 (Lord Browne-Wilkinson).

¹⁵⁸ *Malone v United Kingdom*.

¹⁵⁹ *ibid* [67]. See also *Huvig v France* (1990) 12 EHRR 528 (A/176-B) app.no.11105/84.

¹⁶⁰ *Malone v United Kingdom* [67].

¹⁶¹ *Gillan (HL)* [35].

section 44 is used in the main on persons who are under no suspicion, reasonable or not.¹⁶² Lord Bingham presumes a rational approach to the exercise of section 44 which would be absent if an officer was exercising the power based on, for example, racist beliefs. The presumption of rationality offers no succour in such a case, which is surely precisely the type of case which must be guarded against.

Lord Bingham's central argument was that section 44 is prescribed by law as it is defined and limited with 'considerable precision', relying in particular on PACE, Code A.¹⁶³ This confuses two separate issues: the first is whether the authorisation is prescribed by law; the second is whether its exercise, to which Code A is relevant, is also prescribed by law. Among Lord Bingham's 'close regulations', relating to the authorisation process, were that the authorisation may only be given by an ACPO rank officer if expedient for the prevention of acts of terrorism, that it is limited temporally and geographically and that it must be confirmed by the Secretary of State. The inadequacy of these has been discussed. Lord Bingham also cited the role of the Independent Reviewer as a safeguard. The Independent Reviewer annually reviews the operation of many of the terrorist statutes, including TACT, in addition to various ad hoc reports, for example on the definition of terrorism.¹⁶⁴ The fact that criticism of section 44 in successive reports led to scant changes in practice – at least until 2009 – underlines the limitations of this role. Additionally, the ECtHR noted that the Reviewer has no power to alter or cancel authorisations.¹⁶⁵ Although the Reviewer presently reads every authorisation it is doubtful whether he is best placed to provide such oversight, being already under a considerable workload and having a far broader remit than 'just' section 44. It would be better to improve the present system involving the Home Secretary and NJU or to have the authorisations confirmed judicially, as discussed below.

¹⁶² See Chapter 5.1.

¹⁶³ *Gillan (HL)* [35].

¹⁶⁴ Lord Carlile, 'The definition of terrorism'.

¹⁶⁵ *Gillan (ECtHR)* [82].

The final factor, that any misuse of the power to authorise or confirm or search will expose the officer, the Secretary of State and authorising officer to 'corrective legal action' appears, in light of *Gillan (HL)*, to be a toothless threat. The inadequacy of these limitations, coupled with the extraordinarily broad discretion inherent in the 'trigger' of 'expedient' led the ECtHR to hold that the authorisation process was not 'in accordance with the law' as it did not sufficiently guard against the arbitrary interference with a person's Convention rights by public officials.¹⁶⁶ Alternative 'triggers' and additional forms of accountability which would ensure the authorisation process is prescribed by law are discussed in the final section below.

The claimants in *Gillan (HL)* focused on the fact that an authorisation under section 44 was not accessible to the public so that individuals knew neither whether they were liable to be stopped and searched nor, if they were stopped and searched, whether the action was legally authorised.¹⁶⁷ Against this point, Lord Bingham argued that it would undermine the very purpose of the power if an authorisation were made public and that *Malone* permitted such an approach,¹⁶⁸ in addition to citing *Kuijper v the Netherlands* as supporting the proposition that legislation may have to avoid excessive rigidity so as to deal with changing circumstances.¹⁶⁹ The fact that at the time of *Gillan (HL)* the MPS were in their fifth year of a rolling, pan-London authorisation effectively undercuts Lord Bingham's argument. Lord Hope viewed the question of legality as answered by the fact that the authorisation and confirmation could be viewed if tested by judicial review.¹⁷⁰ These arguments were not addressed by the ECtHR, but the mere act of reviewing the authorisation and confirmation could not be sufficient to ensure the authorisation was passed in accordance with the law. At the very least, even to adhere to the low standard of expediency, closed material on which the authorisation was based would also have to be viewed.

¹⁶⁶ *ibid* [79-82; 86-7].

¹⁶⁷ *Gillan (HL)* [32] (Lord Bingham).

¹⁶⁸ *ibid* [33].

¹⁶⁹ *ibid* [33]; *Kuijper v The Netherlands* (2005) 41 E.H.R.R. SE 16 app.no. 64848/01, 277.

¹⁷⁰ *Gillan (HL)* [55].

4.5) Assessment

This section will draw together the strands of the earlier discussion, concluding whether the authorisation process does or could satisfy the framework principles set out in Chapter 1 of accountability, efficiency and effectiveness in adhering to CONTEST and adherence to human rights and how section 44 could be improved in relation to these principles.

To begin with accountability, the preceding discussion reveals several disturbing gaps. At present the main functioning form of accountability over the authorisation process is the requirement of Ministerial confirmation. It suffers from a lack of transparency as to the methods used by the Home Secretary and as to the outcomes. Without such information, it is impossible to even attempt to discern whether the power is being abused or not. It also makes it very difficult to assess the exercise of the power as the bald number of section 44s carried out without knowledge of whether they relate to one or many authorisations provides no hint of whether the power is being used in a targeted or indiscriminate manner. This is aggravated by the lack of information passed to the PAs.¹⁷¹

Data on authorisations from all UK forces – whether Home Office or not – should be published annually with a time lag, similar to the Statistics on Race and the Criminal Justice System,¹⁷² in an annex to the Carlile Reports or on their own. The number of authorisations should be broken down by force, number applied for, number approved, number modified by geographical area, number modified by time limit and number rejected. The publication should also indicate for how many days each authorisation lasted and whether the authorisations were for the maximum geographical limit, in terms of both those applied for and those confirmed. In terms of the geographical limit, this information could perhaps be broken down further by broad percentages (e.g. 25%, 50%, 75% or 100% of the force area) by the force. The number of stops carried out under each authorisation, broken down in the usual manner, should also be published. As the relevant authorisation would be evident from the date of the stop, it will require little change in practice and impose no additional

¹⁷¹ PA01; PA02.

¹⁷² Published under Criminal Justice Act 1991, section 95.

bureaucratic burdens on the officer exercising the power, although it may require changes to the stops database and to the PDA (palm computer) software. None of this information reveals sensitive data which might hamper police activities or enable would-be terrorist to 'pattern spot', although for this reason it may not be appropriate to provide details of the dates to which authorisations pertain should be revealed. That such information is not sensitive is underlined by the fact that the MPS recently revealed the temporal limits of its authorisations between 19/2/2001 and 22/4/2009.¹⁷³ Such information, while not revealed sensitive material, would make it far easier to hold police forces to account.

The mere fact of having an authorisation in place does not mean that any section 44's need be carried out: 'the [authorisation] form is not a policy document nor is it a tactical deployment document', although clearly the force should not 'keep it up its sleeve for a rainy day'.¹⁷⁴ This raises the question of whether there should be accountability at the level of tactical deployment? Such accountability would require at a bare minimum data linking authorisations with the number of stops carried out under them. Additional information regarding where and when the stops were carried out would enable the necessity of the given temporal and geographical boundaries to be tested. While it is plausible that the number of stops under each authorisation might be published under the 'section 95 statistics' or in a Home Office statistical bulletin, it seems highly unlikely that the additional information would be made public; the most likely argument against this being that it would enable would-be terrorists to anticipate the use of the power and thus attempt to avoid it. The 'bare' number of section 44s carried under each authorisation should ensure that authorisation are not passed for a 'rainy day'. If a force is consistently tending towards the maximum geographical and temporal limits then it may be appropriate for the Independent Reviewer, who has security clearance, to probe more closely into the necessity of using the maximum limits, or the issue could be brought before judicial review.

¹⁷³ MPS, 'Section 44 Authorisation Data'.

¹⁷⁴ MPSSNR05.

The Home Office forces are not obliged to disseminate information of their operations to each other nor to non-Home Office forces, nor vice-versa, however, the successful interaction of the various forces within the 'Guardian forces' (the MPS, the City of London Police, the BTP and the MOD Police), indicates that such cooperation is possible. There should be a requirement to notify another force immediately following the signing of an authorisation which is likely to impinge upon their force area whereupon the forces can notify their own PA. Another option would be to require notification following the decision to tactically deploy section 44, although this would intrude more into forces' operational independence and could be problematic if a decision to deploy the power was taken at short notice. The first option therefore seems preferable and should be contained within a schedule to section 44.

Changes should be made to reduce the possibility of using 'short term' authorisations. As discussed above, encouraging police forces to use shorter authorisations is a positive but the present system of 'short term' authorisations can be viewed as constituting something of a loophole, given that it effectively avoids Ministerial oversight. There should be an opportunity for temporally 'short' authorisations to be issued subject to the 'normal' confirmation process if submitted sufficiently in advance, the present system being clearly geared towards allowing sufficient operational leeway to authorise the use of section 44 for immediate deployment if required. To this end TACT, section 46 should be amended to read:

46(3A) In the case of an authorisation that is for a period of up to 48 hours the NJU must be contacted immediately when the authorisation is signed.

46(4A) In the case of an authorisation that is for a period of up to 48 hours if it is not confirmed by the Secretary of State within 24 hours beginning with the time when it is given -

46(4A)(a) it shall cease to have effect

46(4A)(a) its ceasing to have effect shall not affect the lawfulness of anything done in reliance on it before the end of that period.

The NPIA Advice and HO Circular should be amended to include directions urging authorising officers to submit temporally 'short' authorisations several days before the date of commencement to allow sufficient time for confirmation and to caution against the use of 'short term' authorisations as a means of bypassing the confirmation process. Data on the number of 'short term' authorisations made without prior confirmation should be published, broken down by force, alongside the other authorisation data detailed above. The HO Circular should also include the requirement that any forces seen to rely unduly on such authorisations be subject to an automatic review by their PA and/or the Independent Reviewer and/or the IPCC.

In terms of community accountability, at present the major conduits between the community and the police, the PA, and representative groups such as the CDRPs and IAGs may be left out of the loop due to the absence of any statutory requirement that they be informed before, during or subsequent to an authorisation. This situation undermines community accountability over section 44 and the ability of the PA to fulfil their statutory function of effective oversight of their force. These difficulties are compounded by the fact that non-Home Office forces use the power widely and in doing so may impinge upon a Home Office force area where the local PA or police-community group may be unaware of the authorisation. This is too crucial a part of the accountability jig-saw to be left to the whims of best practice. Underlying these issues is the problem of identifying the transient 'community' who are stopped outside their own police district or even force, whose commonality is that they are either commuters, tourists or people on a night out. Therefore, even if improvements were made to the system as it applies to the PAs and the other community groups, a gap will remain.

Despite this underlying difficulty, efforts must be made to improve the accountability structures. A proposal is being considered by the Association of Police Authorities

regarding the development of a national protocol to govern the reporting of authorisations and subsequent activity under section 44 to the PAs.¹⁷⁵ As this has not yet been approved, it is necessary to consider additional options. Even if a national protocol is developed, it would be better to entrench it as a schedule to TACT rather than as an ACPO national protocol which, while likely to be adhered to, carries no legal weight. A schedule should be added to TACT and section 44 be amended to state that the provisions of the schedule apply when a person is stopped under section 44. The schedule should require adherence to the Practice Advice on similar lines to the obligation to adhere to the PACE Codes, that is, a breach will not of itself give rise to civil or criminal liability but would be admissible in evidence.¹⁷⁶ The Practice Advice should also be amended to require, rather than encourage, engagement with CDRPs and IAGs, although it should be at the force's discretion whether, subject to security concerns, this occurs retrospectively or prospectively. The Advice should also include a requirement that in areas where section 44 is frequently used the PA should conduct an annual review considering, inter alia, the necessity for authorisation, whether the geographical and temporal limits tend towards the minimum or maximum and, if the latter, whether there is sufficient justification for this approach, as well as the areas already cited by the Practice Advice relating to the exercise of the power. In addition, the schedule should require notification of: a) the PA in whose area an authorisation has been granted; b) any PA in whose area the exercise of section 44 may be carried out pursuant to an authorisation where the force areas overlap (i.e. non-Home Office forces should inform the relevant PA when the authorisation is likely to impinge upon their district); and, c) the Chief Constable or equivalent of any force in whose area the exercise of section 44 may be carried out pursuant to an authorisation where the force areas overlap.

The core issue with the authorisation process is the unfettered discretion afforded by the trigger of 'expedient'. It is clear that nothing less than an amendment of the trigger will suffice to address the concerns raised in *Gillan* (ECtHR). The new usage of the powers, in

¹⁷⁵ PA01 (personal email correspondence 3rd February 2010).

¹⁷⁶ PACE 1984, Section 67(10-11).

terms of the 'patchwork' authorisation and 'strands' approach, suggests two possible options. The first, and preferable, option is to simply raise the trigger across the board. One alternative to 'expedient', temporarily instigated in response to the ECtHR's refusal to allow the appeal of *Gillan* (ECtHR) to the Grand Chamber, is 'necessary'.¹⁷⁷ If the trigger were permanently raised to 'necessary', then this formula would restrict the MPS to 'Level 2' deployments and the BTP to 'Strand 1' and 'Strand 2'.

A second option would be to adopt a two-tiered approach, with different triggers for the authorisation of section 44 around high risk sites, including transport hubs, from other areas, the former being of a lower threshold. Given that 'Level 2' areas are identified in response to particular events or intelligence, it should be possible to meet the higher threshold of 'necessary'. This option may not impact significantly on the use of section 44 by the MPS and BTP, although the higher standard serves to remind both senior and front-line officers that this is an extraordinary power to be used in specific circumstances. It could significantly reduce the use of the power in other areas. When questioned about an alternative to 'expedient', Lord Carlile suggested that a phrase such as 'reasonable for the protection of the public' would be more suitable than 'necessary'.¹⁷⁸ This might be an appropriate trigger for 'Level 1' / 'Strand 1' areas which are at risk from a general rather than specific threat, possibly due to their innate vulnerability or importance. If implemented, the authorisation data to be published, discussed above, should be broken down by the number of 'Level 1'/'Strand 1' and 'Level 2' type authorisations. This would provide some additional transparency and permit closer monitoring of the use of section 44 by the general public, PAs and Parliament.

While it seems probable that the threshold of 'necessary', along with additional transparency around the authorisation, would ensure that the authorisation of section 44 is 'in accordance with the law', the lower threshold suggested by Lord Carlile is unlikely to suffice. Moreover, as discussed in Chapter 5, the deployment of section 44 is such that it may

¹⁷⁷ HC vol 513 col 540 8 July 2010 (Theresa May, MP).

¹⁷⁸ Lord Carlile.

require closer scrutiny over the authorisation process. Additional accountability is therefore required. One method would be to make the authorisation subject to judicial rather than ministerial confirmation. The most likely objection to such oversight is that the authorisation will be at least partially justified on closed information. There is, however, precedent for such judicial oversight in relation to extensions to pre-charge detention subsequent to arrest under TACT, section 41 and control orders.¹⁷⁹ Judicial oversight is particularly crucial in the area of detention, as underlined by *Brogan v UK*.¹⁸⁰ While it might be argued that stop and search is of a 'lower order' that does not require such intensive oversight, the ECtHR's comments on Article 5 in *Gillan* (ECtHR) suggest that a section 44 stop might involve a detention, albeit ordinarily a short one.¹⁸¹ Even if it does not, it is evident that there is an incursion into the right to privacy under Article 8 and this of itself should merit judicial supervision, although it must be noted that the ECtHR has accepted ministerial oversight as sufficient in relation to wire-tapping.¹⁸² It is, however, notable that Schenin, the Special Rapporteur, has recommended that all measures which impact upon freedom of expression and assembly be subject to judicial oversight.¹⁸³ As discussed in Chapter 5.4.4, section 44 has the potential to impact upon these freedoms. In addition, the practically unfettered nature of the discretion bequeathed upon the individual officers by the absence of reasonable suspicion and the broad nature of the object of the search point to this being an extraordinary power that warrants intensive safeguards.

Another method for increased transparency would be to publish a list of sites which could be considered for authorisation under the lower threshold. The system of 'designated sites' set out in the Serious Organised Crime and Police Act 2005 (SOCPA) suggests that sensitive

¹⁷⁹ Schedule 8, para. 33(3). Non-derogating control orders issued in pursuance to Prevention of Terrorism Act 2005, section 3(1)(a).

¹⁸⁰ *Brogan v United Kingdom*.

¹⁸¹ *Gillan* (ECtHR) [57].

¹⁸² *Kennedy v United Kingdom* (2011) 52 EHRR 4 app.no.26839/05.

¹⁸³ Schenin 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' [29]. See also: CTITF Working Group on Protecting Human Rights while Countering Terrorism 'Basic human rights reference guide: the stopping and searching of persons' (UN, New York 2010)[12].

sites could be listed by means of a statutory instrument.¹⁸⁴ In SOCPA all nuclear sites and those designated in the relevant statutory instrument are deemed to be 'protected sites'.¹⁸⁵ For section 44 all CNIs and designated sites could be 'protected sites'. One notable difference between SOCA's designated lists and the proposed one is the number of sites that would be included. There are only 29 designated sites under SOCA, mainly RAF bases, government and royal buildings.¹⁸⁶ The list for section 44 would need to be substantially larger. Such a list could be seen as providing terrorists with a list of 'hard' targets enabling them to adjust their plans to target 'soft' sites thus merely shifting the risk rather than reducing it, although having an authorisation in place does not mean there will be actual deployment implying that merely being on the list does not mean the target will necessarily be 'hardened' at any given time. Such a list might also raise issues of commercial sensitivity, as one MPS officer noted: owning or renting a property that is on the list would almost certainly push up insurance premiums which could make it difficult to operate and might even encourage businesses to move to a different city or country. As the officer asked, 'who wants to be the proprietor of a vulnerable site?'¹⁸⁷ There could, however, be benefits to being on such a list: it would help to mitigate any attempt to bring a case via occupiers liability if there were a terrorist attack and enhanced security could encourage business to lease property or consumers to enter the premises if they perceive security to be higher there.¹⁸⁸ An alternative would be for the Home Secretary to draw up such list, which would not be published but would be scrutinised annually by the Independent Reviewer and perhaps a Parliamentary body such as the Home Affairs Committee. Given that a list of designated sites would almost certainly not be published, this two-tier approach would be a

¹⁸⁴ SOCPA, section 128. See, e.g. Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) Order 2005, SI 2007/930.

¹⁸⁵ Section 128(1A).

¹⁸⁶ 13 under Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) Order 2005, SI 2005/3447 and 16 under Serious Organised Crime and Police Act 2005 (Designated Sites under Section 128) Order 2007, SI 2007/930.

¹⁸⁷ MPSSNR06.

¹⁸⁸ See further: National Counter Terrorism Security Office 'Counter Terrorism Protective Security Advice for Commercial Centres' (NCTSO, London 2008) 7.

regressive step that would lessen the transparency around, and hence potential accountability over, the authorisation of section 44.

There is a final option, relevant only to the BTP, which would be to make stop and search a condition of entry onto the railways. This is the approach taken by Amtrak in the USA and can be compared with similar conditions of entry in relation to bars, clubs and football grounds etc. Amtrak requires, as a condition of carriage, that passengers consent to security inspections of persons and/or baggage on-board trains or at designated sites, such as train platforms and boarding or waiting areas.¹⁸⁹ National Rail could impose such a condition of carriage as part of the 'national rail conditions of carriage', or individual railway operators could alter the bye-laws, under the Railway Act 2005, section 46. An offence under the later could lead to a maximum of a level 3 fine.¹⁹⁰ There are a number of objections that may be made against this suggestion. As noted by a BTP officer, 'the good thing about 44... is that it is not only subject to our own authorisation at a very senior level in the police service it's also subject to government scrutiny whereas a lower level carriage of entry condition probably wouldn't be so on that 44 is probably better'.¹⁹¹ Given the criticisms above regarding the failings in the present system of accountability further weakening these systems cannot be supported. An option would be to build in checks and balances within the bye-law or condition of carriage but this seems to be a long-winded way of arriving at the same result that section 44 offers at the moment.

Such a condition of carriage would presumably be carried out by rail staff in addition to the BTP, which raises the additional subject of private policing. That it is feasible has been proven in Israel, where private security, in close association with the local police, run

¹⁸⁹ Amtrak 'Terms of transportation: carriage of passengers' <
<http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241337896121>> downloaded 22nd December 2009.

¹⁹⁰ Railway Act 2005, schedule 9, paragraph 2.

¹⁹¹ BTPSNR03.

intensive security checks at malls.¹⁹² However, there would need to be close control over training and recruitment, to a far greater degree than presently applicable to private security firms under the Private Security Industry Act 2001.¹⁹³ The blurring of the private and public policing spheres has been accelerating over the past decades, the details and consequences of which are beyond the scope of this research, however, the 'out-sourcing' of counter-terrorist policing must be particular cause for concern.¹⁹⁴ Remembering that section 44 is an extraordinary and intrusive police power justified on the basis of tangible terrorist risk, how could it be justified to rely on private companies to carry out sufficient checks on and training of employees to ensure they are fit for the task? There could be no control over such procedures. Additionally, community and democratic accountability, such as it is, would be replaced by corporate accountability. It is also highly unlikely that National Rail or the individual train companies would be willing to take on the additional costs required to ensure there were enough security officers.

4.6) Conclusion

There have been some positive steps towards improving accountability over the authorisation process. The NPIA Practice Advice is to be welcome for its more detailed approach to the authorisation form, although its lack of imperative is a fundamental weakness. There is no outside scrutiny to ensure adherence to the guidance. There is potential for community groups, notably the relevant PAs to step in to fill this gap but, again, there is no compulsion nor external monitoring. The second stage in the authorisation, the approval by the minister, is utterly opaque, the only comment on its functioning being the brief statements in the Independent Reviewer's Reports. This stage requires significant alteration to provide at least some degree of transparency. Accountability, in turns of 'giving an account', is notable by its absence throughout the process, at least in terms of giving an account to the public, to the point where there can be said to be no systematic

¹⁹² See: R Davis, C Ortiz, et al. 'An assessment of the preparedness of large retail malls to prevent and respond to terrorist attack' (The Police Foundation, Washington 2006)10-11.

¹⁹³ Button, M, *Private Policing* (Willan, Cullompton 2002) 125-128.

¹⁹⁴ See, e.g. *Ibid.*

community accountability at all. The extremely permissive trigger of 'expedient' suggests that, at least without an analysis of the underlying intelligence, there is no possibility of a successful legal challenge against the validity of the authorisation.

The adherence to CONTEST is far more nebulous, primarily due to the lack of transparency around the authorisation process, in particular, how many are granted, for what reasons and with what outcomes. It is apparent since *Gillan (ECtHR)* that the key human rights issue, that the process be prescribed by law, is not satisfied. Moreover, the various human rights that may be engaged when the power is exercised, discussed in the next chapter, are dependent on the authorisation being in itself justifiable. So although it may pass its sole test, to adhere to the spirit of human rights must require more stringent control.

There are relatively straight-forward steps that could be taken which would make considerable inroads into the difficulties described above. These would centre around placing the NPIA Advice on the same standing as the PACE Codes, or supplementing the PACE Codes with similar content to that in the NPIA Advice, which must be approved by Parliament, and making imperative the requirement of engaging with community partners and the PA, including in terms of a required review where the force is a heavy user of section 44. In addition, a schedule should be added to TACT relating to section 44 which requires the publication of details of the authorisations, preferably broken down by 'Levels', with 'Level 2' – type authorisations sub-categorised. The number of authorisations applied for, granted, refused and modified by force should have to be published within the section 95 statistics, alongside the number of 'short-term' authorisations. There should be a requirement of notification to PAs and other force when an authorisation is granted that might result in section 44s being carried out in their area. An attempt must be made to curtail the use of 'short term' authorisations by requiring that any authorisation lasting less than 48 hours be confirmed by the Minister within 24 hours and by amending the NPIA Advice to caution against their use except in exceptional circumstances.

The key change must be to the trigger for the authorisation. The options have been set out above. The best option would be the first, which raises the bar higher for all authorisations, whether 'Level 1' or not. Such oversight should occur at the authorisation stage due to the difficulties arising from the nature of stop and search as part of street policing in exercising oversight over the practice of section 44. It is to that practice which this thesis now turns.

Chapter 5) The deployment of section 44

Having considered the authorisation of section 44, it is time to turn to the deployment of the power. This chapter addresses the research questions: how is section 44 used and how ought it be used? It begins by setting out the provisions relating to the exercise of section 44, then assessing the factors invoked by the officers for using it, the safeguards provided by PACE Code A and the use of intelligence arising from section 44. This is followed by an assessment of the compliance of the exercise of section 44 with the HRA, which refers to the principles of the margin of appreciation and deference discussed in Chapter 1. The chapter concludes with an assessment of the deployment of section 44 against the framework principles of accountability, adherence to human rights and efficiency and effectiveness in terms of the CONTEST principles.

5.1) The deployment of section 44

Before discussing the factors which officers invoked for exercising section 44, it is necessary to outline the law governing it, arising from TACT and PACE Code A. The object of the search is articles of a kind which could be used in connection with terrorism, referring to the definition in TACT, section 1, discussed in the previous chapter.¹ The ECtHR viewed this 'as a very wide category which could cover many articles commonly carried by people in the streets'.² There is explicitly no requirement of reasonable suspicion.³

The power may only be exercised by a constable in uniform.⁴ That the exercise of the power is limited to constables in uniform chimes with the use of section 44 for high visibility policing, deterrence and the provision of public reassurance.⁵ This includes PCSOs, providing them with their only stop and search power, although they can carry out stop and accounts.⁶ Within the MPS field sample, there was a strong reliance on PCSOs to carry out section 44 stops. It was indicated that, while this is not the de facto approach, some other boroughs that were 'heavy users' of section 44 also use PCSOs.⁷ This was justified on the basis of logistics, which makes sense when the objective is deterrence and public reassurance through high-visibility police, although questions may be raised in relation to

¹ Section 45(1)(a).

² *Gillan (ECtHR)*[83].

³ Section 45(1)(b).

⁴ Section 44(1)-(2).

⁵ MPSFL02; MPSSNR03; MPSSNR04.

⁶ Police Reform Act 2002, Schedule 1, para.15.

⁷ MPSSNR04.

intelligence gathering, PCSOs ordinarily being less experienced and less well trained than full time officers.⁸ One of the BTP units interviewed, which carries out a substantial number of the force's section 44s, did not use PCSOs, while the other unit did use them, although one officer argued that 'it's bad' to use PCSOs for section 44s as 'it's not their job. Their job is community related, to talk to people'.⁹

During the search a constable may require a person to remove headgear, footwear, an outer coat, jacket or gloves.¹⁰ Headgear worn for religious reasons may only be removed if there is a reason to believe the item is being worn wholly or mainly for the purpose of disguising identity and where practicable the item should be removed in the presence of an officer of the same sex and out of sight of anyone of the opposite sex.¹¹ When there may be such religious sensitivities, the officer should offer to carry out the search out of public view.¹² Any item discovered in the course of a search which the officer reasonably suspects is intended for use in connection with terrorism may be seized and retained.¹³ A search must be carried out at or near where the person or vehicle was stopped and take no longer than is reasonably required.¹⁴ Most officers interviewed in the fieldwork maintained that it would take less than five minutes – some suggesting five as a maximum, some stating it would take a minute or two, although longer if there was a large bag to search.¹⁵ The pedestrian or driver, but not the passenger, who is stopped is entitled, upon request, to a written statement that the car or person was stopped by virtue of section 44(1) or (2), so long as the application is made within twelve months.¹⁶ This is in addition to the stop form, which must be given to all persons stopped.¹⁷ Refusal to submit to a stop or the obstruction of an officer in the exercise of his power constitutes a criminal offence under section 47 for which the person may be liable to imprisonment for up to six months and/or a fine not exceeding level 5 on the standard scale.

⁸ MPSSNR04.

⁹ BTPFL07.

¹⁰ Section 45(3).

¹¹ Code A, note 4.

¹² Code A, note 8.

¹³ Section 45(2).

¹⁴ Section 45(4).

¹⁵ MPSFL02; MPSFL01; MPSFL04; MPSSNR03; MPSSNR04.

¹⁶ Section 45(5).

¹⁷ PACE, Code A, paragraph 4.

5.2) The factors for deploying section 44

The fieldwork revealed several factors for exercising section 44: location, intelligence, deterrence, behaviour and external events.

In keeping with section 44 as an 'all-risks' policing power, location was the central factor for deployment, with the focus being on CNIs and high risk or 'iconic' sites.¹⁸ This focus has been explicitly incorporated within the MPS' 'Levels' system, so it is unsurprising that location featured strongly among those interviewees as a factor for using section 44.¹⁹ In terms of the BTP, although location is not explicit within the 'Strands' approach, the fact that much of the rail network constitutes a CNI means location must be considered an underlying factor. The majority of stops are carried out in and around the railway station, although some are carried out on trains.²⁰

The second most cited factor for the use of section 44 was intelligence.²¹ This usage is consistent with the objectives of section 44 (see Chapter 4.1) and it is appropriate that there is a dialogue between the front-line officers and members of SO15 regarding such intelligence. Intelligence may be gathered from the search itself, however, the low 'hit rate' suggests this is not the main source.²² While the 'hit rate' relates to subsequent arrests, presumably if someone was found in possession of materials which could be used in connection with terrorism they would be arrested and questioned. Although the broad nature of such materials might suggest that the person's details could be taken and the issue followed up as necessary, there is no obligation to provide such details to an officer during a section 44 stop, there being in any case obvious questions concerning the veracity of any details which may be given. While in certain circumstances intelligence can be gathered from nearby CCTV cameras, it appears that a considerable amount of the intelligence comes from what the person says during a stop.

The fieldwork revealed it to be common practice to 'chit chat' with persons who have been stopped, including asking where they came from and were going to.²³ This was justified on the basis that it was 'good manners as much as anything'²⁴ that aimed to put the person

¹⁸ MPSSNR01; MPSSNR02; MPSSNR03; MPSFL02; MPSFL01; MPSFL04.

¹⁹ MPSFL02; MPSFL01; MPSFL04; MPSSNR02; MPSSNR03.

²⁰ BTPSNR03.

²¹ MPSFL04; MPSSNR04; BTPFL01; BTPFL02; BTPFL03; BTPFL04.

²² See Chapter 4.1.

²³ MPSSNR03; MPSSNR04; MPCSO01; MPCSO02; BTPFL01; BTPFL03.

²⁴ MPSSNR03.

being stopped 'at ease'.²⁵ Drawing on Stone and Pettigrew's conclusions, this would seem to constitute 'best practice', their research having strongly emphasised the attitude of the officer during the encounter.²⁶ Furthermore, it can be argued that citizens are under a civic duty to assist officers in detection and prevention of crime.²⁷

Most officers noted either that people were not obliged to give any information during a section 44 stop or stated that they talked to the people but did not 'interview' them.²⁸ One officer said that he would make a note of any intelligence in a pocket book and get the person to sign it.²⁹ However, another stated that on one occasion she was asked by SO15 to make a note of mobile phone numbers, which she did, and 'they got lots of intelligence from that'.³⁰ This is very dubious ground to which the retort 'if they don't want to talk to you they won't' is insufficient. It is analogous to the concerns surrounding stops by consent, discussed in Chapter 3.2, in respect of which it was noted that the lack of knowledge and power on the part of the person stopped, combined with the police reluctance to provide information and their tendency to 'bamboozle' the suspect meant that 'consent' was a very relative concept that 'frequently consists of acquiescence based on ignorance' against a background of 'contextual irrelevance of rights and legal provisions'.³¹

Another factor for exercising section 44 was behaviour, including suspicious activity. This was a major factor with the BTP, corresponding to one of their 'strands', but was cited less frequently by the MPS. The BTP utilise the Behavioural Assessment Screening System (BASS).³² This is one of a number of passenger screening systems, others include the Screening of Passengers by Observation Techniques (SPOT) and the Visible Intermodal Prevention and Response (VIPR).³³ Such screening has become widespread in the transport industries in the US since 9/11.³⁴ It was described by one officer as 'almost quantifying

²⁵ MPSSNR04; BTPFL04.

²⁶ Stone and Pettigrew 'The views of the public on stops and searches'.

²⁷ PACE Code C, 1K asserts this to be so.

²⁸ MPSFL01; MPSSNR04; BTPFL03.

²⁹ BTPFL04.

³⁰ MPSSNR04.

³¹ Dixon, Coleman and Bottomley 'Consent and the legal regulation of policing', 346-348.

³² BTPSNR03.

³³ Transit Cooperative Research Program 'Public Transportation Passenger Security Inspections: A Guide for Policy Decision Makers' (Transportation Research Board, Washington 2007) 19.

³⁴ Transportation Security Administration 'Behavior Detection Officers' <http://www.tsa.gov/what_we_do/layers/bdo/index.shtm> accessed 20th December 2009.

common sense',³⁵ requiring an understanding of the 'base level of what is normal in that area and [then] anything outside of that's going to heighten your suspicions'.³⁶ In relation to section 44 it permits a targeted use of the power, although the suspicion is unlikely to reach the required level for an 'ordinary' stop. It is likely that similar criteria are used instinctively by experienced officers. For example, one MPS officer noted how, with experience, officers learn what to look out for: for example, attempted avoidance of the police or fear.³⁷ Another stated that they would stop someone looking 'out of place'.³⁸ These examples related to all stop powers, not necessarily section 44. As discussed more fully in the next Chapter, these types of passenger screening methods may disproportionately target particular ethnicities or people with disabilities, such as autism, who may avoid eye-contact or act in ways which may be 'suspicious'.³⁹ Nonetheless, BASS training should be provided across the forces as it would help hone the skills of, in particular, inexperienced officers and reinforce the fact that it is behaviour, not someone's appearance, in terms of age, ethnicity, race or gender, that should prompt suspicion. It could be of significant benefit to PCSOs, who may lack the experience and confidence levels of constables in relation to stop and search given that section 44 is their only stop and search power. In an example perhaps of lack of confidence and/or experience, one PCSO felt that stopping someone because of their behaviour would be more the purview of a constable who could use section 43.⁴⁰

A note of caution should be sounded, however, as evident from the successful civil suit brought by a passenger, who happened to be the co-ordinator of the American Civil Liberties Union's (ACLU) national campaign against racial profiling, who was stopped and asked for identification when exiting Logan Airport and was then detained when he refused.⁴¹ The case was supported by the ACLU who criticised the role of behavioural screening, although the jury decided the case without considering what role such screening had played. The case may be distinguished on the grounds that it concerned a border search. The US Supreme Court has held that routine checkpoints carrying out stop and question and a visible search of cars without reasonable suspicion near the Mexican border did not violate the 4th Amendment because the need to carry out the checkpoints to stop illegal immigrants was

Transit Cooperative Research Program, 'Public Transportation Passenger Security Inspections: A Guide for Policy Decision Makers' 19-20.

³⁵ BTPFL01.

³⁶ BTPFL01.

³⁷ MPSFL02.

³⁸ MPSSNR03.

³⁹ See Chapter 6.2.2.2.

⁴⁰ MPSFL01.

⁴¹ *King Downing v Massachusetts Port Authority* Civil Action No. 2004-12513-RBC.

great whereas the intrusion on the 4th Amendment was quite limited.⁴² It is also notable that searches similar to section 44, carried out without reasonable suspicion by the Metropolitan Transportation Authority, were deemed to constitute a special need that involved only a minimal intrusion into the 4th Amendment and were therefore constitutional.⁴³ These US cases concerned stops without reasonable suspicion and not racial profiling, however, additional fears, relevant to the UK, regarding the role of racial profiling as an element of the screening have been voiced.⁴⁴ The issue of racial profiling is discussed further in the next section.

Another manner of ensuring a more targeted use of section 44 is through the use of dogs trained to identify explosives, as used by the BTP.⁴⁵ If a dog gives a clear indication on someone or something then section 43 can be used. However, if the dog gives a weak indication, which would be insufficient for section 43, it may be appropriate to use section 44.

Another factor for exercising section 44 was as a deterrence: would-be terrorists would see high visibility police carrying out a large number of stops and avoid that location or area. This is explicit in the BTP's 'visible search activity' 'strand' and implicit in the references by MPS officers to the utility of section 44 in terms of high visibility policing (see Chapter 4.1). There may be some differences in the approach of the two forces in that a BTP Sergeant stated the final strand is 'about just stopping people',⁴⁶ while a MPS Sergeant noted that while no grounds were required they 'didn't start dipping everyone for the sheer hell of it'.⁴⁷ PACE, Code A requires that section 44 not be used for reasons unconnected with terrorism and that its exercise reflects 'an objective assessment of the threat posed by the various terrorist groups active in Great Britain', but, coupled with the object of the search, it appears to allow the police to 'just stop people' if the purpose is the deterrence of terrorism.⁴⁸

⁴² *United States v Martinez-Fuerte* (1976) 428 US 543. See also: *United States v Flores-Montano* (2004) 541 US 149.

⁴³ *MacWade v Kelly* (2006) 460 F.3d 260.

⁴⁴ ACLU 'ACLU of Massachusetts Challenges Use of Behavioral Profiling at Logan Airport' (November 10th, 2004) <<http://www.aclu.org/national-security/aclu-massachusetts-challenges-use-behavioral-profiling-logan-airport>> downloaded 20th December 2009.

⁴⁵ BTPSNR05; BTPFL01; BTPFL05.

⁴⁶ BTPSNR05.

⁴⁷ MPSSNR04.

⁴⁸ PACE, Code A [2.25].

Two MPS officers referred to carrying out 'purely' or 'completely' 'random' stops.⁴⁹ Similarly, in relation to vehicular stops, one MPS officer attested to using 'random' stops,⁵⁰ while another said a vehicle would be stopped because it was in an authorised area.⁵¹ This use of 'random' or 'routine' stops has prompted criticism from Lord Carlile who, in relation to an observation of the BTP, noted that his one concern was their use of nearly 'random' stops, where it 'looked like they were stopping people for something to do'.⁵² In relation to numerical stops, which involve stopping, for example, every fifth person, most of the BTP officers were clear that these were illegal,⁵³ constituting the fettering of a discretion with policy, whereas one MPS officer said he used them in relation to vehicular searches.⁵⁴ Stopping every eighth person stepping through a door is as (ir)rational as stopping everyone with a blue jumper. Similarly stopping every eighth car is as (ir)rational as stopping all Audis. Unless it is intelligence led, such arbitrary factors should not be used as they will distract the officer from paying attention to more rational indicators, such as suspicious behaviour or a car with an unusually heavy load. This system of numerical stops may be contrasted with the officers being told to maintain a high visibility by stopping as many people as possible. This would not constitute a fettering of a discretion with a policy as it is arguable that this would be a briefing rather than 'policy' and, even if it were deemed to be a policy, it would constitute a rational exercise of the discretion, the object being to deter terrorists from reconnaissance or acts of terrorism through a visible police presence.

The final factor for exercising section 44, which was cited far less frequently than the others, is external events, such as a terrorist attack or attempted attack or a change in the terrorist threat level. One senior BTP officer cited the decreased threat level as one of the prompts for the BTP to move from a pan-force, rolling authorisation to the 'strands' approach.⁵⁵ It is reasonable to expect the usage of section 44 to increase if there is an increase in the threat level, however, the continuance of the level at severe from July 2005 until July 2009 raises questions about whether there should be such an unsophisticated correspondence between the two. Indeed, if one focuses on intelligence gathering then, as suggested by one officer, there is no reason why this should decrease with a decreased, but still serious, threat level.⁵⁶

⁴⁹ MPSFL01; MPSSNR02.

⁵⁰ MPSFL04.

⁵¹ MPSSNR04.

⁵² Lord Carlile.

⁵³ C.f. BTPFL03.

⁵⁴ MPSFL01.

⁵⁵ BTPSNR03.

⁵⁶ BTPFL04.

There have been substantial variations between the usage of section 44, particularly in some forces, despite the constant threat level.⁵⁷ It remains to be seen whether the decrease in the threat level between July 2009 and January 2010 will be followed by a substantial decrease in the number of section 44 stops and the correspondence with the MPS' deployment of the 'Levels' system – and the resulting decrease in section 44 stops - may skew the data.⁵⁸

The emphasis on broad factors such as location or intelligence – the usefulness of which cannot be established until after the stop – rather than subjective factors such as behaviour is required by the dictates of 'all-risks' policing and enabled by the absence of the requirement of reasonable suspicion and the consequential permission to conduct random stops – the particular usefulness of section 44 in permitting random car stops being specifically mentioned in an interview.⁵⁹ It is, however, a two-edged sword, as one senior officer stated: 'the biggest problem...is how does an officer decide who they're going to search and that's the key in the whole issue around the person's liberty, rights and why me and not the person next to me'.⁶⁰ This was echoed by a front-line officer who said: 'it's got to be black and white for police...it absolutely has to be straight down the line so officers know what they're doing'.⁶¹ The Independent Police Complaints Commission's (IPCC's) position on stop and search, that the officer must explain why they are stopping the person,⁶² is extremely difficult to implement in relation to 'random' section 44 stops. This was acknowledged by one officer, who commented that 'it's still quite an uncomfortable thing to do, to search somebody with no grounds whatsoever, very difficult to explain'.⁶³ Another said 'under section 44, because it is supposed to be a groundless search, it's very hard to formulate or to tell that person why you are searching them'.⁶⁴ The primary problem is how to provide

⁵⁷ Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2008/09'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2007/08'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System 2006/07'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2006'; Home Office, 'Statistics on Race and the Criminal Justice System - 2005'; Home Office, 'Statistics on Race and the Criminal Justice System - 2004'; Home Office, 'Statistics on Race and the Criminal Justice System - 2003'.

⁵⁸ See figure 4.1 above.

⁵⁹ MPSFL04.

⁶⁰ BTPSNR03.

⁶¹ BTPSNR02.

⁶² IPCC, 'IPCC position regarding police powers to stop and search' (IPCC, London 2009) principle 1; Mike Franklin. This is also the position of the UN, see: CTITF Working Group on Protecting Human Rights while Countering Terrorism, 'Basic human rights reference guide: the stopping and searching of persons' [53].

⁶³ BTPSNR02.

⁶⁴ BTPFL10.

more concrete guidelines regarding the selection process without section 44 being subsumed within section 43. The NPIA Guidance required the use of objective criteria but the criteria provided – location and/or the person – offers little actual guidance, as discussed further below at Chapter 5.4 and 5.5.

One factor which all officers stated they did not use in determining whether or not to exercise section 44 was racial profiling, although some officers felt that they should be able to target certain ethnicities who were more likely to be engaged in a particular type of terrorism, while stating that they did not do so. Two officers commented that they could use racial profiling, if it was based on ‘really good intelligence’, but said that this had not happened to date.⁶⁵ Another officer said: ‘I don’t feel comfortable in stopping white, male or female...when quite clearly in this situation, i.e. the Al Qaeda...[they] tend to be [from an] Asian background’.⁶⁶ One officer stated that they stopped people to ‘balance’ the numbers and that it was these, white people, who were most vocal in their opposition to the power.⁶⁷ Another officer did not think such ‘balancing’ was useful: ‘it’s a waste of our time, it’s going to alienate people who are never going to be of any interest to us’.⁶⁸ Another officer categorically denied that ‘balancing’ occurred.⁶⁹ Officers should not stop people to ‘balance’ the statistics on ethnicity as doing so is unlawful, being the fettering of a discretion with policy. On a corresponding issue, most officers rejected the concept of a terrorist profile,⁷⁰ although one said that ‘young British Asian males are going to be 90 per cent of the guys that commit terrorist activity under the AQ [al ‘Qaeda] banner’.⁷¹ One officer questioned whether it was possible to construct a profile but argued that if there was relevant intelligence the police should use it.⁷² Profiling is discussed in depth in Chapter 6.2.

5.2.1) Reasons for not exercising section 44

In terms of reasons not to exercise section 44, there were more disparate opinions. The officers appeared to be talking theoretically rather than from experience. There appeared to

⁶⁵ BTPSNR05; BTPFL05.

⁶⁶ BTPFL09.

⁶⁷ BTPFL05.

⁶⁸ BTPFL01.

⁶⁹ MPSFL03.

⁷⁰ MPSSNR01; MPSFL07; MPSFL06; MPSFL01; BTPFL02; BTPFL03; BTPFL06; BTPFL04; BTPFL10 c.f. BTPFL08 and BTPFL09 who were equivocal.

⁷¹ BTPFL05.

⁷² BTPSNR02.

be different interpretations to the question;⁷³ one officer stated that once you start to carry out a section 44 stop you would finish it, interpreting the question as asking what factors would make you stop mid-search rather than before the search started.⁷⁴ Another interpreted it in the same way, stating that whether they finished the stop would depend on ‘whether the stop’s a normal stop or an important stop’,⁷⁵ while others appeared to be discussing what would make one not start to carry out a stop. Given the prompts of safety, conflicting priorities and fear of causing or aggravating community tension, the officers stated that the first two factors would be reasons not to carry out a section 44 stop, safety relating to either officers or the general public, with an urgent call possibly also relating to someone’s safety, for instance if someone had been stabbed nearby.⁷⁶ One PCSO stated that if the PCSO with whom they were paired was called away then, for reasons of officer safety – PCSO’s must work in pairs – they would not exercise section 44.⁷⁷ A few officers mentioned community tension.⁷⁸ One commented that in some areas of the borough there could be community tension but that they would still carry out section 44.⁷⁹

A final issue relating to the exercise of the power, although not in fact a factor for exercising it, is the confusion regarding whether the stop power could change during the stop and search depending on the outcome. The suggested scenario was that while carrying out a section 44 stop drugs are found: does the power then ‘switch’ to the Misuse of Drugs Act 1971, section 23? Some thought it would not change,⁸⁰ while others thought that it would change.⁸¹ One officer was more nuanced, stating that if a further search then had to be carried out then it would be done under section 23.⁸² Another said that the power would not change, although the drugs would be seized and an arrest carried out under section 23.⁸³ One officer referred to a borough where there was procedure whereby if something was found in the course of section 44 stop to prompt a search under a different power – for instance drugs were found, then the section 44 search ceases and another under the relevant

⁷³ See Appendix A.

⁷⁴ MPSSNR03.

⁷⁵ MPSFL04.

⁷⁶ MPSSNR03; MPSSNR04; MPSFL02; MPSFL01; MPSFL04; BTPFL01; BTPFL03.

⁷⁷ MPSFL01.

⁷⁸ MPSFL04; BTPFL01; BTPFL04.

⁷⁹ MPSFL04.

⁸⁰ MPSSNR04.

⁸¹ MPSSNR03; MPSFL04; BTPFL03.

⁸² MPSFL02.

⁸³ MPSSNR04.

power begins.⁸⁴ This is the correct approach, however, the confusion in this area points to the need for such procedures to be introduced in across all forces and for more, or refresher training to be given, particularly as this may skew the statistics if an officer were under the impression that a section 44 stop which resulted in a drugs seizure should be categorised as a section 23 stop. Both the section 44 stop which initiated the search and the subsequent section 23 search should be recorded. To ensure consistency across forces, a paragraph should be added to PACE detailing the approach officers should take when progressing through two stop and search powers in this manner.

5.3) Safeguards

In addition to the regulations within TACT, section 44 is governed by PACE Code A,⁸⁵ pursuant to PACE, section 60(1)(a). The latest version of Code A came into force on the 1st January 2009.⁸⁶ The general guidance, relating to all powers of stop and search, states that the power to stop and search: ‘must be used fairly, responsibly, with respect for the people being searched and without unlawful discrimination’, be carried out ‘with courtesy, consideration and respect for the person concerned’ and that the co-operation of the person to be searched must be sought in every case.⁸⁷ The person being searched must be informed that they are being detained for a search, which legal power is being exercised, the purpose of the search and that they are entitled to a record of the search.⁸⁸ If the person appears not to understand or to be deaf reasonable steps must be taken to explain their rights under the Code.⁸⁹

These regulations appear to have been taken on board by the police with officers listing ‘respect’,⁹⁰ ‘politeness’,⁹¹ ‘friendliness’,⁹² ‘communication skills’,⁹³ and the provision of as much information as possible regarding the stop – why the person is being stopped, what the

⁸⁴ MPSSNR05.

⁸⁵ Paragraph 2.1(c).

⁸⁶ Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Code A) (No.2) SI Order 2008/3146.

⁸⁷ Paragraphs 1.1, 3.1, 3.2.

⁸⁸ Paragraphs 3.8(a), (c), (d) and 3.10.

⁸⁹ Paragraph 3.11.

⁹⁰ MPSFL02; MPSSNR01.

⁹¹ MPSFL02.

⁹² MPSFL02; BTPFL02.

⁹³ BTPFL01; BTPFL03; BTPFL04.

object of the search is for, etc.,⁹⁴ as factors constituting a ‘good stop’ or which made an officer ‘good’ at stop and search. One noted that there can be difficulties when explaining the reason for the stop to tourists who may not speak English very well and that on such occasions writing down the reasons may help.⁹⁵ The availability of ‘stop leaflets’, explaining the objectives behind section 44 and the reasons for its exercise are a positive step in adhering to the Code A requirements, although they should be available in several languages for both tourists and residents who may have no or a low level of English. One senior officer noted that complaints regarding section 44 focused on why the person had been stopped with no criticism of the manner of the police in stopping them; some even stated that the officer acted respectfully and courteously.⁹⁶

Another safeguard, which provides a layer of accountability, are the annual reports by the Independent Reviewer. These provide an account to Parliament, accessible to the general public, regarding the exercise of section 44. The discussion on section 44 runs over only a couple of pages and does not go into significant detail, although this is both predictable and necessary given the present breadth of counter-terrorism powers and the corresponding limits on the Reviewer’s time and space in the report. In addition, the commentary on section 44 became, on the whole, rather pro forma. This can be viewed as reflecting the static nature of the use of the power over the past number of years, which perhaps explains the substantially more strident tone taken in the 2010 Report, after the *Gillan (ECtHR)* ruling.⁹⁷

5.3.1) Stop forms

One key aspect of accountability over section 44 are the stop forms.⁹⁸ As discussed in Chapter 3.2.3, these were instituted following the recommendation of the Macpherson Report.⁹⁹ According to PACE, Code A, ‘forces in consultation with police authorities must make arrangements for the records to be scrutinised by representatives of the community’.¹⁰⁰ The operation and effectiveness of the various police-community organisations is discussed

⁹⁴ MPSFL01; MPSFL04; BTPFL02; BTPFL03; BTPFL04.

⁹⁵ MPSFL01.

⁹⁶ MPSSNR01.

⁹⁷ Lord Carlile, ‘Report on the operation in 2009 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006’ 174-187.

⁹⁸ Form 5090 (see appendix A).

⁹⁹ Sir W Macpherson, ‘The Macpherson Report’.

¹⁰⁰ PACE, Code A, paragraph 5.4.

in the next Chapter. In 2009 the forms were changed, shortening them considerably.¹⁰¹ They aim to provide a system of oversight, which feeds into the statistics on the use of stop and search, providing a record for the person stopped. The stop form given to the person stopped has a second page explaining the person's rights under each stop power. A form must be completed for every stop at the time and given to the person stopped, or if there are exceptional circumstances which would make it wholly impracticable then once it becomes practical.¹⁰² From the officers surveyed the trend was to complete the form on the spot.¹⁰³ One community representative said that when he joined the MPA in 2006, it took some boroughs 180 days to input the stop forms, although this period had decreased to 30 days by 2009.¹⁰⁴ This raises questions relating to intelligence gathering objectives of section 44, presuming that information is inputted into the intelligence database at the same time. The default position, that the officer must provide his or her name, does not apply in cases of enquiries linked to the investigation of terrorism where the officer must only provide their warrant number.¹⁰⁵ One officer stated that she would normally give the name of the base station, notwithstanding that this was not required.¹⁰⁶

As section 44 has no requirement of reasonable suspicion officers could complete the form very tersely, merely stating that section 44 was used. Some of the officers surveyed took this approach, one saying they only put in 'searching under section 44, TACT, searching for paraphernalia, documentation and the operation we're on',¹⁰⁷ while another stated they would just put in 'section 44' and who it was authorised by.¹⁰⁸ Other officers took a more expansive approach, some put in 'all the details',¹⁰⁹ some put in information such as location and time¹¹⁰ and possibly why section 44 was being used at that location.¹¹¹ One of the units had 'sticky labels...which explain that the power has been granted by the...deputy Chief Constable and authorised in conjunction with the Home Secretary and it has the powers'

¹⁰¹ Compare the old form in Appendix B.

¹⁰² PACE Code A [4.1-4.2A].

¹⁰³ MPSFL01; MPSSNR03; BTPFL01; BTPFL03.

¹⁰⁴ COMMD.

¹⁰⁵ Paragraphs 3.8(b), 4.4.

¹⁰⁶ MPSFL02.

¹⁰⁷ MPSFL01.

¹⁰⁸ MPSSNR03; BTPFL02; BTPFL04.

¹⁰⁹ BTPFL03.

¹¹⁰ MPSSNR04.

¹¹¹ MPSFL02; MPSSNR04.

listed beneath the statement.¹¹² One officer drew a distinction between a ‘normal stop’ where nothing is found, in which case ‘no further action taken’ is written on the form, and a stop where something comes out of the stop, in which case that will be recorded.¹¹³ In a similar vein, another officer said that if they had no suspicions about someone the form would be quite brief, whereas if they had some suspicions they would ‘try and get as much information as possible’.¹¹⁴ Some guidelines as to what information should be included in the case of authorised stops should be added to PACE Code A to ensure consistency.

All forms must be entered onto the force database. Most frequently the officer inputs the form,¹¹⁵ although sometimes an officer’s assistant¹¹⁶ or a deskbound officer does it.¹¹⁷ In the MPS when, for instance during a large event, officers are brought in from other boroughs they sometimes leave the forms to be inputted by members of that borough.¹¹⁸ The data quality manager for the MPS stated that ‘sometimes’ the data quality is better if the person who writes the form inputs as this avoids any issues surrounding bad handwriting and may allow the officer to pick up a missed entry or obvious error (such as giving a woman’s name and then ticking the gender as male).¹¹⁹

The BTP have rolled out PDAs, which are hand held computers, at least to the units surveyed, and the MPS began to pilot them in early 2010.¹²⁰ The BTP use theirs in conjunction with portable printers carried in their jackets, connected by Bluetooth, although paper copies are also carried in case there is a technical fault.¹²¹ There are a two major advantages to the PDAs. First, the stop form is automatically inputted into the force database. Second, there are some boxes which must be completed before the officer can move onto the next screen.¹²² There are also some potential drawbacks. It was noted that they take a ‘little bit longer’.¹²³ The BTP’s printed copy of the form is shorter than the paper form and does not explain the various stop and search powers nor the person’s rights;

¹¹² BTPSNR01.

¹¹³ MPSFL04.

¹¹⁴ BTPFL01.

¹¹⁵ MPSFL02; MPSFL01; BTPFL04.

¹¹⁶ MPSFL01.

¹¹⁷ BTPFL04.

¹¹⁸ Data Quality Manager (DQM).

¹¹⁹ DQM.

¹²⁰ DQM.

¹²¹ BTPFL01.

¹²² BTPFL03.

¹²³ BTPFL01; BTPFL03.

rather the person is referred to a website. However, the person may be given a stop leaflet, which details the extent of the power and their rights. Although most people now have access to the internet, perhaps via a library or similar, they may not have access to (free) printing. To ensure the use of abbreviated forms does not impact unfairly upon such people they should be given the option of having the full form or relevant information printed for them at a local police station, upon production of the stop form.

What was worrying about the discussions of the stop forms with the front line officers was their absolute lack of knowledge concerning the audit trail. All were aware that the forms had to be inputted into the stop database but few knew – even vaguely – what happened after the forms were inputted – whether they were audited at borough level or centrally or how they were audited.¹²⁴ In one of the BTP units, the sergeant checked the forms and signed the back of each when this was done.¹²⁵ This general lack of knowledge suggests that the forms provide little in terms of a real audit and instead are just an example of ‘number crunching’. Most officers could not give any example of sanctions or measures being applied for the misuse of section 44, although one remembered being taken aside and told ‘it might be a good idea’ to carry out the stop slightly differently,¹²⁶ while another said they had spoken to a member of the team, advising them on how to improve their stop.¹²⁷ Lord Carlile knew of similar measures – where a senior officer advises a junior officer to amend the way they carry out section 44.¹²⁸

5.4) Intelligence

This section considers the role of intelligence relating to the exercise of section 44. Intelligence may be broken down into four constituents: collection, collation, evaluation and analysis.¹²⁹ It is beyond the scope of this research to go into detail regarding the evaluation or analysis of intelligence,¹³⁰ although it should be noted that it is when the step from data collection to data collation and analysis is taken that ECHR, Article 8 is most likely to be

¹²⁴ MPSSNR03; MPSSNR04; MPSFL02; MPSFL01; MPSFL04.

¹²⁵ BTPSNR01.

¹²⁶ BTPFL04.

¹²⁷ BTPFL10.

¹²⁸ Lord Carlile.

¹²⁹ Phillips, D, 'Police intelligence systems as a strategic response' in C Harfield and others (eds) *The handbook of intelligent policing: consilience, crime control, and community safety* (OUP, Oxford 2008) 26.

¹³⁰ See, e.g. Ibid; Innes, M, Fielding, N and Cope, N, 'The appliance of science?': the theory and practice of crime intelligence analysis' (2005) 45 BJC 39.

engaged.¹³¹ This section will instead focus on collection and collation, in particular the potential intersections with human rights, and data quality. That intelligence gathering is one of the objectives of section 44 is both a consequence of the imperatives of the risk society and chimes with the centrality of intelligence in broader counter-terrorism terms.¹³² While intelligence stands as the life blood of counter-terrorism –and policing more broadly – it also constitutes a potential minefield in terms of accountability and adherence to human rights, in particular the right to privacy. In a report on surveillance, the House of Lords Select Committee on the Constitution identified ‘the freedom of the individual’ as a paramount precondition to proper constitutional functioning and warned that ‘the growing use of surveillance by government bodies and private organisations...could constitute a serious threat’ to this principle, underpinned as it is by the requirements of privacy and restraint in the use of surveillance and data collection.¹³³

5.4.1) Data quality

Taking collection first, a key issue is its quality. For intelligence to be useful, it must be of a sufficient quality. The importance of data quality to policing was underlined by the Bichard Inquiry Report following the Soham Murders, which noted that poor data quality in a number of Ian Huntley’s contacts with the police and social services, such as the day and month of his birth being reversed in his vetting check, contributed to him ‘falling through the cracks’.¹³⁴ Special attention must therefore be given to the procedures which ensure data quality in addition to systems of accountability and safeguards. The MPS have a data quality team (DQT), situated within the Directorate of Information, which aims to improve the quality of data retained by the MPS through technological solutions. The DQT produces a number of weekly and monthly reports which are collated centrally then fed back to, for example, the Stop and Search Action Team and boroughs. The reports focus on whether ‘the information is valid, whether it’s in the right format, whether it is consistent across a report and also specifically some business rules that will be specific to that particular application’.¹³⁵ An example of a business rule in relation to stop forms is recording arrests

¹³¹ Home Office ‘The National Intelligence Model’ (Home Office, London 2000) 29-38.

¹³² Walker, C, ‘Intelligence and anti-terrorism legislation in the United Kingdom’ (2005) 44 *Crime, Law & Social Change* 387.

¹³³ Select Committee on the Constitution, *Surveillance: Citizens and the State* (IIL 2008-09, 18-1).

¹³⁴ Sir M Bichard, *The Bichard Inquiry Report* (HC 2003-04, 653-1).

¹³⁵ DQM.

related to counter-terrorism.¹³⁶ A sample of the tests applied on a daily basis to the Stops Database is given in Table 5.1 below, with the full example provided in Appendix B.2.

Table 5.1: Tests applied to data in MPS Stops Database¹³⁷

Field in Stops database	Data Quality tests applied
Person Forename	Name contains invalid characters (e.g. numerals, invalid punctuation marks)
	Name is entered as 'Unknown' or 'N/A' or some variant
	Form indicates that person gave their name, but the field is blank or shown as 'N/A', 'REFUSED', 'ANONYMOUS' or some variant.
	Form indicates that person gave their name but only a single initial is entered.
Age / DoB	The Age entered is inconsistent with the DoB.
	DoB and Age are both blank
DoB	Year of Birth is pre 1900
	Is later than or the same as the Date of the Stop
	Not entered
Age	Age is <= 9 years
	Age is > 75 years
	Is recorded a 0
Gender / Person Forename	The Person's gender is inconsistent with the Person's gender e.g. Mary recorded as Male or Barry recorded as Female (we have list of names/genders that we are reasonably confident should agree).

¹³⁶ DQM.

¹³⁷ Source: DQM.

Field in Stops database	Data Quality tests applied
Self-Defined Ethnicity (SDE)	<p>Is blank or not recorded (where the reason for it not being recorded is given as one of the 'N' codes:</p> <p>N1 – Where the officer's presence is urgently required elsewhere</p> <p>N2 – Situation involving public disorder</p> <p>N3 – When the person does not appear to understand what is required</p> <p>N4 – Where the person declines to define their ethnicity</p> <p>Is not recorded (i.e. is blank on the form – no reason for not recording the SDE is given)</p>
Ethnicity (IC Code)	Is recorded as 'Unknown'
SDE & IC Code	Are inconsistent e.g. SDE indicates 'Black or Black British' and IC code indicates 'White Northern European'
Vehicle Registration Mark	Vehicle is stopped, but registration mark is not recorded (field is blank)
Outcome/Subject of Search	<p>Outcome is inconsistent with Subject of Search e.g. Only Searched a vehicle, but outcome is shown as either Arrest, Verbal Warning, Advised (i.e. relevant to a person not a vehicle).</p> <p>Outcome is applicable to an adult only, but the Person stopped has an age of < 16 years – for Outcome code 7 – 'Directed to leave alcohol related crime or disorder locality.</p>

The Data Quality Manager highlighted the dual nature of the reports: 'We're trying to ask the person who created the stop in the first place to review the record but hopefully it's also a training and education activity as well to say these fields are quite important, make sure you get it right next time'.¹³⁸ The subjects of the above tests underlines the potential benefits of using PDAs to input stop forms: basic data inputting errors, such as giving a date of birth of 1/1/1850, could be blocked by the software, ensuring officers can correct the error at the time they are completing the form and would, ordinarily, have the person stopped in front of them if any clarification were needed. The MPS systematic approach to improving their data is to be welcomed and thought must be given to how to exploit these improved systems and this improved data to provide much needed accountability over section 44.

¹³⁸ DQM.

In addition to these generic issues of data quality, data that is used for intelligence must adhere to additional quality principles. According to the 'Code of Practice: Management of Police Information', the source, nature and reliability of the police information should be graded.¹³⁹ The usual approach is the 5 x 5 x 5 system which evaluates the source, from reliable to unreliable and unknown; the information, on a five-point scale; and, the appropriate handling code, that is, to what degree it may be disseminated among the police and partner agencies.¹⁴⁰ An alternative approach is the 4 x 4 system which grades the reliability of the information, on a scale of A, B, C and X, and the source, on a scale of 1 to 4.¹⁴¹ It appeared from the interviews that front-line officers simply inputted data they felt was relevant and that SO15, or the relevant branch, then assessed the information and, presumably, applied the grade at that stage.¹⁴²

5.4.2) Collection

Intelligence from section 44 stops tends to come from either oral statements made to the officer during the stop or from visual records obtained through CCTV. Any articles relating to terrorism which are found would also provide intelligence and the stop forms themselves may constitute intelligence, although one senior officer dismissed them as 'useless for intelligence'.¹⁴³ In addition to the discussion at 5.1 above, regarding officers 'chit-chatting' with people stopped, it should be noted that the person stopped under section 44 may be lawfully detained only for the duration of that stop and search. Any detention thereafter for the purpose of questioning the person would be unlawful and constitute false imprisonment and a violation of the ECHR, Article 5. The illegality of such action is underlined by the NPIA 'Practice Advice', which states that section 44 'does not provide officers with the power to detain individuals for the purpose of questioning'.¹⁴⁴ In this respect section 44 may be contrasted with the Justice and Security (Northern Ireland) Act 2007, section 21, which permits officers to stop and question people to ascertain their identity and movements. Under section 21 the person may be detained until they have answered the relevant questions. A related issue is that section 44 may only be used for the purpose of searching for articles that could be used in connection with terrorism. It cannot be used primarily as an

¹³⁹ National Centre for Policing Excellence 'Code of Practice: Management of Police Information' (NCPE, 2005) para.4.3.

¹⁴⁰ Walker 'Intelligence and anti-terrorism legislation in the United Kingdom', 411, footnote 180.

¹⁴¹ Harfield, C and Harfield, K, *Intelligence: investigation, community and partnership* (OUP, Oxford 2008) 193.

¹⁴² MPSFL01; BTPFL02; BTPFL04; BTPFL01; MPSFL05; BTPFL05.

¹⁴³ BTPSNR04.

¹⁴⁴ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' 12.

intelligence gathering tool, although it would be virtually impossible to prove intent in this regard.

Turning to the use of CCTV, it should be noted that ‘CCTV’ is something of a misnomer given that most surveillance cameras today are networked and digital rather than ‘closed-circuit’.¹⁴⁵ Given this proviso and the popular use of the term, ‘CCTV’ will be used in this research to refer to surveillance cameras. The use of CCTV to monitor the actions of an individual in a public place does not interfere with the individual’s rights under Article 8,¹⁴⁶ however, the processing or collecting of the data and, in particular, making a permanent record of the image(s) may give rise to an interference with the right.¹⁴⁷ In *Perry v UK* the claimant successfully argued that the police had violated his Article 8 rights by covertly recording him in a police custody suite for the purposes of arranging a video identification parade.¹⁴⁸ The ECtHR focused in particular on the fact that the CCTV was altered – the lens was focused – so as to capture a clear image of the claimant. While being on CCTV in the custody suite was foreseeable and would not ordinarily engage Article 8, the use to which the police put the footage ‘went beyond the normal or expected use of this type of camera’.¹⁴⁹ One officer described how he could call the control room, who would direct him to move the person stopped into a particular position so their image could be captured.¹⁵⁰ The need to speak to an engineer or controller and direct them to direct and/or focus the camera on the person and possibly manoeuvre the person into an appropriate position to get a clear shot is analogous to the behaviour of the police in *Perry*, although the question of an Article 8 infringement is likely to turn on what is done to or with the image afterwards, as illustrated by the case of *Friedl v Austria*.¹⁵¹

Friedl concerned an alleged violation of Article 8 by the Viennese police for photographing and retaining the image of the claimant who was attending a demonstration. The Commission held there was no violation of Article 8 on the basis that the photographs were of a public incident and were taken in view of ensuing criminal proceedings.¹⁵² The fact that the photographs remained anonymous and that neither they nor the personal details

¹⁴⁵ Home Affairs Committee, *A surveillance society?* (HC 2007-08, 58-I) [30].

¹⁴⁶ *Herbecq v Belgium* (1887) 92-A DR 92 app.no.32200/96.

¹⁴⁷ *Peck v United Kingdom* (2003) 36 E.H.R.R. 41 app.no.44647/98; *Perry v United Kingdom* (2004) 39 EHRR 3 app.no.63737/00.

¹⁴⁸ *Perry v United Kingdom*.

¹⁴⁹ *ibid* [38; 41]. See also *Peck v United Kingdom*.

¹⁵⁰ BTPSNR05.

¹⁵¹ *Friedl v Austria* (1996) 21 EHRR 83 app.no. A/305-B.

¹⁵² *ibid* [49].

gathered subsequently by the police were entered into any data processing system was also highlighted.¹⁵³ The ECtHR also highlighted the fact that the claimant in *Friedl* was at the location to demonstrate, the purpose of which is to be seen. *Friedl* suggests that if the image of the person stopped is captured on CCTV but they do not give their details and the image is not collated with a database this will not infringe Article 8, however, if the image is processed further or linked with personal data it seems likely to engage Article 8. If there is no reasonable suspicion, then it seems likely that the infringement will not be justifiable under Article 8(2). Although it is not clear-cut, the fact that Article 8 may be violated through this use of CCTV suggests that this practice should be reviewed and that considered procedures are put in place and made accessible to the general public.

The use of CCTV may also engage the Data Protection Act 1998 (DPA) and may require authorisation under the Regulation of Investigatory Powers Act 2000 (RIPA). The DPA only applies to the data gathered from the CCTV and offers relatively little succour unless the individual can be identified, in which case it becomes 'personal data' and is covered by the 'data protection principles'.¹⁵⁴ However, the use of CCTV operated for non-crime-related purposes, for example, road traffic cameras designed to manage the flow of traffic, for crime-related purposes may breach the DPA. The use of CCTV is not covered by the provisions of RIPA unless it is being used for a pre-planned operation, which would exclude the 'routine' use of section 44 under the MPS 'Level 1' and BTP 'Strand 1' and 'Strand 3'..¹⁵⁵ If CCTV is being used as part of a pre-planned operation, then an authorisation would have to be granted under RIPA, section 28. Such an authorisation may be made if the authorising officer believes it necessary because, inter alia, it is in the interests of national security and is proportionate.¹⁵⁶

Despite the recommendation of the 'National CCTV Strategy', there is to date no standard period for image retention.¹⁵⁷ The BTP retain any image which contains intelligence or reveals an offence for seven years and does not keep any others.¹⁵⁸ All the areas where the MOD Police carry out section 44 stops have CCTV coverage so the images are automatically captured and an officer may take copies of the images, upon production of

¹⁵³ *ibid* [50].

¹⁵⁴ DPA, section 1; schedule 1.

¹⁵⁵ Home Office 'Covert surveillance and property interference: revised code of practice' (TSO, London 2010) [2.21; 2.27-2.28].

¹⁵⁶ RIPA, section 28(1)(2); 28(3)(a).

¹⁵⁷ Gerrard, G and others, 'The national CCTV strategy' (ACPO/Home Office, London 2007) 30.

¹⁵⁸ BTPSNR04.

appropriate documentation, which is kept for as long as necessary for the investigation.¹⁵⁹ It is evident that closer regulation is required as a matter of urgency.¹⁶⁰ This should address issues relating to the potential to infringe Article 8 ECHR and also seek to set forth clear lines of accountability, within the police forces and between them and the public the most obvious conduit being either the Information Commissioner and/or the CCTV Regulator.

A difficulty with CCTV as an intelligence source is that the quality of coverage varies widely across the country.¹⁶¹ There are variations in terms of how advanced the cameras are, with resulting issues relating to picture quality, whether they are static or not, and whether they are monitored or not and if so whether by an officer or a civilian.¹⁶² There has been a vast proliferation of differing CCTVs, meaning that many are incompatible with each other, leading to difficulties for the police in playing back images.¹⁶³ One significant issue in terms of collecting intelligence from them is the interface between the CCTVs belonging to different organisations, be it local government, the police or private companies. The vast majority of CCTVs are owned and operated by private companies, although most public space CCTVs are operated by local authorities.¹⁶⁴ The City of London pioneered such integration with the creation of 'Camerawatch' in 1993, which networked over 1,200 cameras from over 373 systems as part of the 'ring of steel'.¹⁶⁵ Such integration has been replicated in London with the London Councils' Camera Sharing Scheme.¹⁶⁶ There is also a problem of information over-load whereby so much data is gathered that there is insufficient capacity to collate or analysis it.¹⁶⁷ These issues have been identified by the Government and are being addressed through the National CCTV Strategy Board which created a CCTV Oversight Body and a CCTV Regulator in December 2009.¹⁶⁸ The challenges and needs of counter-terrorism policing were specifically addressed, but the report of the consultation was not made public.¹⁶⁹

¹⁵⁹ MODPC (by email 3rd February 2010).

¹⁶⁰ The implementation of a Code of Practice for CCTV is included in the Protection of Freedoms Bill 2010-2011, sections 29-35.

¹⁶¹ BTPSNR03.

¹⁶² Gerrard and others 'The national CCTV strategy' 12.

¹⁶³ *ibid* 12.

¹⁶⁴ *ibid* 8.

¹⁶⁵ Norris, C and McCahill, M, 'CCTV: Beyond penal modernism?' (2006) 46 BJC 97.

¹⁶⁶ Gerrard and others 'The national CCTV strategy' 13.

¹⁶⁷ *ibid* 24.

¹⁶⁸ *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414.

¹⁶⁹ Gerrard and others 'The national CCTV strategy' 28.

5.4.3) Collation and dissemination

Moving onto collation, the MPS is planning to integrate their stop forms system with their intelligence system, CRIMINT.¹⁷⁰ This would permit officers to complete stop forms within CRIMINT and, if relevant, to complete an intelligence report which is automatically linked to the stop form.¹⁷¹ Stop forms will also be able to be linked to each other. These linkages should ensure key intelligence is not overlooked and will enable more systematic analysis of the stop forms. The stops database could be used more broadly than at present to provide accountability over stop and search by performing analysis force wide on the number of stop forms which do not, for example, have ethnicity included, or the number of section 44 searches being carried out on minors or in a specific area on a given date and time, for example when a protest occurred. If some issue is uncovered, then the relevant officer could be identified and measures taken. There is no indication that the Data Quality Team will move towards this type of audit, and it may be that their attempts to improve the quality of the data gathered by the MPS would be undermined if they began to audit it in such a manner as instead of aiming to help the police improve their data quality the Data Quality Team may be viewed in opposition to the police, as a monitoring mechanism that is trying to 'catch them out'. However, there is no reason why a separate team, perhaps linked to the Stop and Search Action Team or similar, could not do so. Thought should be given to whether CCTV images can also be linked into the various intelligence systems, although, again, care must be taken to ensure compliance with the DPA and HRA.

The final issue is the dissemination of any relevant data. The failings in effective dissemination highlighted by Bichard prompted him to recommend that 'a national IT system for England and Wales to support police intelligence should be introduced as a matter of urgency'.¹⁷² The response was the instigation of a new Police National Database (PND), which forces began testing in 2010.¹⁷³ The PND ought to make the dissemination of intelligence across forces seamless. The proliferation of PDAs should also assist officers in accessing relevant data. Beyond the police themselves, relevant intelligence must be disseminated to the other relevant security services involved in counter-terrorism. Intelligence which is flagged on the force intelligence system is analysed by their special branch, SO15 in the case of the MPS, and ought then to be progressed up the chain to JTAC if required.

¹⁷⁰ DQM.

¹⁷¹ DQM.

¹⁷² Sir M Bichard, *The Bichard Inquiry Report* 13.

¹⁷³ NPIA 'Largest UK police force connects to the NPIA Police National Database' (NPIA) <<http://www.npia.police.uk/en/17085.htm>> accessed 1st February 2011.

5.5) Human rights and the exercise of section 44

The next matter for consideration is whether a stop and search, in accordance with the provisions and regulations of TACT and PACE, Code A and in line with the officers' comments on how they exercise the power, would constitute a violation of the person's rights under the ECHR, specifically in relation to articles 5, 8, 10, 11 and 14? Each article will be dealt with in turn, with the tort of false imprisonment considered alongside Article 5. The ruling in *Gillan (ECtHR)* will be discussed in depth in relation to Article 8, as this was the focus taken by the ECtHR.

Before considering the law it is worth noting that the front-line officers surveyed were not, on the whole, particularly familiar with the HRA. Some thought it was simply not an issue in relation to section 44,¹⁷⁴ one acknowledged its importance but only in the vaguest terms.¹⁷⁵ One, who trained other officers, stated that he would not discuss the impact of the HRA in training on section 44,¹⁷⁶ although another stated that 'it always comes up in training'.¹⁷⁷ Two officers cited privacy as being engaged by section 44.¹⁷⁸ While the identification of a specific right which may be engaged was positive, it was the only right the officers mentioned. Only one front-line officer seemed to comprehend how human rights impacted upon stop and search, in particular the authorised powers, noting the requirements of proportionality and reasonableness.¹⁷⁹ This suggests that the training, both in the broadest terms and specific to section 44, ought to be reviewed. The focus should be on embedding the HRA within training, rather than treating it as an add-on or a box to be ticked. A good example of such incorporation is the PSNI's approach to human rights, with the NI Policing Board specifically mandated to monitor the performance of the PSNI in complying with the HRA and produce an annual report on the subject,¹⁸⁰ while the PSNI produces an annual Human Rights Programme of Action in response to the Board's recommendations.

5.5.1) Article 5

The central issue regarding the applicability of Article 5 to section 44 is whether a stop and search under the power crosses the threshold from the restriction of movement, protected by Article 2 of Protocol 4, which the UK has not ratified, to the deprivation of liberty, protected

¹⁷⁴ MPSFL02; MPSSNR03.

¹⁷⁵ MPSFL04.

¹⁷⁶ MPSSNR03.

¹⁷⁷ MPSFL04.

¹⁷⁸ MPSFL01; BTPSNR03.

¹⁷⁹ MPSSNR04.

¹⁸⁰ Police (NI) Act 2000, section 3(3)(b)(ii).

by Article 5. There is no bright line for the threshold, rather the distinction between the restriction of movement and deprivation of liberty is 'merely one of degree or intensity, and not one of nature or substance'.¹⁸¹ Consenting to the detention does not mean it may not constitute a deprivation of liberty.¹⁸² The ECtHR has held that the correct starting point is the concrete situation in the specific case, which must take account of 'criteria such as the type, duration, effects and manner of implementation of the measure in question.'¹⁸³ The relevant case law is highly ambiguous. It has been held that house arrest for twelve hours a day and all weekend,¹⁸⁴ is not a deprivation of liberty, nor is ten hours curfew a day;¹⁸⁵ however, the restriction of a man for a matter of minutes while forcibly taking blood was held to be a deprivation of liberty.¹⁸⁶ In *Storck v Germany*¹⁸⁷ the court held that confinement for 'a not negligible length of time' would constitute a deprivation of liberty under Article 5, although in that case the period was several months it is arguable that 'not negligible' encompasses far shorter lengths of time. Domestically, Lord Hoffmann, in a control order case, stated that one must confine 'the deprivation of liberty to actual imprisonment or something which is for practical purposes little different from imprisonment',¹⁸⁸ while Lord Brown proffered sixteen hours as the threshold.¹⁸⁹

In reaching his conclusion in *Gillan (HL)* that section 44 did not constitute a deprivation of liberty, Lord Bingham emphasised that persons stopped and searched under section 44 would 'not be arrested, handcuffed, confined or removed to another place' and that the procedure would 'ordinarily be relatively brief'.¹⁹⁰ A number of criticisms may be made about this argument. First, the length of the detention is not determinative in deciding whether or not it crosses the threshold from restriction to deprivation of liberty.¹⁹¹ Second, the exact length of the detention was contested, with the officers claiming Quinton's search

¹⁸¹ *Guzzardi v Italy* (1981) 3 EHRR 333 app.no.7367/76 [93].

¹⁸² *HM v Switzerland* (2004) 38 EHRR 17 app.no.39187/98; *De Wilde, Ooms and Vesyp v Belgium* (1979-80) 1 EHRR 373 (Series A, No.12).

¹⁸³ *Guzzardi v Italy* [92]. The degree of supervision and impact upon the possibility of maintaining normal social contacts are also pertinent, although not relevant to section 44 (van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 458).

¹⁸⁴ *Trijonis v Lithuania* (2005) app.no.2333/02, judgment of 17 March 2005.

¹⁸⁵ *Raimondo v Italy* (1994) 18 EHRR 237 app.no.12954/87.

¹⁸⁶ *X v Austria* (1979) 18 DR 154 app.no.8278/78.

¹⁸⁷ *Storck v Germany* (2006) 43 E.H.R.R. 6 app.no.61603/00 [74].

¹⁸⁸ *Secretary of State for the Home Department v JJ* [2007] UKHL 45 [44].

¹⁸⁹ *ibid* [105].

¹⁹⁰ *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12 [25].

¹⁹¹ *Järvinen v Finland* (1998) app.no.30408/96.

took five minutes while she maintained it was closer to thirty, while both parties agreed that Gillan's search took approximately twenty minutes.¹⁹² Third, anyone refusing to submit to a search under section 44 commits an offence under section 47 for which they will be liable to imprisonment for up to six months or a fine not exceeding £5,000 or both.¹⁹³ A final, minor point is that the person may be removed to a different place, if headgear which has religious connotations is to be removed.¹⁹⁴ It was the element of coercion that was the focus of the ECtHR's comments on Article 5 in *Gillan (ECtHR)*.¹⁹⁵

Before discussing the ECtHR's approach it is necessary to note the case of *Austin v Commissioner of Police of the Metropolis*.¹⁹⁶ In *Austin* Lord Hope introduced the novel concept of the 'purpose principle', by which Article 5 was held not to apply *ab initio* in a case of 'kettling' – where the police place a cordon around a crowd – because the purpose of the restriction was deemed to be legitimate, proportionate and not arbitrary. Clearly there are several points of contention with this case, primarily the fact that it appears to stand in conflict with ECtHR case law and basic statutory interpretation which clearly shows that Article 5 always applies, if the threshold has been crossed, the question being whether it is justifiable under any of the qualifying paragraphs.¹⁹⁷ *Austin* has been appealed to the ECtHR and it awaits to be seen whether they will uphold the 'purpose principle' but in the meanwhile it stands as good law and reinforces the perception that domestically there is a very high bench mark for infringements of Article 5 in relation to police powers or counter-terrorism which a section 44 stop is unlikely to reach.

Gillan (ECtHR) strongly suggests that the ECtHR will find there to have been a deprivation of liberty in *Austin*. In *Gillan* the ECtHR discussed the potential applicability of the Article 5 but deemed it unnecessary to rule on the matter given their ruling on Article 8. It stated that coercion, such that if the person refused to submit to the police activity they may be forced, as occurred in *Foka v Turkey*,¹⁹⁸ or would be committing an offence, as under TACT, section 47, 'is indicative of a deprivation of liberty within the meaning of Article 5(1)'.¹⁹⁹ If this view is endorsed in later cases, such as *Austin*, then this will bring some

¹⁹² *Gillan (HL)*.

¹⁹³ The fine is the standard level 5 (Criminal Justice Act 1982, section 37).

¹⁹⁴ PACE Code A, note 4.

¹⁹⁵ *Gillan (ECtHR)*.

¹⁹⁶ [2009] UKHL 5.

¹⁹⁷ See: Lennon, G, 'Police Powers: Article 5 ECHR and Crowd Control' (2009) 3 Web JCLI

¹⁹⁸ *Foka v Turkey* (2008) app.no.28940/95.

¹⁹⁹ *Gillan (ECtHR)* [57].

welcome clarification to the law in this area and will serve notice to the domestic courts that police detentions do engage Article 5.

Proceeding on the basis that Article 5 is engaged, the next question is whether such interference is justified under Article 5(1). As it stands, section 44 cannot be justified under Article 5(1) as its authorisation is not in accordance with the law (see Chapter 4.4). It is argued below in relation to Article 8, that the exercise of the power is also not in accordance with the law, however, presuming that changes are made to ensure that section 44 is authorised and deployed in accordance with the law, by raising the trigger and bolstering accountability and making the changes suggested in the next section, then the interference with Article 5 would be justifiable under Article 5(1)(b) – to secure the fulfilment of an obligation prescribed by law and there would therefore be no infringement of Article 5.

A related question is whether the tort of false imprisonment might apply. False imprisonment is not on all fours with the deprivation of liberty: an act may constitute false imprisonment without being a deprivation of liberty and vice versa.²⁰⁰ The tort²⁰¹ requires that the claimant be ‘imprisoned’ in circumstances not expressly or impliedly permitted by law.²⁰² ‘Imprisonment’ is the complete restraint of the claimant’s freedom of action,²⁰³ whether ‘in the open field, or in the stocks or cage in the street, or in a man’s own house, as well as in the common gaol’.²⁰⁴ There is no requirement the claimant be aware that they are compelled to remain, although this may go towards the quantum of damages.²⁰⁵ The courts have been consistently unsympathetic to claims of false imprisonment arising from a legal search. Cases from Northern Ireland show the courts are willing to imply a power to detain persons so as to prevent them from raising the alarm or resisting arrest,²⁰⁶ or such as is ‘necessary for the execution of a speedy and efficient search’,²⁰⁷ including the detention of

²⁰⁰ *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5[87] (this aspect of the ruling was not subject to appeal).

²⁰¹ It is also a criminal offence.

²⁰² *Warner v Riddiford* (1858) 140 ER 1052.

²⁰³ *Bird v Jones* [1988] 1 W.L.R. 692.

²⁰⁴ *Termes de la Ley* cited in Rogers, WVH, *Winfield & Jolowicz on Tort* (16th ed. edn Sweet Maxwell, London 2002) 81.

²⁰⁵ *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 (c.f. *Herring v Boyle* (1834) 1 CrM&R, 149 ER 1126, approved in *Murray v Ministry of Defence* [1987] 3 NIJB 84).

²⁰⁶ *Murray v Ministry of Defence* [1988] 1 WLR 692.

²⁰⁷ *Kirkpatrick v Chief Constable of the RUC and Ministry of Defence* [1988] 4 NIJB 73; *DPP v Meaden* [2003] EWHC 3005 (Admin) [32] per Rose, LJ.

persons who are not the target of the search.²⁰⁸ Although these cases have been subject to academic criticism they remain good law,²⁰⁹ *Murray* having been cited with approval by the Court of Appeal.²¹⁰ If the basis for the legal action is unlawful then the subsequent detention would be false imprisonment, however, the requisite hurdles to prove that the authorisation or its exercise are *ultra vires* are almost insurmountable, at least without access to the underlying intelligence. It seems that such detention engages the maxim: *de minimis non curat lex*.

5.5.2) Article 6

Article 6 guarantees the right of access to the courts in the determination of civil rights and obligations or of any criminal charge.²¹¹ If evidence procured during the stop and search was used subsequently in court a challenge might be brought under Article 6.²¹² The fact that no criminal charge was brought against the claimants in *Gillan* may explain why they did not argue their case in relation to Article 6. If the claimants cooperated with the police, Article 6 is applicable on the basis of determining civil rights.²¹³ If a claimant refused to submit or obstructed the police in their exercise of section 44 then Article 6(3) would be engaged, the case being a criminal one. Dijk argues that the principles in Article 6(2) and 6(3) are applicable to both civil and criminal cases,²¹⁴ although the ECtHR affords 'greater latitude' to the State in civil cases.²¹⁵

The central issue concerns the right to not incriminate oneself, which intersects with the right to silence, neither of which are absolute.²¹⁶ In *Funke*, the fact that the authorities attempted to compel Funke to disclose the documents which they suspected he had through the imposition of accumulating fines, was a key factor in the ECtHR determining that there had been a violation of Article 6(2).²¹⁷ The coercive nature of section 44, by virtue of the

²⁰⁸ *Murray v Ministry of Defence*.

²⁰⁹ Walker, C, 'Army special powers on parade' (1989) 40 NILQ 1.

²¹⁰ *Connor v Chief Constable of Merseyside Police* [2006] EWCA Civ 1549.

²¹¹ Article 6(1).

²¹² *Funke v France*, App. No. 10828/84, Ser. A. 256-A (1993).

²¹³ This terse assertion underplays the complexity of this area, for more see: van Dijk and Arai *Theory and practice of the European Convention on Human Rights* [10.2].

²¹⁴ *ibid* 579.

²¹⁵ *Dombo Beheer B.V. v The Netherlands* (1994) 18 EHRR 213 app.no.14448/88.

²¹⁶ *Saunders v United Kingdom* (1994) 18 EHRR CD23 app.no.19187/91; *Heaney & McGuinness v Ireland* (2001) 33 EHRR 12 app.no.34720/97.

²¹⁷ *Funke v France* (1993) 16 EHRR 297 app.no.10828/84. See also *Heaney & McGuinness v Ireland*.

offences under TACT, section 47, is comparable. The ECtHR distinguishes between material which has an 'existence independent of the will of the applicant', such as bodily samples and documents, and that which is co-existent with the will of the applicant.²¹⁸ This suggests that the procurement of documents or similar materials during a section 44 search would not raise issues relating to Article 6 in a subsequent trial, however, as discussed above at Chapter 5.1, intelligence appears to be gathered from 'conversations' with the persons stopped and this is liable to be covered by Article 6. A complicating factor is that section 44 does not compel persons to provide any information and it is likely to be argued that such information was provided voluntarily. As a counter-argument, the various criticisms regarding the (non)-voluntary nature of 'voluntary searches', as discussed in Chapter 3.2, could be raised. The absence of legal advice would also strengthen the case of the person stopped,²¹⁹ but as there is no analogous case-law it is unclear whether it would succeed.

5.5.3) Article 8

The right to privacy was the only specific right cited in the fieldwork as being engaged by section 44, though one of the two references was to the fact that the person stopped did not need to give their personal details to the officer – a situation which the ECtHR has held is not covered by Article 8.²²⁰ It is settled law that actions taking place in public may still be afforded the protection of the article²²¹ and that private life includes 'a person's physical and psychological integrity'²²² and 'social identity'.²²³ In *Gillan (HL)* the defendants conceded that Article 8(1) was engaged only in the case where an address book, diary, correspondence or similar was perused.²²⁴ Lord Bingham concurred, stating that 'an ordinary superficial search of the person and an opening of bags...can scarcely be said to reach the level of seriousness to engage the operation of the Convention'.²²⁵ Lord Bingham's dismissal of contention that Article 8 is engaged by the routine exercise of Article 8 is perhaps indicative of the wider reluctance in the British courts to acknowledge the impact of Article 8.²²⁶ He argued that a search under section 44 was 'of the kind to which passengers uncomplainingly

²¹⁸ *Heaney & McGuinness v Ireland* [40].

²¹⁹ *Salduz v Turkey* (2008) 49 EHRR 421 app.no.36391/02.

²²⁰ MPSFL01. *Reyntjens v Belgium* decision of 9th September 1992 app.no.16810/90, 136.

²²¹ *Peck v United Kingdom* [57].

²²² *Von Hannover v Germany* (2005) 40 EHRR 1 app.no.59230/00 [50].

²²³ *R (Marper) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39 [66].

²²⁴ *Gillan (HL)*.

²²⁵ *ibid* [28].

²²⁶ See, e.g. *R (Marper) v Chief Constable of the South Yorkshire Police*; c.f. *R (Wood) v Commissioner of Police of the Metropolis*.

submit at airports'.²²⁷ A similar point was made by one of the officers.²²⁸ As noted by the ECtHR, this reasoning is flawed: section 44 is exercised on persons going about their daily business who have done nothing to warrant the attention of the police, still less a search of their person and bag.²²⁹ Borders and ports have always subjected persons to distinct, and more onerous, conditions of passage than occur while travelling within a country. It is true that this distinction has been broken down somewhat in recent years as all air travel, whether domestic or international, now imposes the same conditions of travel, in terms of searching persons or bags. Nonetheless there remains the important distinction that passengers choose to travel and may be viewed as having consented to the security checks as a condition of travel.

The ECtHR held in *Gillan* that Article 8 was engaged by a section 44 search, whether or not there was personal correspondence.²³⁰ This approach, by attacking the 'ordinary' use of section 44, clearly puts any 'extraordinary' searches, such as those involving personal correspondence beyond the pale as well. The ECtHR focused on the coercive nature of the search, while emphasising that the public nature of the search may 'compound the seriousness of the interference because of an element of humiliation and embarrassment'.²³¹ This accords with the reaction of some of the community participants, interviewed after they had been stopped under section 44, who stated that they were embarrassed at being stopped by the police so publicly.²³²

Given that Article 8 is ordinarily engaged, the encounter would be permissible only if it complies with Article 8(2): being in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or for the prevention of crime, or for the protection of the rights and freedoms of others.²³³ The starting point is whether the procedure is 'in accordance with the law'. Although the ECtHR did not do so, it is necessary to consider whether the exercise of section 44 could be deemed to be 'necessary in a democratic society'. This, which relates equally to Articles 10 and 11, is intrinsically tied to the principle of proportionality.²³⁴ The law as it presently stands is disproportionate because of the authorisation process, therefore the following discussion will proceed on the

²²⁷ *Gillan (HL)* [28].

²²⁸ MPSSNR03.

²²⁹ *Gillan (ECtHR)* [64].

²³⁰ *ibid* [63].

²³¹ *ibid* [63].

²³² COMMS1, COMMS3.

²³³ The other exceptions in article 8(2) are inapplicable here.

²³⁴ *Gillan (HL)* [29].

basis that the 'trigger' to section 44 is 'necessary' and that this suffices to ensure the power is in accordance with the law. In *Gillan (HL)* Lord Bingham argued, in the context of Article 8, that if section 44 were exercised in accordance with the law 'it would...be impossible to regard a proper exercise of the power...as other than proportionate when seeking to counter the great danger of terrorism', thus, Article 8(2) would be engaged.²³⁵ This terse appraisal of the requirement of 'necessary in a democratic society', which skips several key steps, seems to turn on playing a trump at the end: the objective is counter-terrorism; ipso facto, it must be necessary and proportionate. Terrorism is no such trump. While the ECtHR have recognised that the investigation of terrorist offences present authorities with special problems,²³⁶ they have emphasised that this does not present authorities with a *carte blanche*.²³⁷

If one takes the legislative object broadly as the prevention of terrorism this will be sufficiently important to warrant limiting fundamental rights,²³⁸ as required under the proportionality principle.²³⁹ The next question is whether the procedure is rationally linked to that object and is the least restrictive alternative.²⁴⁰ Lord Carlile's statement that '[t]here is little or no evidence that the use of *section 44* has the potential to prevent an act of terrorism as compared with other statutory powers'²⁴¹ and that 'its utility has been questioned by senior Metropolitan Police staff with wide experience of terrorism policing' at the very least raises doubts as to whether there is a rational link between section 44 and the prevention of acts of terrorism.²⁴² In contrast to these pronouncements the front line officers interviewed maintained that section 44 was necessary and that the power should remain,²⁴³ and Lord Carlile maintained the need to retain the power until his report in 2010.²⁴⁴ Proving

²³⁵ *ibid* [29].

²³⁶ *Aksoy v Turkey* [78]; *Brogan v United Kingdom* [57].

²³⁷ E.g. *Aksoy v Turkey* [78].

²³⁸ *Brogan v United Kingdom*.

²³⁹ *R v DPP (Ex.p. Kebeline)* [1999] 3 WLR 175, 80.

²⁴⁰ *Campbell v United Kingdom*.

²⁴¹ Lord Carlile, 'Report on the operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006' [130] (emphasis in original) and Lord Carlile, 'Report on the operation in 2006 of the Terrorism Act 2000'[11]. He also commented that 'other powers are on the whole perfectly adequate for most purposes' (Lord Carlile, 'Report on the operation in 2005 of the Terrorism Act 2000' [96].

²⁴² Lord Carlile, 'Report on the operation in 2006 of the Terrorism Act 2000' [114].

²⁴³ MPSSNR03; MPSSNR04; MPSFL02; MPSFL01; MPSFL04.

²⁴⁴ Lord Carlile, 'Report on the operation in 2009 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006' [54]. C.f., for instance, Lord Carlile, 'Report on the operation in 2008 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006' [150].

the necessity of preventative measures such as section 44 is extremely difficult, given that its 'success' rests on an event not happening. If deemed necessary, the procedure must also have sufficient safeguards to ensure no arbitrary treatment.²⁴⁵ The key issue therefore is whether, even with amendments to the 'trigger', the deployment of section 44 is sufficiently circumscribed to prevent arbitrary treatment. The ECtHR stated of the exercise of section 44 that 'there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer', focusing its criticism on the absence of any curb on the officer's discretion as to who to stop.²⁴⁶ This is remarkably similar to *King* where, in relation to 'sus', Hency, J stated that 'in its arbitrariness and its unjustifiable discrimination...[it] fails to hold...all citizens to be equal before the law'.²⁴⁷

While raising the 'trigger' would circumscribe, to some degree at least, the areas where section 44 was authorised, it would not affect the open-ended nature of the officer's discretion on the street. Code A, as noted by the ECtHR, regulates the officer's actions when she is conducting the search and does not affect her discretion in choosing who to search. Interestingly, this open-ended aspect of section 44 made several of the officers interviewed uncomfortable, as it went against their training and the 'normal' use of stop and search powers.²⁴⁸ The NPIA's Practice Guidance instructs officers to 'always use objective criteria to select people for search', the suggested criteria being: the individual himself or herself; the location the person is in; a combination of the two.²⁴⁹ It goes on to suggest that when using section 44 as part of a pre-planned policing operation then, although the various tactics that could be deployed are too numerous to comprehensively list, consideration should be given to stopping and searching everybody entering or leaving a given location, or those doing so using a specific route or some of those entering or leaving the location.²⁵⁰ Even taken together these suggested criteria or tactics provide virtually no meaningful guidance to an officer. The focus on location, while perhaps natural given the geographical nature of an authorisation, is made redundant by that very fact – of course location is relevant as it is only in the specified location that the deployment of section 44 is legal, but how does that become an objective criterion which assists front-line officers in exercising the power? The reference to the 'individual' is followed by a clear injunction not to use a person's ethnicity, perceived religion or 'other personal criteria' as the sole basis for

²⁴⁵ *Klass v Germany*.

²⁴⁶ *Gillan (ECtHR)* [85].

²⁴⁷ *King v AG & DPP [1981]* 255.

²⁴⁸ BTPFL10.

²⁴⁹ NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' 14.

²⁵⁰ *ibid* 15.

exercising the power and that profiling on the basis of age, gender, sexuality or disability may amount to illegal discrimination.²⁵¹ Given this, it is difficult to understand what the 'objective criteria' of 'the individual themselves' refer to. The only conceivable criteria would be suspicious behaviour falling below the threshold of reasonable suspicion. Evidently, a person could be stopped on the basis of personal criteria if appropriate intelligence suggested they were or had been involved in the commission or preparation of acts of terrorism, however, in that case section 43 would be the appropriate power to use. Without adding the requirement of reasonable suspicion it is difficult to conceive how the criteria could be circumscribed, yet if this was included then section 44 would become redundant, being a mere repetition of section 43, presuming that section 43 was widened to include the stopping and searching of cars.²⁵²

Another option would be to refine the object of the search to something more precise than articles of a kind which could be used in connection with terrorism. It would be possible to provide a list of objects, such as explosives or items relating to explosives, including manuals, publications etc. The difficulty with such a list is that to make it sufficiently inclusive to cover all objects the police might want to search for would end with the list being as broad as the present objective of section 44. It may be that the ECtHR would accept the broad discretion afforded to the officer in selecting who to stop if the authorisation process was considerably more circumscribed, for example, by raising the 'trigger' threshold and introducing judicial oversight, particularly given the wide margin of appreciation afforded to states when matters of national security are invoked as a justification for restricting the rights under Article 8.²⁵³

5.5.4) Articles 10 and 11

Compliance with Articles 10 and 11 depends firstly on whether the procedure is 'necessary in a democratic society'. As has been discussed above and in Chapter 4, at the very least without amendment to the 'trigger', this requirement will not be satisfied. It is nevertheless still necessary to consider the treatment of the issue by the House of Lords and whether the power would infringe Articles 10 and 11 if the power was amended and the 'trigger' raised.

²⁵¹ Practice Advice 14.

²⁵² As advocated by the coalition government: the Protection of Freedoms Bill 2010-2011, section 59.

²⁵³ *Leander v Sweden* (1987) 9 EHRR 433 app.no.9248/81 [67].

Lord Bingham stated that if the power was exercised in compliance with the provisions of the statute and Code A, and not to 'silence a heckler at a political meeting',²⁵⁴ it would be hard to conceive of examples where it would violate Articles 10 or 11, but if it did it would be justified under Articles 10(2) and 11(2), which carry the same exceptions as 8(2). There can surely be no automatic justification as suggested. A violation of Articles 10 or 11, unlike a violation of Article 8, is not a consequence of the intrinsic process of the power. Whether or not the interference is justifiable must be dealt with on a case by case basis with regard to the particular facts, although their Lordships' treatment of the claimants' assertion that section 44 was exercised against them because they were protesting, and in the case of Gillan reporting on the protests, is not grounds for optimism that this will be done: the claims were summarily dismissed in nine and a half lines.²⁵⁵

Much of the criticism of section 44 surrounds precisely these Article 10 and 11 situations, with Liberty criticising the use of section 44 at anti-war, anti-weapons and anti-capitalist protests.²⁵⁶ The 'Level 2' areas for the use of section 44 could clearly incorporate protests and, in any case, most protests are likely to pass through 'Level 1' areas. Similarly, protests against the war in Iraq and MOD policy have congregated in areas where section 44 was authorised.²⁵⁷ One senior officer said: 'if you have a protest and people are protesting and they're ... [committing] offences, arrest them for those offences or use other stop and search powers, don't use [section] 44 as a fishing trip...I wouldn't look on it as an object to search people who are protesting, to me it's a preventative power...I don't think [section] 44 should be used as a blunt instrument like that'.²⁵⁸ However, he noted that there might be legitimate reasons to use both sections 44 and 43 at protests, particularly 43.²⁵⁹ If a non-authorised stop and search power can be used it should be used; of the authorised powers CJPO, section 60 would generally be more appropriate in such situations than section 44, which is not to say that it should be relied on in all or even in most protest situations. It is at present very difficult to assess whether the 'heavy' users of section 44, such as the MPS, use it inappropriately in protest situations because it is unlikely to cause a spike in their numbers, although this may be evident in areas with typically low use of section 44 such as Gloucestershire, which went from 22 section 44 stops in 2001/02 to 511 in 2002/03 to

²⁵⁴ This is a reference to its use against Mr. Wolfgang at the Labour Party Conference in 2005.

²⁵⁵ *Gillan (HL)* [30] (per Lord Bingham).

²⁵⁶ Liberty, 'Casualty of War: 8 weeks of counter-terrorism in Rural England' (Liberty, London 2003).

²⁵⁷ *ibid*; COMMB.

²⁵⁸ MPSSNR01.

²⁵⁹ MPSSNR01.

1,1013 in 2003/04 before falling to 0 in 2004/05.²⁶⁰ This strongly suggests that the rise was at least in part attributable to the protests around RAF Fairford.

Freedom of speech is accorded a special position in the ECHR as 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment'.²⁶¹ Where, as in *Gillan*, the expression of free speech does not encourage violence or constitute hate speech,²⁶² or invoke the protection of morals²⁶³ then it is unlikely that a wide margin of appreciation will be accorded by the ECtHR to the State: '[t]here is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest'.²⁶⁴ Indeed, the use of the margin concept at all in relation to Article 10 has been strongly criticised.²⁶⁵ In addition, the chilling effect doctrine comes into play.²⁶⁶ Presuming section 44 to be authorised by law, then given the national security dimension the interference is likely to be accepted as pursuing a legitimate aim. However, if the police use section 44 to target protesters qua protesters without more – particularly if the protesters could prove that they did not pose any terrorist security risk – it would be an inappropriate use of the power: it would not be rationally linked to the objective of counter-terrorism, it would not be the least restrictive alternative and would therefore not be necessary in a democratic society.

An additional factor in *Gillan*, given the fact that Quinton was an accredited journalist, is the great importance the ECtHR attaches to the press.²⁶⁷ Campaign groups, even if small and

²⁶⁰ Home Office, 'Statistics on Race and the Criminal Justice System - 2005'; Home Office, 'Statistics on Race and the Criminal Justice System - 2004'; Home Office, 'Statistics on Race and the Criminal Justice System - 2003'.

²⁶¹ *Handyside v United Kingdom* [49].

²⁶² Which would be grounds for restricting freedom of speech: *Dicle v Turkey* Judgement of 10 November 2004 app.no.34685/97.

²⁶³ For the consideration of the protection of morals in an Article 10 case see *Handyside v United Kingdom*.

²⁶⁴ *Stankov v Bulgaria* (1998) 26 EHRR CD 103 app.no. 29221/95 and 29225/95 [88], approving *Wingrove v United Kingdom* (1996) 24 EHRR 1 app.no.17419/90. van Dijk and Arai *Theory and practice of the European Convention on Human Rights* Chapter 14, especially 14.2-14.4.6.

²⁶⁵ Lester 'Universality versus subsidiarity: a reply'; Feingold, C, 'The doctrine of margin of appreciation and the European Convention on Human Rights' (1977) 53 Notre Dame LR 90.

²⁶⁶ *Steel v United Kingdom* [99-101].

²⁶⁷ van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 797; *Lingens v Austria* (1986) 8 EHRR 407 app.no.9815/82; *Jersild v Denmark* (1995) 19 EHRR 1 app.no.15890/8; *Castells v Spain* (1992) 14 EHRR 445 app.no.11798/85.

informal, such as the Gloucestershire Weapons Inspectors,²⁶⁸ may claim analogous protection as that afforded to journalists.²⁶⁹ In a similar vein it strongly guards the right to criticise public figures, particularly politicians,²⁷⁰ although there is no requirement generally of public interest in relation to the freedom of expression.²⁷¹ In *Gillan (ECtHR)* the ECtHR deemed it unnecessary to consider the issue of a violation of Article 10 given its ruling in relation to Article 8, however, it is likely that if the matter came before it again it would emphasise that section 44 cannot be used as blanket power in protest situations where it exerts a chilling effect on the freedom of speech.²⁷²

In relation to Article 11, the approach of the ECtHR is very similar to that with Article 10 but it is not identical,²⁷³ although Article 11 must be considered in light of Article 10.²⁷⁴ There is a slim margin of appreciation in relation to the freedom of assembly,²⁷⁵ although it is broader if incitement to violence is proven.²⁷⁶ In addition, targeted bans are less likely to fall foul of Article 11 than general bans.²⁷⁷ The ECtHR's function is to 'review' the decision of the domestic courts, not to rehear the case as it relates to the Convention,²⁷⁸ although later cases highlight inconsistency in this area as to the degree of review required.²⁷⁹ It is clear, however, that in cases where the State alleges that there was a threat of violence (only the right to *peaceful* assembly is protected), then the ECtHR itself considers the evidence for

²⁶⁸ *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary*; Gask, A, 'Section 44 of the Terrorism Act 2000 and the right to protest' (Liberty, London 2003).

²⁶⁹ *Steel v United Kingdom*; van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 799.

²⁷⁰ *Lingens v Austria*; *Castells v Spain*.

²⁷¹ *Jacobowski v Germany* (1995) 19 EHRR 64 app.no.15088/99; *Nafria v Spain* (2003) 36 EHRR 36 app.no.46833/99.

²⁷² *Gillan (ECtHR)*.

²⁷³ van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 819-20.

²⁷⁴ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121 app.no.19392/92(1981); *Refah Partisi (Welfare Party) v Turkey* (2001) 37 EHRR 1 app.no.41340/98.

²⁷⁵ van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 818.

²⁷⁶ *Stankov v Bulgaria* [90].

²⁷⁷ *ibid* [109].

²⁷⁸ *Handyside v United Kingdom*, c.f. dissenting opinions.

²⁷⁹ *The Sunday Times v United Kingdom*, which referred to the 'sufficient reasons' criteria more usually associated with Article 5(3), c.f. *Markt Intern and Beermann v Germany* (1990) 12 EHRR 161 app.no.10572/83, which made no reference to those criteria, focusing rather on the traditional proportionality test.

that claim and does not defer to the State.²⁸⁰ That the views espoused in the protest are offensive, shocking or disturbing provide no grounds to limit it.²⁸¹

The ECtHR in *Gillan (ECtHR)* did not rule on Article 11 in light of its finding of a violation of Article 8. Following the arguments in relation to Article 10 it again seems possible, even likely, that the use of section 44 against non-violent protesters who do not pose any particular terrorist risk would be viewed as an unjustifiable violation of Article 11. However, it is worth sounding a note of caution. The quantitative study of Article 11 cases before the ECtHR by David Mead provides a detailed insight into the operation of the ECtHR in relation to the right to protest and suggests that the chances of succeeding in such a claim are low.²⁸² Mead found that in only one quarter of all such cases is a violation found.²⁸³ Cases relating to more disruptive and obstructive forms of protest, such as direct action or marches, were least likely to succeed, followed by those where it was deemed necessary or proportionate to interfere so as to prevent disorder.²⁸⁴

5.5.5) Article 14

The final Convention right which may be invoked is Article 14. As discussed in Chapter 3, the issue of the discriminatory application of stop and search powers is perennial and has been flagged in relation to section 44.²⁸⁵ It has already been noted that all officers disavowed the use of racial profiling. Article 14 does not provide a stand-alone right to non-discrimination but is more properly viewed as an accessory to the other rights in so far as a claim may only be made under Article 14 if another Convention right is invoked, although a breach does not need to be proven for it to come into play.²⁸⁶ The ECtHR, however, has been quite lenient in its application of this principle.²⁸⁷ Discrimination can arise either from differential treatment in analogous situations or from similar treatment in different situations.²⁸⁸ The ECtHR's approach is to ascertain whether there is (a) differential

²⁸⁰ *Stankov v Bulgaria*.

²⁸¹ *ibid* [86].

²⁸² Mead, D, 'The right to peaceful protest under the European Convention on Human Rights - a content study of Strasbourg case law' (2007) 4 *EIIRLR* 345, 354-5.

²⁸³ *ibid* 354-5.

²⁸⁴ *ibid* 356-7.

²⁸⁵ Moeckli, D, *Human Rights and non-discrimination in the 'War on Terror'* (OUP, Oxford 2008).

²⁸⁶ Protocol 12 goes some way to giving providing an independent right of freedom from discrimination but it has not be ratified by the UK. *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 *EHRR* 471 app.nos.92148/80, 9473/81, 9474/81 [71].

²⁸⁷ See, e.g. *Thlimmenos v Greece* (2001) 31 *EHRR* 15 app.no.34369/97.

²⁸⁸ *Hoffmann v Austria* (1993) 17 *EHRR* 293 app.no. 12875/87; *Thlimmenos v Greece*.

treatment of equal cases, or similar treatment of distinct cases, (b) without an objective and reasonable objective, or if (c) the aims are disproportionate to the means,²⁸⁹ although in practice it only considers the comparability test if the claim has no merit, otherwise it is subsumed within the assessment of the justifications.²⁹⁰ Given that strong arguments can be presented relating to Articles 5, 6, 8, 10 and 11, (albeit with the likely acceptance of a justifiable interference with Article 6), Article 14 could also be invoked.

The margin of appreciation is applicable in Article 14 cases.²⁹¹ While, as with all areas of the doctrine of the margin of appreciation, it is difficult to define precise lines of demarcation, in areas where there is common ground among Member States, in existing law or policy, there appears to be a narrower margin afforded to States.²⁹² Such common ground is evident in relation to non-discrimination on grounds of race, ethnicity or religion, with all members of the ECHR being signatories to the International Convention on the Elimination of All Forms of Racial Discrimination, in addition to the prohibition on such discrimination in the Treaty of Rome Article 13.²⁹³ Most Member States are also signatories to the Framework Convention for the Protection of National Minorities. Certain grounds of discrimination, including, in all likelihood, race, require close scrutiny and a significant narrowing of the margin doctrine, if indeed it applies at all.²⁹⁴

Although it was not applicable in *Gillan*, the potential for the discriminatory use of section 44 was mentioned by their counsel and was addressed by their Lordships, albeit *obiter dicta*. Article 14 was tested in the *Roma Rights* case,²⁹⁵ which held that the motive for discrimination is irrelevant and that individuals 'should not be assumed to hold characteristics which the [exerciser of the power] associates with the group, whether or not most members of the group do indeed have such characteristics',²⁹⁶ even though this may not seem to accord with 'common sense'.²⁹⁷ In *Gillan (HL)* Lord Hope concurred with these

²⁸⁹ *Poirrez v France* (2005) 40 EHRR 2 app.no.40892/98.

²⁹⁰ van Dijk and Arai *Theory and practice of the European Convention on Human Rights* 1039.

²⁹¹ Belgian Linguistic Case.

²⁹² Schokkenbroek, J, 'The prohibition of discrimination in Article 14 of the Convention and the margin of appreciation' (1998) 19 Human Rights LJ 20, 21-3.

²⁹³ See also: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

²⁹⁴ *Ibid.*

²⁹⁵ *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport*. See also *Williams v Spain* (CCPR/C/96/D/1493/2006).

²⁹⁶ *ibid* [36] (Lord Steyn) and [74] (Baroness Hale).

²⁹⁷ *ibid* [37] (Lord Steyn).

principles, noting that '[d]iscrimination on racial grounds is unlawful whether or not, in any given case, the assumptions on which it was based turn out to be justified'.²⁹⁸ He proceeded to argue that while being of Asian appearance might initially attract the officer's attention 'a further selection process will have to be undertaken...before the power is exercised', this further process constituting the difference between inherent discrimination and non-discrimination.²⁹⁹

Lords Brown and Scott concluded that the disproportionate targeting of individuals of Asian appearance would not be discriminatory. Lord Scott based this on sections 41(1)(a) and 42 of the Race Relations Act 1976, as amended, which state that no act done in pursuance of a statutory authority or for the purpose of national security will be rendered unlawful by Parts II to IV of the Act. This does not, however, address the human rights issue but rather the question of liability under the 1976 Act. Under the HRA 1998 it is unlawful for a public authority, including the police and courts, to act in a manner that is incompatible with the ECHR. The HRA, section 6(2) is not applicable as nothing in TACT demands the disproportionate targeting of a particular group using section 44. Lord Brown argued that '[e]thnic origin...can and properly should be taken into account when deciding whether and whom to stop and search provided always that...the selection is made for reasons connected with the perceived terrorist threat and not on grounds of racial discrimination.'³⁰⁰ It is telling that Lord Brown admitted finding it 'most difficult' to reconcile this with the judgment in the *Roma* case, stating that the only basis he could discern was that in the *Roma* case the immigration officers failed to treat each applicant as an individual.³⁰¹ This approach is mirrored in PACE, Code A which, while cautioning officers to take particular care to ensure no discrimination occurs when stopping members of minority ethnic groups under section 44, states that it may be appropriate to take into account a person's ethnic origin in response to a specific terrorist threat.³⁰² If there is sufficient intelligence to suspect that particular persons are terrorists then ethnicity can validly be used, but in such cases section 43 should be used. Stopping, for example, all Algerians because there is a threat from Groupe Islamique Armée, is not compatible with the *Roma* case, Article 14, the Race Relations Act 1976,³⁰³ or PACE, Code A³⁰⁴ and would be discriminatory.³⁰⁵ Somewhat

²⁹⁸ *Gillan (HL)* [44].

²⁹⁹ *ibid* [46].

³⁰⁰ *ibid* [81].

³⁰¹ *ibid* [80, 90].

³⁰² Paragraph 2.25.

³⁰³ As amended by the Race Relations (Amendment) Act 2000.

³⁰⁴ *Cadwell* [1.1].

confusingly Lord Brown, notwithstanding his earlier comments, concurred that additional factors are required.³⁰⁶

Proceeding on the presumption of an associated claim under Articles 5, 6, 8, 10, 11 and 14, the facts of the case would obviously need to be different from *Gillan*. Let us therefore take the facts as follows: a Muslim man on his way to peaceful protest against the latest Anti-Terrorism Bill is stopped and searched which, according to his evidence, deters him from attending the protest. Once discrimination is proved, or proven as arguable,³⁰⁷ it is for the Government to prove its justification.³⁰⁸ Statistics may constitute part of the evidence submitted to prove discrimination.³⁰⁹ On the imaginary facts it seems likely that the burden would be shifted onto the Government to disprove or justify the alleged discrimination. In particular the introduction of the statistics regarding section 44 seem to give an arguable case. As underlined in the *Roma* case,³¹⁰ no difference in treatment based 'exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified'. Thus any attempt to argue that Muslims are disproportionately involved in Islamist terrorism will be no justification.³¹¹ If a discretion capable of interfering with a Convention right is conferred on a national authority then the regulations governing the exercise of that discretion will be material.³¹² As argued above, the discretion inherent in the exercise of section 44 is not sufficiently well regulated, although this arises partially from the intrinsic nature of street policing. The most plausible way to defeat this claim would be if the Government could prove that, as required by the PACE Codes, race was not the only or decisive factor in choosing who to stop and search. It is arguable that a violation of Article 14 would be upheld. Certainly it will be difficult for the Government to discharge its reversed burden of proof.

5.6) Assessment

This section, as in previous Chapters, pulls together the various strands of argumentation, concluding whether the deployment of section 44 is, or is capable of, adhering to the

³⁰⁵ Moeckli, D, 'Stop and search under the Terrorism Act 2000: a comment on R(Gillan) v Commissioner of Police for the Metropolis' (2007) 70 MLR 654, 664.

³⁰⁶ *Gillan (HL)* [91].

³⁰⁷ *Nachova v Bulgaria* (2006) 42 EHRR 43 app.no.43577/98.

³⁰⁸ *Chassagnou & Others v France* (2000) 29 EHRR 615 app.nos.25088/94, 28331/95, 28443/95 [91-2].

³⁰⁹ *Hoogendijk v Netherlands* (2005) 40 EHRR SE22 app.no.58641/00; *DH v Czech Republic* (2008) 47 EHRR 3 app.no.57325/00.

³¹⁰ *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport*.

³¹¹ *Timishev v Russia* (2007) 44 EHRR 37 app.no.18465/05 [58].

³¹² *DH v Czech Republic* [206].

framework principles set out in Chapter 1 of accountability, human rights and efficiency and effectiveness in implementing the relevant sections of CONTEST.

The fact that location is a key factor for the exercise of section 44 could provide a means of additional accountability if statistics were published identifying how many authorisations were granted in each force justified primarily by the location, whether due to innate importance or vulnerability. These are comparable with relative ease across the country. Similarly, a way of controlling the misuse of section 44 at protests and similar events would be to require that the number of section 44s carried out at such events be published in annual reports, adopting the definition of 'public assembly' in the Public Order Act 1986, section 11(1). The broad nature of the category would not permit 'pattern spotting' by would-be terrorists while the increased transparency would allow closer monitoring of the use of section 44. It was suggested in Chapter 4.5 that data on authorisations of all UK forces be published annually. This data should be broken down further into broad types based on the major factors for exercising section 44. The categories might include: high risk site/CNI; night-time economy; intelligence operation; public assembly; and sporting fixtures. An authorisation might cover more than one category. The authorisation pro-forma should be expanded to include a section with the list of categories, and the relevant ones should be ticked. None of this information reveals sensitive data but it would make it easier to hold police forces to account. For example, if it transpired that a force carried out 90% of its section 44 stops at 'public assemblies', then this would suggest an abuse of the power and the infringement of Articles 10 and 11 and should prompt a review by the relevant PA and/or the IPCC.

In order to control better the use of the power, PACE Code A should be amended to set out minimum standards regarding what information should be inputted on the stop form in a section 44 stop. This should include, in addition to present requirements, the location, operation name (if relevant), details of suspicious activity (if relevant) (for example, BASS or a police dog, trained to detect explosives, giving a weak indication towards a person) and the age and gender of the person stopped. To improve the quality of data on the stop forms and to ensure better collation of that data PDA's should be introduced across all forces in place of paper stop forms. However, an effort must be made to ensure that any curtailed details, formerly included on the paper form, are available to all persons. This could be addressed by providing the person with a stop leaflet, which contains the same information. The stop leaflets are a useful innovation but should be printed in a variety of languages. If a system of receipts is introduced, then means should be provided for persons who do not have access to either the internet or a printer to print the stop form at a local police station or library. Stop databases should be updated to permit the linking of intelligence reports to stop forms and of stop forms to other stop forms. The Home Secretary announced in a

speech to the Police Federation in 2010 that she would abolish all stop forms, although there is to date no legislation advancing this proposal. This should be strongly opposed. Although they are a highly imperfect form of accountability over stop and search, they are one of the only forms of accountability governing the encounter between the officer and person stopped. The reason why stop forms were adopted was discussed in Chapter 3.2.3. These reasons remain and, at least until a more effective form of accountability is devised, so should the stop forms.

To ensure that any conversation between the officer and person is on the basis of consent, PACE Code A should be amended to instruct officers to inform persons at the outset that they do not need to respond to any question posed to them and that declining all questions does not of itself provide any suspicion, for example, to instigate a section 43 search. Such information may not affect people's response: the community sample, interviewed after they were stopped, revealed that all persons, even those relatively disgruntled about being stopped, provided their details to the officer even though they were told that they did not need to do so.³¹³ Officers should be cautioned to adhere to the requirements of the Data Protection Act 1998 (DPA), in particular that the data collected is proportionate to the purpose of collection.³¹⁴ Clear, publicly assessable procedures on the use of CCTV and the use of data from CCTV should be available on all police websites.

In terms of human rights, *Gillan (ECtHR)* has made clear that the present usage of section 44 is in violation of Article 8. Though the ECtHR declined to rule on possible violations of Articles 5, 10 or 11, its comments on Article 5 suggest it is potentially applicable, and the case-law suggests that, depending on the facts, a strong case may be made for a violation of all of these Articles, in addition to Article 14. There is also a possibility that Article 6 would be violated if evidence procured during the search was used in a subsequent criminal case. The issue is whether, if the authorisation was amended so that it was in accordance with the law, could the deployment be carried out in a Convention compliant manner? It seems likely in such circumstances, although Article 5 is engaged, it would be a justifiable interference under Article 5(2). The potential engagement of Article 6 is relatively narrow as it relates to evidence which does not have an independent existence from the will of the accused in a criminal trial. If PACE, Code A was amended, as suggested above, so that officers had to inform the person at the outset that they did not need to provide any information whatsoever then this would seem to head off any potential interference with the right to silence, notwithstanding the coercive nature of the power. It appears doubtful,

³¹³ COMMS1, COMMS3, COMMS4, COMMS5.

³¹⁴ DPA, schedule 1, paragraph 3. Emphasised in *S v United Kingdom* (2009) 48 EHRR 50 app.nos.30562/04, 30566/04 [107]. However, c.f. DPA, section 28(1)(a), which exempts any data from the provisions of the data protection principles if required for national security.

however, that raising the ‘trigger’ without more would satisfy Article 8, given the coercive nature of the stop and the extremely broad nature of the object of the search. It may be sufficient if additional forms of accountability over the authorisation process were instigated, such as judicial oversight and increased transparency through the publication of statistics on the granting and modification of authorisations.

If it is necessary to amend the object of the search, it is difficult to imagine how that could be done without bringing section 44 so close to section 43 as to make it redundant. The breadth of the object of the search, and the difficulties arising from it, are natural consequences of the fact that the power enables police to act pre-emptively. Because the police are acting in advance of any evidence that a specific person has been involved in an offence or an inchoate offence, they are forced to focus on the subject of the risk – the location or something in it – rather than on the object of the risk. ‘All-risks’ policing powers necessitate vagueness in the statutes governing the powers.³¹⁵ Therefore, not only is it practically exceptionally difficult to conceive of ways of limiting the officer’s discretion in relation to section 44, except in terms of giving an account afterwards, to do so would undercut the purpose of the power as an ‘all-risks’ policing tool.

The use of section 44 at protests and similar situations where it is likely to impinge on Article 10 and 11 was not a key factor cited by the officers but has been flagged by other groups. While such use of section 44 may be for counter-terrorist ends, it will ordinarily be inappropriate. Certainly the routine use of section 44 in such circumstances would be. The use of terrorism powers for non-terrorism related purposes can be highly damaging to community / police relations and consequently for PREVENT. A simple and effective way of curbing such misuse of section 44 would be to instigate better monitoring of the deployment of the power by requiring officers to write ‘protest’ on the stop forms, or by adding another box to the forms. Such an approach would provide a degree of transparency and the resulting evidence of usage would indicate whether further action, such as a section in the NPIA ‘Practice Advice’, is required or not. For example, if a force carried out 90% of its section 44 stops at ‘public assemblies’, this would suggest an abuse of the power, and the infringement of Articles 10 and 11, which should prompt a review by the relevant PA and/or the IPCC and/or the Independent Reviewer. If section 44 is deployed according to its stated ends it should not infringe Article 10 or 11.

The final pertinent right is Article 14. Clearly there is substantial potential for the discriminatory use of section 44, as evidenced by the statistics on its use to date. Whether

³¹⁵ See also the discussion in Chapter 3.1.2 for the similarities with ‘sus’.

this potential has moved to actuality and what can be done to limit the potential for section 44 to be discriminatorily applied are discussed in the next Chapter.

5.7) Conclusion

This Chapter addressed the questions of how section 44 was used and how it ought to be used. The recent developments in the use of section 44 within the BTP and MPS are advances on their previous usage, although time is needed to judge the effect of these changes in terms of the number of stops carried out. Section 44 is deployed primarily with the objective of deterrence and disruption, and, to a lesser degree, intelligence gathering. While arguably outside the spirit of the law, the former objectives are accommodated within the letter of the law as set out in section 44. Intelligence gathering walks a finer line and officers should be required under PACE Code A to explain to the person stopped that they are under no obligation to respond to any questions asked which do not pertain to objects found in the course of the search.

In terms of the encounter itself, the fact that officers cited respect, courtesy and a clear explanation of the powers as constituting a 'good stop' is encouraging and suggests that the conclusions from Stone and Pettigrew's research on stop and search are being taken into account.³¹⁶ The regulations relating to the encounter under PACE Code A are admirable, so far as they go, and if adhered to should bound somewhat the exercise of stop and search, although the major difficulty remains that there is simply no way of effectively ensuring their enforcement.

The criticism in *Gillan v UK* of the expansive nature of the object of the search is difficult to address without bringing section 44 so close to section 43 as to make it obsolete. However, increasing accountability around the deployment, in particular by increasing transparency over its use, coupled with changes in the authorisation process, may be enough to address the ECtHR's concerns. These changes would also assist in ensuring that section 44 is only used for its prescribed ends and not used in non-counter-terrorist situations.

³¹⁶ Stone and Pettigrew 'The views of the public on stops and searches', discussed in Chapter 3.

Chapter 6) The Impact of Section 44

6.1) Introduction

The two preceding chapters have detailed how and to what ends section 44 is authorised and used by the police, discussing whether these practices adhere to the normative framework of adherence to human rights, accountability and utility in terms of CONTEST. This chapter addresses the penultimate research question: how does section 44 impact upon the community? As discussed in Chapters 4 and 5, section 44 impacts upon individuals stopped and searched, affecting their rights to privacy, liberty and, potentially, the right to a fair trial. However, these are not the focus of this Chapter as they equally affect all persons stopped and have already been discussed in detail. Rather, this Chapter focuses upon when and how section 44 impacts upon ‘communities’ or groups. The impact of section 44 upon communities raises issues around disproportionality and goes to the core of the question of whether section 44 adheres to CONTEST.

As explained in Chapter 2, the community sample is less expansive than that of the police and stakeholders due to the limited time and resources available, difficulty in gaining access, and the fact that, if the impact on the community was the sole focus of this thesis, then little would be added to the existing literature.¹ The fieldwork therefore focused on a sample of ‘community representatives’. While not allowing definitive conclusions to be drawn regarding the impact of section 44 on all communities the interviews served to highlight areas of concern among some communities and groups. The qualitative findings are interwoven with doctrinal analysis from secondary sources and case-law, highlighting areas of concern without claiming to determine their extent. Consequent to this ‘broad-stroke’ approach and the need to set forth and critique the major debates in relation to areas such as discrimination and the criminal justice system, the first sections of this Chapter are more descriptive than Chapters 4 or 5. This is balanced by the later analysis when determining how the debates fit around the particular issues raised by section 44.

The first section below introduces the topic of discrimination in the criminal justice system, providing a brief overview of the historical experiences of ‘Black’ and minority ethnic (BME) communities before considering the statistical evidence for discrimination and the explanations for the evident disproportionality. The next section draws upon the fieldwork to assess the practice of section 44 in relation to the communities and groups represented in the interviews. The final section assesses the practice in light of the theoretical discussion in section 1, determining whether disproportionality is evident, how it can be explained and what changes could be made which would contribute towards reducing disproportionality.

¹ See Chapter 2.2.3.

6.1) Discrimination and the Criminal Justice System

This section deals with discrimination in the criminal justice system in broad terms, although focusing in particular on stop and search and counter-terrorism. The focus is upon 'Black and minority ethnic' (BME) communities as there has been sustained criticism – and statistical evidence – regarding their disproportionate targeting under stop and search powers. Although, as the final section below highlights, it is not only BME communities who are disproportionately targeted by section 44, much of the criticism regarding section 44's impact relates to Muslim communities, themselves a BME community. In addition, most of the literature on discrimination and the criminal justice system focuses on one or more BME communities, whether in broad terms or in relation to stop and search.² The literature on race and the criminal justice system, both academic and governmental, increased exponentially from the early 1970s, therefore that date will be taken as a convenient starting point, although this is not to suggest that no discrimination was evident in policing before that point. Chapter 3 has highlighted how this is clearly not true in relation to stop and search.³ As this section draws upon government statistics, and literature which draws upon government statistics, the same categories will be used, that is: 'Asian', 'Black', 'mixed', 'other' and 'white'.⁴

Discrimination in the criminal justice system occurs in two main ways: BME communities are over-policed by being disproportionately represented as actors in the criminal justice system, and they are under-policed, that is, while on the one hand they are more likely to be victims than the majority white population, they have consistently lower levels of trust in the efficiency, effectiveness and justice of the system, in addition to the perennial issues in relation to the policing of racist attacks, epitomised by the Steven Lawrence affair.⁵ From the early 1970s, the literature focused on the over-policing of the Afro-Caribbean

² See: Gelsthorpe, L, 'Minority Ethnic Groups in the Criminal Justice System: papers presented to 21st Cropwood Roundtable Conference 1992' (Cambridge, Institute of Criminology 1992); Benyon, J and Bourn, C, *The Police: Powers, Procedures and Proprieties* (Pergamon Press, Oxford 1986); Bowling and Phillips, *Racism, crime and justice*; Smith and Gray, *Police and people in London: the PSI Report*; Crawford, A and others, *The Second Islington Crime Survey* (Middlesex Polytechnic Centre for Criminology, Middlesex 1990); Rowe, M (ed), *Policing beyond Macpherson* (Willan, Cullompton 2007); Institute for Race Relations, *Policing against Black People* (IRR, London 1987).

³ One of the first Government report on police and BME relations dates to 1971: Select Committee on Race Relations and Immigration, *Police/immigrant relations*. See also: Select Committee on Race Relations and Immigration, *Report on the West Indian community*.

⁴ Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2007/08'.

⁵ Sir W Macpherson, 'The Macpherson Report'.

community, who were significantly over-represented in terms of the prison population, number of arrests and in relation to stops and searches.⁶

Given the particular issues in relation to section 44 and Muslim communities and the frequent conflation of 'Asian' and 'Muslim' in related critiques,⁷ it is worth noting that the 'Asian' experience of the criminal justice system deviates in several regards from that of the Afro-Caribbean and other 'Black' communities, although often the literature collapses the two into the categorisations of 'Black'⁸ or 'ethnic minority'.⁹ Stevens and Willis, using data from 1975, found that 'Asian' arrest rates were comparable to those of white people, while 'Black' people were substantially over-represented.¹⁰ In terms of stop and search, the PSI study revealed that 'Asians' were less likely to be stopped than white people, while 'West Indians' were twice as likely to be stopped than white people.¹¹ 'Asians' were, however, more likely to suffer attacks on their person and property than white people.¹² A 1981 Home Office Report found that 'Asians' were also the most likely ethnic group to be victims of racial attacks.¹³ 'Asians', in common with 'Black' people, have had consistently lower levels of satisfaction in the police and criminal justice system more broadly.¹⁴ Smith and Grey, in their study of policing in London, found that though the police 'occasionally...refer

⁶ Smith and Gray, *Police and people in London: the PSI Report*; Stevens and Willis 'Race, crime and arrests'; Bowling and Phillips, *Racism, crime and justice*; Reiner, R, 'Race, Crime and Justice: Models of Interpretation' in L Gelsthorpe (ed) *Minority Ethnic Groups in the Criminal Justice System: papers presented to 21st Cropwood Roundtable Conference 1992* (Cambridge, Institute of Criminology 1992).

⁷ See below, Chapter 6.2.3.1.

⁸ E.g. Reiner, 'Race, Crime and Justice', note 1; Benyon and Bourn, *The Police: Powers, Procedures and Proprieties*: 'A...survey of the British black population revealed that 30 per cent of Asians believed that they were treated worse than white people by the police' (30).

⁹ E.g. Bowling and Phillips, *Racism, crime and justice*.

¹⁰ Stevens and Willis 'Race, crime and arrests' Chapter 3.

¹¹ Smith and Gray, *Police and people in London: the PSI Report* 87.

¹² Modood, T, 'British Asian Muslims and the Rushdie Affair' in J Donald and A Rattansi (eds) *'Race', culture and difference* (Sage, London 1992) 261.

¹³ Home Office 'Racial attacks: Report of a Home Office study' (Home Office, London 1981). See also: Mayhew, P, Elliot, D and Dowds, L, 'The 1988 British Crime Survey' (Home Office (HORS 111), London 1989) Chapter 5; Mayhew, P, Aye Maung, N and Mirrlees-Black, C, 'The 1992 British Crime Survey' (Home Office (HORS 132), London 1993) 87-8.

¹⁴ Home Office, 'Racial attacks: Report of a Home Office study'; Mayhew, Elliot and Dowds 'The 1988 British Crime Survey' 13-8; Mayhew, Aye Maung and Mirrlees-Black 'The 1992 British Crime Survey' 33-5; Crawford and others, *The Second Islington Crime Survey*; Skogan 'Contacts between police and public: findings from the 1992 British Crime Survey' 21-5.

to Asians as 'Pakis', they had a 'limited abusive vocabulary to describe...Asians'.¹⁵ While they found lower levels of open hostility towards 'Asians' than 'Black' people, it was 'far more common...to say that Asians or 'Pakis' are devious, sly or unreliable, and in particular that they don't tell the truth'.¹⁶ In a similar vein, Jefferson argued that the racist connotations of 'Asianness' tended to paint 'Asians' as 'manipulative conformists' rather than criminals,¹⁷ in contrast with the perception of 'Black' people as 'disorderly; as having a predisposition to crime; as violent; and as a complaining, untrustworthy group'.¹⁸

Writing in 1992, Jefferson suggested that the majority Indian population among the broader 'Asian' category might be 'masking' the different experiences of Bangladeshi and Pakistani communities, both of whom had a younger and more deprived demographic profile from which, '[g]iven the correlation between age/deprivation and criminalization, one could anticipate a concomitant difference in these groups' involvement in processes of criminalization'.¹⁹ By the time of the 'Section 95' reports, changes are evident in these trends as 'Asians' became more likely to be arrested and stopped and searched than white people, although still less likely than 'Black' people.²⁰ Similarly, data from the 2006/07 British Crime Survey indicates that people from a white or 'mixed' ethnic background are slightly less satisfied with the police than those from an 'Asian', 'Black', 'Chinese' or 'other' background, with overall confidence in the system falling since 2001/02.²¹

6.1.1) Statistical evidence of discrimination

Chapter 3 detailed how, historically, stop and search powers impacted disproportionately upon ethnic minorities. Statistically stop and search powers continue to fall disproportionately upon BME communities (see Figures 3.2 and 3.3 above). In 2007/08,

¹⁵ Smith and Gray, *Police and people in London: the PSI Report* 391.

¹⁶ *ibid* 396.

¹⁷ Jefferson, T, 'The racism of criminalization: policing and the reproduction of the criminal other' in L Gelsthorpe (ed) *Minority Ethnic Groups in the Criminal Justice System: papers presented to 21st Cropwood Roundtable Conference 1992* (Cambridge, Institute of Criminology 1992) 37.

¹⁸ Holdaway, S, *The Racialisation of British Policing: Black or White?* (MacMillan, London 1996) 78.

¹⁹ Jefferson, 'The racism of criminalization: policing and the reproduction of the criminal other', note 14.

²⁰ Home Office, 'Statistics on Race and the Criminal Justice System: 1999'; Home Office, 'Statistics on Race and the Criminal Justice System: 1998'.

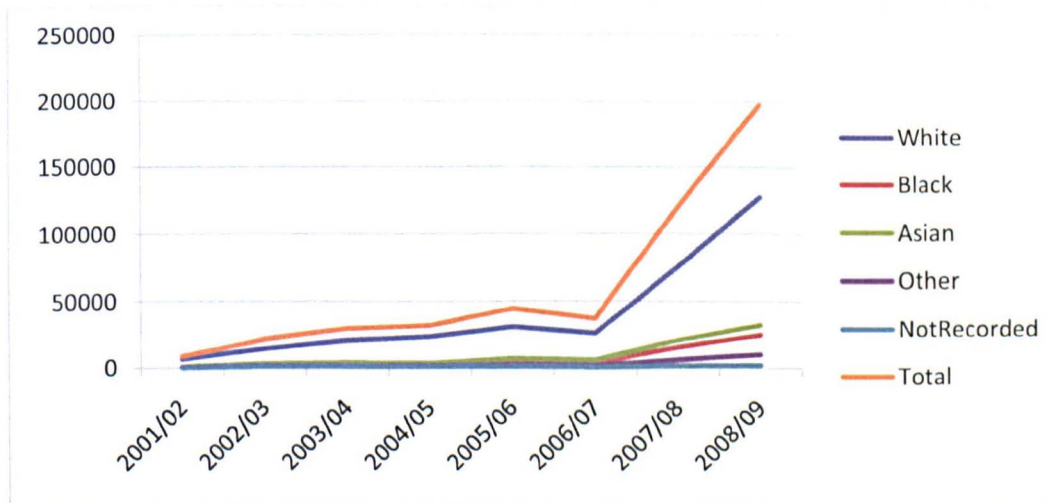
²¹ Jansson, K and others, 'Attitudes, perceptions and risks of crime: Supplementary Volume 1 to Crime in England and Wales 2006/07' (Home Office (Statistical Bulletin 19/07), London 2007) 8-9. See also: Nicholas, S and Walker, A, 'Crime in England and Wales 2002/03: supplementary Volume 2: Crime, disorder and the Criminal Justice System – public attitudes and perceptions' (Home Office (Statistical Bulletin 2/04), London 2004), Chapter 1.

under PACE, section 1 ‘Black’ people were 7.6 times more likely to be stopped than white people, while ‘Asians’ were 2.3 times more likely to be stopped than white people.²² As the number of stops in relation to the CJPO, section 60 or section 44 are not broken down per 1,000 of the population they are produced below in Table 6.1 followed by the percentages of each ethnicity according to the 2001 Census. There is evident disproportionality when the percentage of those stopped by ethnicity is compared to the proportion of that ethnicity within the total population. Figures 6.1 and 6.2 below show the number of stops under section 44, broken down by ethnicity, since 2001/02.

Table 6.1: Stop and search under section 60, CJPO and section 44, TACT 2007-08.²³

Power	White % (census%)	Black % (census %)	Asian % (census %)	Other % (census %)
Section 60, CJPO	67% (91.3%)	22% (2.2%)	7.7% (4.4%)	2.2% (2.1%)
Section 44, TACT	64% (91.3%)	13% (2.2%)	18% (4.4%)	5% (2.1%)

Figure 6.1: Stops under section 44, TACT 2001/02 – 2008/09²⁴

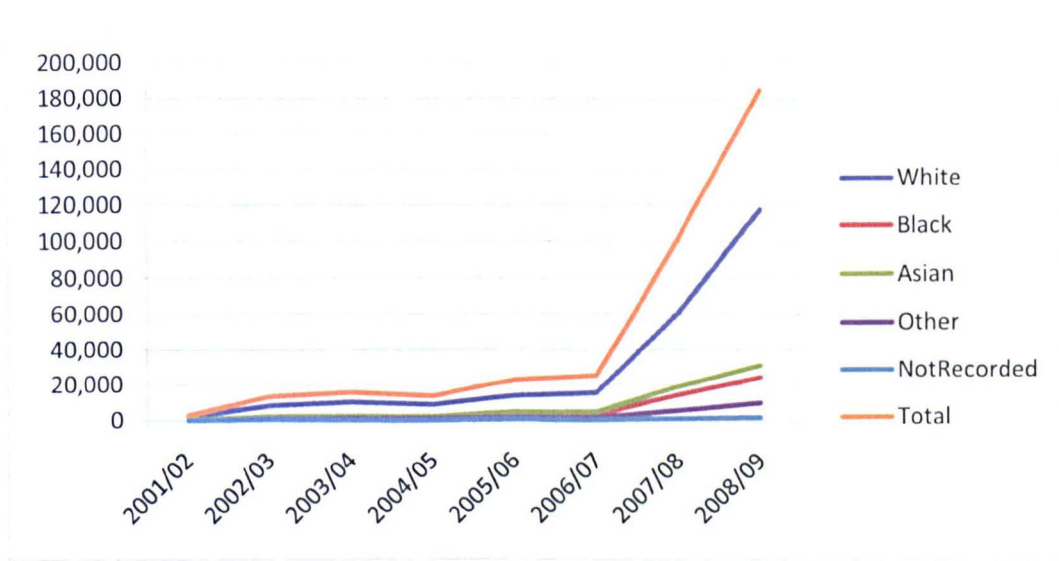


²² Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2007/08' 28.

²³ *ibid.*

²⁴ *Ibid.*

Figure 6.2: MPS stops under section 44, TACT 2001/02 – 2008/09.²⁵



Despite the seemingly obvious disproportionality, the limitations of using such statistics as definitive evidence of such must be considered. This discussion goes over ground covered in Chapter 3, but bears brief repetition given its importance. The first difficulty is the strong likelihood that stops are under-reported,²⁶ although the latest research on this dates to 2000 and improvements may be seen if PDAs are rolled out fully. The second problem is with the classification of 'white' / 'Black' / 'Asian' / 'mixed' and 'other'. The crude nature of these classifications prompts practitioners and academics to talk in terms of race, despite the general disavowal of the term. In addition, these classifications provide no additional information, regarding, for instance, the person's socio-economic background, which is often an explanatory factor as to why certain groups are targeted more by the police.²⁷ A side-point is that the 'Section 95' statistics, until 2008/09, provided only the police officer's perception of the person's ethnicity, which may differ from the person's ethnic self-classification. Another difficulty is the inaccuracy of the Census data, given that it is carried out only once a decade. The final, general, difficulty, is that these quantitative figures reveal nothing about the quality of the stop, which has been found to be central in determining whether or not the person stopped is 'satisfied' with the encounter.²⁸ Even if statistically

²⁵ Ibid.

²⁶ Quinton, Bland and Miller 'Police Stops, Decision-making and Practice'.

²⁷ Jefferson, 'The racism of criminalization: policing and the reproduction of the criminal other' note 14.

²⁸ Delsol and Shiner 'Regulating stop and search: a challenge for police and community relations in England and Wales', 258; Waddington, P, Stenson, K and Don, D, 'In Proportion: police stop and search' (2004) 44 BJC 889, 892.

disproportionately can be proven, it is highly problematic to then apply those conclusions to individual cases.²⁹

The 'available' population thesis, discussed in Chapter 3.2.4, argues that the proportion of stops and searches by ethnicity ought to be calculated by reference to the demographic of the population in the area at the time of the stop as opposed to the demographics of the 'resident' population. There are, however, difficulties in applying the 'available' population thesis to section 44. First, the studies which used the 'available' population did not focus on authorised powers without reasonable suspicion. Waddington et al's study focused on PACE, section 1, and, although it is unclear which powers were included in Miller's study, only two of the forces, the MPS and Leicestershire, carried out a significant number of section 60 stops over the time period.³⁰ It therefore seems likely that, like Waddington et al, much of Miller's study focused on 'routine', non-authorised search powers. It may well be, as suggested by Miller, that authorised search powers reveal different patterns of usage.³¹ Certainly, section 44 has different patterns of usage from PACE, section 1, being used at choke points such as transport hubs and around iconic sites where pedestrian traffic is heavy.

Second, some of the explanations regarding the 'availability' of some BME communities do not apply to the use of section 44. In Waddington et al most of the stop and search activity took place in the late evening and early morning. However, the fieldwork in this thesis indicates that, generally, section 44 activity takes place during the day.³² If particular BME communities are more 'available' to the police in the late evening and night-time, due to structural inequalities such as higher levels of unemployment, such groups, or at least some of them, should therefore be less 'available' for section 44 stops. Certainly in relation to unemployment, such groups should have been less 'available' for stops by the BTP under their previous deployment of section 44, which operated primarily during rush hour.³³ This does not necessarily lead to a conclusion that more 'white' people will be stopped than members of BME communities, as the structural inequalities which may lead some to be 'available' at night clearly apply only to some sub-groups within particular communities. However, the logic underlying the thesis appears flawed in relation to section 44: if a person appears 'out of place' because this is not a place or time where the police would usually

²⁹ Alschuler, A, 'Racial Profiling and the Constitution' [2002] University of Chicago Legal Forum 163, 245.

³⁰ Miller 'Profiling populations available for stops and searches'; Waddington, Stenson and Don 'In Proportion: police stop and search'; Home Office, 'Statistics on Race and the Criminal Justice System: 1999/00'.

³¹ Miller 'Profiling populations available for stops and searches' 90.

³² See Chapter 5.1.

³³ See Chapter 4.1.2.

view them as 'available', this fact of itself may prompt the police to stop them under section 44, although the issue was not raised in the fieldwork. A final point, which is perhaps particularly relevant to the fieldwork forces, is the difficulty of ascertaining who the 'available' population is, given its transient nature.³⁴ Given these problems, the 'available' population thesis does not appear to be applicable to section 44.

6.1.2) Disproportionality

This section will consider the explanations for the statistical disproportionality discussed above, focusing on two categories, those which accept the fact of its occurrence and seek to explain how it occurs and those which argue the disproportionality is justifiable. The latter will be discussed within a broader analysis of profiling, in general terms and in relation to counter-terrorism.

6.1.2.1) *Explanations of disproportionality*

Turning first to the former category, which accepts the fact of disproportionality and tries to explain rather than justify it, adapting from Bowling and Phillips, there are four main theses: the 'bad apple' thesis; the 'canteen culture' thesis; the 'reflection of society' thesis and the institutional racism thesis.³⁵ The first two draw upon cultural analysis, while the latter two adopt a structural model.³⁶ As will become evident there is some overlap between the bases of the following arguments and those which will be considered in the next section which justify disproportionality.

The 'bad apple' thesis, cited in the Scarman Report,³⁷ is fairly self-explanatory, accepting that some officers act in a prejudicial or racist manner, but asserting that these are a tiny minority of the force.³⁸ The 'canteen culture' thesis points to policing cultures, the characteristics of which have been variously identified as: authoritarian conservatism; racial prejudice; in-group loyalty and solidarity, with resulting alienation from 'general' society; a sense of mission; action; cynicism; and pessimism.³⁹ Reiner has argued that these characteristics combine to result in the police treating sections of society as 'police property', whereby certain groups bear the brunt of policing and are denied "full'

³⁴ See Chapter 4.3 for further discussion of this 'transient' community.

³⁵ Bowling and Phillips, *Racism, crime and justice* 156-161.

³⁶ Reiner, 'Race, Crime and Justice' 3.

³⁷ Lord Scarman, 'The Scarman Report' [4.63].

³⁸ See, e.g. *Ibid.*

³⁹ Skolnick, J, *Justice Without Trial* (John Wiley & Sons, London 1966) passim 42-70; Waddington, P, 'Police (canteen) sub-culture: an appreciation' (1999) 32 BJC 287; Reiner, *The politics of the police* Chapter 3.

citizenship'.⁴⁰ Chapter 3 detailed how stop and search powers have, historically, been used against such 'police property': those groups at the margins of society.⁴¹ Smith and Grey warn against presuming a straightforward relationship between attitudes and action, arguing that racist attitudes serve various different needs than those which come into play when an officer is actually interacting with a member of a BME group and therefore 'it would be quite wrong to assume that, because there is a good deal of racist talk...it follows that the police discriminate against members of minority groups or regularly behave towards them in a hostile manner'.⁴²

While these cultural explanations may explain the disproportionality in part, the structural explanations of disproportionality against BME communities, historically focusing on the Africo-Caribbean populations, are the most convincing and academically dominant theories.⁴³ They assert that it is structural discrimination against BME communities which results in their over-representation within the criminal justice system. This intersects with other theories discussed above, such as the 'available' population thesis. As Reiner explains: '[t]he basic trigger for what can become a vicious circle of spiralling conflict is societal and institutionalised racism. This forces discriminated-against ethnic minorities to acquire those characteristics upon which 'normal' policing bears down most heavily, and it is the policing element which is crucial for feeding disproportionate numbers of 'Black' people into the system'.⁴⁴ Although the historical focus has been on the disproportionality against 'Black' people within the criminal justice system, the structural inequalities which fed, and continue to feed, this manifestation are evident among many of the Muslim communities in Britain.⁴⁵

The 'reflection of society' and 'institutional racism' theses can be seen as two sub-genres of the structural approach. The 'reflection of society' thesis argues that as the police are a reflection of society as a whole and as a proportion of society are racially prejudiced it follows that a proportion of officers will be also prejudiced.⁴⁶ In the context of section 44 and its alleged misuse against 'British Muslims', this thesis offers an interesting study given the substantial increase in recent times in Islamophobia. In the UK, the Runnymede's

⁴⁰ Reiner, *The politics of the police* 78.

⁴¹ See especially Chapter 3.1.4.

⁴² Smith and Gray, *Police and people in London: the PSI Report* 402.

⁴³ See, e.g. Reiner, R, 'Race and Criminal Justice' (1989) 16 *New Community* 5; Bowling and Phillips, *Racism, crime and justice*.

⁴⁴ Reiner 'Race and Criminal Justice' 18.

⁴⁵ Department for Communities and Local Government 'Understanding Muslim Ethnic Communities: Summary Report' (The Change Institute, London 2009).

⁴⁶ Bowling and Phillips, *Racism, crime and justice* 156.

seminal report on Islamophobia dates to 1997,⁴⁷ while the European Monitoring Centre on Racism and Xenophobia (EUMC), an EU body, first noted Islamophobia in its second annual report in 2000.⁴⁸ Indeed, the European Commission against Racism and Intolerance's 'General Policy Recommendation, No. 5', which focuses on combating intolerance and discrimination against Muslims, dates to April 2000.⁴⁹ The EUMC has since published several reports focusing solely on Muslim communities and/or Islamophobia across the EU.⁵⁰

Since 9/11, previous attempts to depict a 'clash of civilisations' have gained traction in some quarters, and increasingly there is a tendency, particularly within the print media, to equate Islam and terrorism.⁵¹ The study of Moore, Mason and Lewis into the depiction of Muslims in the UK print media revealed that stories about British Muslims and 'terrorism or the war on terror' accounted for 36% of the total between 2000 and 2008, 22% focused on cultural or religious issues, particularly the 'cultural differences between British Muslims and other British people', with Muslim extremism accounting for a further 11%.⁵² Only 5% of stories focused on problems which Muslims face or attacks on Muslims.⁵³ More generally, Hudson and Bramhall argue that 'since the Rushdie Affair, and even more since September 11' there is evidence of 'the recasting of close family ties, strong informal social control, self-regulation and conformity from positive to negative constructions of Asianness'.⁵⁴ The 'reflection of society' thesis therefore suggests that, given the increase in Islamophobia across society, an equivalent increase in prejudice will be evident among the police.

⁴⁷ Conway, G, 'Islamophobia: a challenge for us all' (Runnymede Trust, London 1997); Commission on British Muslims and Islamophobia 'Islamophobia: issues, challenges and action' (Runnymede, London 2004).

⁴⁸ EUMC 'Diversity and Equality for Europe: Annual Report 2000' (EUMC, Vienna 2000) 47.

⁴⁹ ECRI 'General Policy Recommendation No. 5' (2000) .

⁵⁰ EUMC, 'Summary Report on Islamophobia in the EU after 11 September 2001' (EUMC, Vienna 2002); EUMC, 'The fight against Anti-Semitism and Islamophobia: bringing communities together' (EUMC, Vienna 2003); EUMC, 'The Impact of the 7 July 2005 London Bomb Attacks on Muslim Communities in the EU' (EUMC, Vienna 2005); EUMC, 'Muslims in the European Union: discrimination and Islamophobia' (EUMC, Vienna 2006). See also: Allen, C and Neilsen, J, 'Report on Islamophobia in the EU after 9/11' (EUMC, Vienna 2002); Abbas, T, *Muslim Britain* (Zed Books, London 2005) Pt II.

⁵¹ Huntington, S, 'The clash of civilizations?' (1993) 72 *Foreign Affairs* 22.

⁵² Moore, K, Mason, P and Lewis, J, 'Images of Islam in the UK: The Representation of British Muslims in the National Print News Media 2000-2008' (Cardiff School of Journalism, Cardiff 2008) 10.

⁵³ *ibid* 11.

⁵⁴ Hudson, B and Bramhall, G, 'Assessing the "other": constructions of "Asianness" in risk assessments by probation officers' (2005) 45 *BJC* 721, 734.

'Institutional racism', now synonymous with the Macpherson Report, draws upon both the cultural approach, given its reference to attitudes, and the structural approach through its emphasis on the unwitting impact that processes and behaviours may have on particular communities.⁵⁵ As discussed in Chapter 3.2.3, Macpherson's definition of institutional racism focused on collective failures of an organisation to provide an appropriate service to BME communities, often arising through unwitting prejudice, stereotyping or prejudice.⁵⁶ The definition, described as 'slippery', proved controversial and was frequently misunderstood.⁵⁷ In particular individual racism was elided with institutional racism.⁵⁸ This led to much 'anger' among individual officers who felt that the label signified widespread individual racism.⁵⁹ As Waddington et al have noted, the complexity of the definition lies in the interaction between processes, attitudes and behaviours and between various policing practices.⁶⁰

6.1.2.2) Justifying disproportionality: Profiling

Profiling in broad terms is intrinsically linked to the exponential rise of the use of actuarial methods within the criminal justice system, and thus also entwined with the rise of the 'risk society', responding to models of risk and pre-emption. Within the criminal justice system, risk management came to the fore initially in relation to parole, with the most recent theoretical developments concerning indeterminate sentences⁶¹ and the economic analysis of 'efficient' profiling in relation to stop and search.⁶² Although incubated within theories of risk, it may appear at first blush that profiling has no role in 'all-risks' policing, given the logic of treating all persons within a given location as a risk. This presumes that the police will exercise no discretion whatsoever and will in fact treat all people as equal risks, however, some selection process is inevitable given the restraints upon police resources. Moreover, as discussed in Chapter 5.1, the police would be acting *ultra vires* if they selected

⁵⁵ Sir W Macpherson, 'The Macpherson Report'.

⁵⁶ *ibid* [6.34].

⁵⁷ Skidelsky, R, 'The Age of Inequality' in D Green (ed) *Institutional Racism and the Police: fact or fiction?* (Institute for the Study of Civil Society, London 2000) 1.

⁵⁸ Home Affairs Committee, *The Macpherson Report – Ten years on* (HC 2008-09, 427).

⁵⁹ Foster, J, Newburn, T and Souhami, A, 'Assessing the impact of the Stephen Lawrence Inquiry' (Home Office (HORS 294), London 2005) Chapter 3.

⁶⁰ Waddington, Stenson and Don 'In Proportion: police stop and search', 910.

⁶¹ *Wells v Secretary of State for Justice* [2009] UKHL 22

⁶² Ayres 'Outcome tests of racial disparities in police practices'; N Persico and PE Todd 'The Hit Rates Test for Racial Bias in Motor-Vehicle Searches'; c.f. Engel 'A Critique of the "Outcome Test" in Racial Profiling Research'; Engel and Tillyer 'Searching for Equilibrium: The Tenuous Nature of the Outcome Test'; Engel, Calnon and Bernard 'Theory and racial profiling: shortcomings and future directions in research'; Anwar and Fang 'An alternative test of racial prejudice in motor vehicle searches: theory and evidence'.

persons on the basis of arbitrary numerical categories. The proliferation of profiling within counter-terrorism has been noted with concern by the Special Rapporteur.⁶³

Profiling may be used in relation to suspects on the basis of evidence arising from a specific committed offence. This type of evidence-based 'suspect-profiling' is not contentious, leaving aside issues of eye-witness reliability, and is not under discussion here. Rather, the focus is on profiling on the basis of group membership. Before discussing such profiling it is worth making a few points concerning behavioural profiling. Behavioural profiling 'appears to be significantly more efficient' than profiling on the basis of group membership and is nominally neutral in terms of race, ethnicity and religion.⁶⁴ However, some commentators fear that behavioural profiles may act as a proxy for group profiling on the grounds of characteristics.⁶⁵ One criticism is that the criteria used are usually so broad as to permit officers to act on preconceived racial biases.⁶⁶ For example, the Department of Homeland Security lists the following among its list of 'Indicative Behaviors of Suicide Bombers': 'eyes appear to be focused and vigilant'; 'clothing is loose'; 'does not respond to authoritative voice commands or direct salutation from a distance'; and 'suspect is walking with deliberation but not running'.⁶⁷ A second issue is that such behavioural profiling may constitute indirect discrimination or institutional racism. For example, certain nationalities and ethnicities may wear loose clothing or not make direct eye contact. People with certain disabilities may behave in a 'suspicious' manner.⁶⁸ BME communities who have suffered from over-policing or immigrants who have been mistreated by their domestic police, may not respond positively to 'authoritarian...commands' or salutations.⁶⁹

Turning now to profiling on the basis of group characteristics, such profiling can be on the basis of any number of characteristics but the concern here is with ethnicity, national origins and religion. The CTITF has accepted that difference in treatment based on criteria of race

⁶³ Schenin 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' [32-62].

⁶⁴ CTITF Working Group on Protecting Human Rights while Countering Terrorism, 'Basic human rights reference guide: the stopping and searching of persons' [38].

⁶⁵ Ritchie, A and Mogul, J, 'In the shadows of the war on terror: persistent police brutality and abuse of people of color in the United States' (2008) 1 De Paul J. for Soc. Just. 175, 217-218.

⁶⁶ *ibid*, 217-218.

⁶⁷ DHS 'Maintaining awareness regarding Al-Qaeda's potential threats to the Homeland' <http://www.dps.state.vt.us/homeland/library_aware.htm> downloaded 27 July 2010.

⁶⁸ City of London Police 'Counter-terrorism Policy' <<http://www.cityoflondon.police.uk/NR/rdonlyres/6CACD994-1B22-443E-9B3F-F458C76D57E6/0/counterterrorismFOI.pdf>> accessed 20th May 2010 9.

⁶⁹ Ritchie and Mogul 'In the shadows of the war on terror: persistent police brutality and abuse of people of color in the United States' 218.

or religion may be non-discriminatory 'if it was supported by objective and reasonable grounds', albeit with the caveat that it is usually not possible to provide such objective and reasonable grounds.⁷⁰ As noted in Chapter 5.5.5, this does not accord with domestic or ECtHR jurisprudence. Those who support profiling often justify it on the basis that it leads to more 'efficient' policing. This view is predicated upon the belief that there is an offending differential between groups, however characterised. If Group A offends more than Group B then, it is argued, the police will maximise their efficiency by targeting Group B rather than Group A, at least until such a time as the offending differential is eliminated. There are a number of difficulties with this approach. One fundamental problem is the issue of which characteristics are used to define the group. It is ethically problematic to assert group membership on the basis of 'un-chosen' characteristics, such as race or ethnicity. Similar concerns arise with religion and national origins, although it could be argued these may, in some circumstances, be 'chosen'. Various studies, including Tyler's 'Chicago Study', have found that the key factor which influences a person to comply with the law or not is its perceived legitimacy, on which perceptions of procedural justice have the greatest impact.⁷¹ If the general public, majority or minority groups feel that the police are acting illegitimately or are failing to adhere to procedural norms in targeting groups on the basis of shared characteristics this may undermine their perception of the legitimacy of the law and their adherence to it. In terms of counter-terrorism, this 'collateral impact' may also alienate them from the police, damming the flow of crucial information.⁷² The perception of legitimacy is likely to be particularly pertinent in relation to stop and search given the extremely low hit-rate. As Fitzgerald noted: 'even if there were no discrimination in searches...as long as some groups have a higher risk of being the legitimate target of searches, disproportionate numbers of innocent people in those groups will be searched'.⁷³

Even if this ethical issue is put to one side, difficulties remain. In relation to ethnicity, religion and national origins, a more prosaic problem, which may undermine any purported gains in efficiency, is the difficulty in identifying someone on the basis of any of these characteristics. An obvious exception is at border controls where national origin can be determined, or at least one's current national origin. Where ethnicity is underlined by national origins, for instance the categorisation of 'Arabs' in the USA, it may be somewhat easier to discern group members, although the category will still suffer from both over- and

⁷⁰ CTITF Working Group on Protecting Human Rights while Countering Terrorism, 'Basic human rights reference guide: the stopping and searching of persons' [36].

⁷¹ Tyler, T, *Why People Obey the Law* (Yale UP, London 1990).

⁷² CTITF Working Group on Protecting Human Rights while Countering Terrorism, 'Basic human rights reference guide: the stopping and searching of persons' [20].

⁷³ FitzGerald, M. 'Supplementary memorandum' to Home Affairs Committee, *Young Black People and the Criminal Justice System* (HC 2006-07, 181-II) Ev 242 [4.9].

under-inclusion. While some members of groups may have overt indicators of their ethnicity, religion and national origins, many will not. Moreover, most overt indicators of these characteristics may be easily disguised or 'substituted' for characteristics which are not profiled. Tucker notes that in Israel 'suicide bombers have...sought to foil profiling efforts by shaving their beards, dyeing their hair blond, and wearing Israeli uniforms or even the traditional clothing of orthodox Jews'.⁷⁴ Islamophobic attacks have focused particularly on visible indicators of faith, targeting for instance women wearing the hijab or burka, however, there has also been a noted increase of attacks on Sikhs, which, while reflecting the perpetrators' ignorance of different religions, also underlines the difficulty in drawing concrete conclusions regarding religious discrimination based on visible difference.⁷⁵

6.1.3) The Outcome Test

In relation to stop and search, one of the major contemporary debates concerns the 'outcome test', whereby 'efficiency' is judged in terms of maximising the 'hit-rate' from searches.⁷⁶ Deriving from economic theory originally devised in the 1950s by Becker,⁷⁷ the 'outcome test' was developed significantly in the 2000s.⁷⁸ Essentially, a comparable rate of 'successful' searches across groups represents an 'equilibrium' with any disproportionality explicable on the basis that the police are maximising their efficiency rather than on the basis of any discrimination, or as Boorah puts it, the police are acting out of 'business necessity' rather than 'bigotry'.⁷⁹ A number of criticisms may be made concerning the 'outcome test'. First, a successful 'outcome' from a stop and search is not the same as saying that the person has been found guilty of an offence. This undercuts the correlation of an offending differential. Second, it is predicated on the understanding that the only differentials for police action are the 'hit-rate' and costs in terms of time, effort and a 'taste

⁷⁴ Tucker, J. cited in Harcourt, B, *Against prediction: profiling, policing, and punishing in an actuarial age* (University of Chicago Press, London 2007) 232.

⁷⁵ EUMC 'Muslims in the European Union: discrimination and Islamophobia'; Allen and Neilsen 'Report on Islamophobia in the EU after 9/11'.

⁷⁶ Engel 'A Critique of the "Outcome Test" in Racial Profiling Research' 3.

⁷⁷ Becker, G, *The Economics of Discrimination* (Chicago UP, Chicago 1957).

⁷⁸ Ayres 'Outcome tests of racial disparities in police practices'; N Persico and PE Todd 'The Hit Rates Test for Racial Bias in Motor-Vehicle Searches'; c.f. Engel 'A Critique of the "Outcome Test" in Racial Profiling Research'; Engel and Tillyer 'Searching for Equilibrium: The Tenuous Nature of the Outcome Test'; Engel, Calnon and Bernard 'Theory and racial profiling: shortcomings and future directions in research'; Anwar and Fang 'An alternative test of racial prejudice in motor vehicle searches: theory and evidence'.

⁷⁹ Boorah, V, 'Racial bias in police stops and searches: an economic analysis' (2001) 17 *European Journal of Political Economy* 17.

for discrimination'.⁸⁰ However, research has pointed to various other factors which may influence an officer. Young and Skogan both argued that socio-economic factors were more dominant than racial ones.⁸¹ Waddington highlighted the demeanour of the person when they were stopped,⁸² while empirical research by Norris et al found that white people were more likely to be aggressive towards the police, perhaps due to the fact that they were also more likely to be intoxicated.⁸³ The outcome test fails to take account of these factors or of differences in the intensity of the search which may impact upon the 'outcome'. Extraneous factors, such as the deployment of police resources, whether in relation to specific offences, locations or times may also impact upon the 'hit-rate'.

Another criticism of the 'outcome test' is that it presumes a constant 'elasticity' of offending to policing across all groups, which represents the response of individuals to police actions.⁸⁴ Harcourt argues that where there is an offending differential between groups the group that offends more is likely to have less elasticity, particularly if there are underlying socio-economic causes.⁸⁵ The structural inequality thesis, discussed above, suggests that in such a case increased police attention may not significantly impact upon the group due to the continuing underlying factors.⁸⁶ Margoth and Blumkin take this further, arguing that where a minority group offends more the majority group should be targeted by the police as the 'marginal group' within the majority, that is those people who are as likely to obey the law as to disregard it, are likely to be more sensitive to deterrence than the minority group.⁸⁷ In relation to 'ordinary' crime, this suggests that targeting the minority group with a higher offending differential will increase crime.

Terrorism must be distinguished from 'ordinary' crime in this respect. The ideological framework within which terrorists justify their actions makes it unlikely that a 'marginal group' will turn to terrorism simply because they think they are unlikely to be detected. However, taking account of terrorists' elasticity is important. Due to the ideological nexus,

⁸⁰ Harcourt, *Against prediction: profiling, policing, and punishing in an actuarial age* 124.

⁸¹ Skogan 'Contacts between police and public: findings from the 1992 British Crime Survey' 21-5; Young, *Policing the streets: stops and search in North London*.

⁸² Waddington, P, 'Black Crime, the "racist" police and fashionable comparison' in D Andersons (ed) *The Kindness that Kills* (SPCK, London 1984).

⁸³ Norris, C and others, 'Black and blue: an analysis of the influence of race on being stopped by the police' (1992) 43 BJC 207.

⁸⁴ Harcourt, *Against prediction: profiling, policing, and punishing in an actuarial age*.

⁸⁵ *ibid.*

⁸⁶ *ibid* 123.

⁸⁷ Margalioth, Y and Blumkin, T, 'Targeting the majority: redesigning racial profiling' (2006) 24 Yale LPR 317.

terrorist's elasticity is likely to be very low, especially in relation to suicide bombers. Moreover, while profiling a group may lead to higher detection rates in relation to that type of event or in relation to that location, history suggests that it will result in the substitution of different terrorist attacks, whether in terms of different types of attacks or different locations. For example, the implementation of metal detectors in US airports in 1973 radically decreased the number of hijackings but studies suggest that there was a corresponding rise in the number of assassinations; similarly, the fortification of US embassies resulted in a rise of assassinations.⁸⁸

While it is evident from the criticisms above that the 'outcome test' cannot justify statistical discrimination on the basis of maximising efficiency, the question remains whether disproportionality that maximises efficiency would be acceptable. In the context of section 44, given that one of the central aims of the power is deterrence, 'efficiency' must be seen as the overall reduction of the threat from terrorists. Difference in treatment does not necessarily constitute discrimination under Article 14 and is acceptable if it has an 'objective and reasonable justification'.⁸⁹ *Ireland v United Kingdom* established that the Government may act differentially in its response to different terrorist groups, in that case, interning only suspected IRA terrorists between 1971 and 1973 and thereafter interning a very small number of suspected Loyalist terrorists.⁹⁰ It is perhaps notable that the ECtHR limited its discussion to distinguishing Loyalist and IRA/Republican terrorism rather than considering how the security tactics impacted upon the wider community, in terms of Catholics and Protestants.⁹¹ This suggests that the case could stand as a precedent for the application of differential security measures against, for instance, dissident Republicans rather than 'international terrorists', a regional approach having been approved in *Magee v United Kingdom*.⁹² However, *Ireland v United Kingdom* may not stand in aid of disparate treatment of communities in respect of the same terrorist threat. The ruling in *A v Secretary of State for the Home Department* is a reminder that the current 'international terrorism' threat comes from 'home-grown' and foreign terrorists and that it is not possible to contend that

⁸⁸ Cauley, J and Im, E, 'Intervention policy analysis of skyjackings and other terrorist incidents' (1998) 78 *American Economic Review* 27; Enders, W and Sandler, T, 'The effectiveness of antiterrorism policies: a vector-autoregression-intervention analysis' (1993) 87 *American Political Science Review* 829; Enders, W and Sandler, T, 'What Do We Know About the Substitution Effect in Transnational Terrorism?' in A Silke and G Ilardi (eds) *Researching terrorism: trends, achievements, failures* (Frank Cass, London 2004).

⁸⁹ *Belgian Linguistic Case*.

⁹⁰ *Ireland v United Kingdom*.

⁹¹ The terms 'Republican terrorism' and 'IRA terrorism' are used interchangeably in the judgement.

⁹² (2001) 31 EHRR 35, app.no.28135/95. See also *Brannigan v United Kingdom* (1994) 17 EHRR 539 app.no.14553/89.

national origins are an 'objective and reasonable justification' for differential treatment. Most 'international terrorists' are Muslim. However, these are a tiny proportion of the Muslim population and to target all Muslims, ignoring the difficulties already noted in respect of identifying someone on the basis of their religion, could not be seen as a reasonable or objective reaction and would in any case be far too large a class to be an efficient method.

Three final points must be made in relation to profiling. The first, which links into the legitimacy argument is that profiling, especially in relation to 'sensitive' characteristics such as religion, race, ethnicity or national origins, is likely to reinforce the perceptions of injustice, thus strengthening the 'preferences of terrorists'.⁹³ There seems little doubt that singly or cumulatively, the detention of over 1,200 non-citizens post 9/11 – some for up to three years, the scandals in relation to torture and the degrading treatment in Abu-Ghraib and Guantanamo, the differential treatment of certain nationalities at borders, all combined to alienate, at least some, among the Muslim and Arab communities from the USA.⁹⁴ Similar arguments may be made domestically in relation to the mistreatment of prisoners in Iraq, the internment of non-nationals in Belmarsh and continuing control orders. The second point is that many commentators argue that there is no terrorist profile. Sageman, for example, after studying the biographies of 400 terrorists, concluded that there was no terrorist profile; the most that could be discerned was the similar paths to jihad that many took.⁹⁵ The final point is that focusing on apparent profiles may lead the police to miss more pertinent factors because of their presumptions regarding group characteristics.

6.1.3.1) 'Suspect Community'?

One explanation given for the disproportionate impact of section 44 upon 'Asians' in particular is that the Government has created a 'suspect community' of 'British Muslims' who suffer the brunt of counter-terrorist measures.⁹⁶ It could perhaps be said, adapting

⁹³ Cited in Harcourt, *Against prediction: profiling, policing, and punishing in an actuarial age* 234.

⁹⁴ Donohue, L, *The cost of counter-terrorism* (CUP, Cambridge 2008) 117-122; Harcourt, *Against prediction: profiling, policing, and punishing in an actuarial age* 234; ACLU 'Sanctioned bias: racial profiling since 9/11' (New York 2004).

⁹⁵ Sageman, M, *Understanding terror networks* (University of Pennsylvania Press, Philadelphia 2004). See also: Travis, A, 'MI5 Report Challenges Views on Terrorism in Britain' *The Guardian* (London, 20th August 2008); Walker "'Know thine enemy as Thyself': Discerning Friend from Foe under Anti-Terrorism Laws'.

⁹⁶ Pantazis, C and Pemberton, S, 'From the 'old' to the 'new' suspect community' (2009) 49 BJC 646; Nickels, H and others, 'A comparative study of the representations of "suspect" communities in multi-ethnic Britain and of their impact on Irish communities and Muslim communities' (Institute for the Study of European Transformations, London 2010); Liberty, 'The impact of anti terrorism powers on the British Muslim population' (Liberty, London 2004); Peirce, G, 'Was it like this for the Irish?' (2008) 7 London Review of Books 3;

Kennedy's analogy, that 'British Muslims' pay a 'religious tax' for society's 'war on terrorism'.⁹⁷ To assess the explanatory force of this thesis it is necessary first to consider its origin and then to consider how it is applied contemporarily.

The term 'suspect community' is derived from Hillyard's eponymously titled book which analysed the impact of the PTAs on the Irish in Britain.⁹⁸ His thesis was that the PTAs created a two-tiered justice system wherein Irish people were targeted not because they were suspected of involvement in or of carrying out an illegal act but rather they were 'suspects primarily because they [were] *Irish*': the PTAs turned the Irish into a 'suspect community'.⁹⁹ His methodology may be criticised from a number of angles. Although there are discrepancies within the text regarding the number and background of his interviewees,¹⁰⁰ there is unquestionably a heavy bias towards 'Irish' people, whether Irish Catholics living in Britain or Northern Ireland or from the Republic of Ireland.¹⁰¹ By excluding other groups Hillyard at best proves that one community – the Irish – was a 'suspect community'. Thus, the thesis cannot explain why of those stopped under the PTA 1989, section 13A, 7% were 'Black' persons and 5% were Asian.¹⁰² The second bias – towards Northern Irish¹⁰³ – is potentially problematic as this group is likely to have been influenced by the PTAs as practised in Northern Ireland, in addition to the EPAs.¹⁰⁴ The legislation and policing practices differed significantly between Northern Ireland and Great Britain and so conclusions in relation to Britain may be inaccurate. Additionally, policing at ports and borders must be considered separately from 'general' policing in Britain.

Spalck, B, El Awa, S and MacDonald, L, 'Police-Muslim Engagement and Partnerships for the Purposes of Counter-terrorism: An Examination (Summary Report)' (University of Birmingham, Birmingham 2008); Mythen, G, Walklate, S and Khan, F, "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety' (2009) 49 BJC 736 (although they do not refer specifically to a 'suspect community', speaking rather of a 'suspect population'). Cf Greer, S, 'Anti-terrorist laws and the UK's 'suspect Muslim community': a reply to Pantazis and Pemberton' (2010) 50 BJC 1171.

⁹⁷ Kennedy, R, *Race, crime and law* (Vintage, New York 1998).

⁹⁸ Hillyard, P, *Suspect community: people's experience of the Prevention of Terrorism Acts in Britain* (Pluto Press in association with Liberty, London 1993).

⁹⁹ *ibid* 4,7.

¹⁰⁰ C.f. *Ibid* 11 and Table 3.2.

¹⁰¹ *ibid* 11.

¹⁰² Home Office 'Statistics on Race and the Criminal Justice System: 1997/98' (Home Office, London 1998) [3.8].

¹⁰³ Hillyard, *Suspect community: people's experience of the Prevention of Terrorism Acts in Britain* 11.

¹⁰⁴ See Chapter 2 for a discussion of these powers.

The thesis would be more tenable if applied to specific and identifiable communities in Northern Ireland. For example, persons living in and around the Falls Road in Belfast were 'suspects' because they came from the Falls. As a community they were repeatedly subjected to military and police activity, with examples including: internment in 1971 and the Falls Curfew of 1970, which was imposed to curb rioting provoked by house searches.¹⁰⁵ This is not to say that the group was the only 'suspect community', merely it was an example of a 'suspect community'. Clearly many of the practices cited also impacted upon other communities.

Many of today's commentators who adopt Hillyard's thesis do so uncritically.¹⁰⁶ None mention the significant differences between the conflict and the law in relation to 'international terrorism' and Northern Ireland-related terrorism. Hillyard's book restricts itself to the operation of the PTA in Britain, however, following on from the arguments above that the 'suspect community' thesis can best be sustained in relation to the impact of counter-terrorist laws in Northern Ireland, the differences between the impact on British Muslims and on the communities in Northern Ireland will now be sketched.

First, with Northern Ireland-related terrorism, there was a clear stratification to the law: the 'basic' law applied across the UK, in addition to supplementary powers in Northern Ireland, often significant in their breadth, relating to, for example, internment, trial without jury and exclusion orders.¹⁰⁷ There has not been, and it is implausible to imagine their being, different laws applied to areas in Britain which have substantial Muslim communities. The attempt, under Operation Champion, to encircle two predominantly Muslim areas in Birmingham with Automatic Number Plate Recognition Cameras and CCTV, funded through PREVENT, reveals that the same laws may be differentially applied, although the outcry and subsequent dismantling of the scheme suggests that stratification to the degree seen in Northern Ireland is unacceptable.¹⁰⁸

¹⁰⁵ Campbell, C. & Connolly, I. "A Model for the 'War against Terrorism'? Military Intervention and the 1970 Falls Curfew." (2003) 30 *Journal of Law and Society* 341; McKittrick and McVea, *Making sense of the Troubles*; Coogan, *The IRA* .

¹⁰⁶ Nickels and others 'A comparative study of the representations of "suspect" communities in multi-ethnic Britain and of their impact on Irish communities and Muslim communities'; Liberty 'The impact of anti terrorism powers on the British Muslim population'; Peirce 'Was it like this for the Irish?'; Spalek, El Awa and MacDonald 'Police-Muslim Engagement and Partnerships for the Purposes of Counter-terrorism: An Examination (Summary Report)'; Mythen, Walklate and Khan "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety'. C.f. Pantazis and Pemberton 'From the 'old' to the 'new' suspect community'.

¹⁰⁷ Regulation 23, SPA 1922; Section 2, EPA 1976.

¹⁰⁸ Thompson, S, 'Project Champion Review' (Thames Valley Police, 2010).

The second major difference is the military, who were present in Northern Ireland on a permanent basis from 1969 until 2007, their numbers peaking at 21,800 in 1972, and who were particularly active in the 1970's pre-'Ulsterization'.¹⁰⁹ The third difference is the intensity of the conflict, both in terms of terrorist attacks and the security services' response. The 7/7 attack was more deadly than any previous terrorist attack in the UK, however, the intensity of the 'Troubles', in terms of the number of attacks and the cumulative death toll – 3,720 – far outstrips the intensity to date of 'international terrorism' in the UK.¹¹⁰ In terms of policing, in 1975, the 'heaviest' year for counter-terrorist policing during the Troubles, there were 437 people detained under the PTA 1974, section 12, compared with 285 under TACT, section 41 in 2005/06, again the year with the 'heaviest' statistics.¹¹¹ While there have been instances, such as Forest Gate and the de Menezes killing, where the police adopted a heavy handed, militarised approach, this is not the norm.¹¹² In contrast, the police in Northern Ireland were routinely armed, used plastic bullets and water cannons and were directly responsible for the deaths of fifty-one people.¹¹³ The issue of collusion, again disputed although reports to date strongly suggest its occurrence, has also not featured in the 'current' counter-terrorist strategies.¹¹⁴ These differences have been highlighted not to suggest that no correlation can be made between the impact of counter-terrorist strategies now compared with those employed during 'the Troubles' but rather to insist that any comparisons must be suitably nuanced.

The most significant flaw among the research which asserts 'British Muslims' have become a 'suspect community' is the uncritical approach towards 'British Muslims', who are portrayed as a homogenous group. While this is not problematic among those who talk broadly of the impact of counter-terrorist measures upon 'British Muslims', without

¹⁰⁹ Walker, 'The role and powers of the Army'. See Chapter 2.

¹¹⁰ McKittrick and others, *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles*, table 1.

¹¹¹ Lord Carlile, 'Report on the operation in 2006 of the Terrorism Act 2000'; Walker, C, *The prevention of terrorism in British law* (Manchester University Press, Manchester 1992) 162.

¹¹² See: IPCC, 'IPCC Independent Investigation into the Shooting of Muhammed Adbulkhar in 46 Landsdown Road, Forest Gate on Friday 2 June 2006' (IPCC, London 2006); IPCC, 'Stockwell One: Investigation into the shooting of Jean Charles de Menezes at Stockwell underground station on 22 July 2005' (IPCC, London 2007); IPCC, 'Stockwell Two: An investigation into complaints about the Metropolitan Police Service's handling of public statements following the shooting of Jean Charles de Menezes on 22 July 2005' (IPCC, London 2007).

¹¹³ McKittrick and others, *Lost Lives: the stories of the men, women and children who died as a result of the Northern Ireland troubles*, table 2. See also: Punch, *Shoot to kill: Exploring police use of firearms*.

¹¹⁴ Judge Cory, 'The Cory Collusion Inquiry: Lord Justice Gibson and Lady Gibson; Chief Superintendent Breen and Superintendent Buchanan; Billy Wright; Patrick Finucane; Rosemary Nelson and Robert Hamill'.

reference to particular groups or statistics,¹¹⁵ others, such as Mythen and Walklate and Liberty uncritically read 'Asian' as 'Muslim'.¹¹⁶ Statements regarding the impact of counter-terrorist policing on 'British Muslims' must be nuanced and refrain from drawing generalisations without sufficient evidential proof. Just as Garland et al. have argued that the dominant discourses of 'Black', 'Asian' or 'BME' 'obscure the distinct experiences of certain groups', so too the use of the term 'British Muslims' obscures the distinct experiences of groups, such as British-Pakistanis, or British-Bangladeshis.¹¹⁷

6.2) Section 44: the practice

This section considers the practice of section 44 as revealed in the community interviews. As explained in Chapter 2.2.3, this snapshot of the 'community' was informed by the main research focus – the police; all bar two of the interviewees were members of police / community groups, the remaining interviewees being contacted directly following their public comments on how the police were carrying out section 44. In addition to its impact on the Muslim communities, the fieldwork revealed that section 44 is being (mis-)used against 'protesters', 'photographers' and members of the GLBT community.¹¹⁸ It is not possible to draw definitive conclusions regarding the extent of the misuse of section 44 on the basis of this small sample, however, the qualitative experience may trump the question of quantity in shaping community opinion. Indeed, even, as noted by Lord Scarman after the Brixton riots, the perception of misuse rather than actual misuse can lead to community distrust of the power, its objectives and use.¹¹⁹ Comparisons can perhaps be drawn with the community reaction to Operation Champion, which was found to have 'resulted in significant community anger and loss of trust', notwithstanding that the CCTVs never became operative.¹²⁰ To similar effect, the community may not distinguish between one type of stop and search and another: 'if you ask the community, they don't care whether it's section 44, PACE; stop and search per se, that's it'.¹²¹ More broadly, 'it's the wider policing

¹¹⁵ Spalek, El Awa and MacDonald 'Police-Muslim Engagement and Partnerships for the Purposes of Counter-terrorism: An Examination (Summary Report)'; Nickels and others 'A comparative study of the representations of "suspect" communities in multi-ethnic Britain and of their impact on Irish communities and Muslim communities'.

¹¹⁶ Liberty 'The impact of anti terrorism powers on the British Muslim population' 5; Mythen, Walklate and Khan "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety' 738.

¹¹⁷ Garland, J, Spalek, B and Chakraborti, N, 'Hearing lost voices: issues in researching 'hidden' minority ethnic communities' (2006) 46 BJC 423, 423.

¹¹⁸ COMMA; COMMB; COMMC.

¹¹⁹ Lord Scarman, 'The Scarman Report' [4.67]. See Chapter 3.1.4.

¹²⁰ Thompson 'Project Champion Review' 49.

¹²¹ COMMD.

agenda' that can impact upon how people view stop and search, and their view may be coloured by 'personal intervention with the police on a different matter, or a friend of a friend'.¹²²

6.2.1) Choice of person stopped

6.2.1.1) *'Black', 'Asian' and Muslim communities*

As highlighted above, the 'Section 95' statistics, even taking account of their limitations, indicate a disproportionate impact of section 44 against 'Black' and 'Asian' communities. This chimes with the most persistent criticism of section 44, which relates to its disproportionate targeting of, variously, 'British Muslims', 'Asians' and, although cited to a lesser degree, 'Black' people.¹²³ There is of course an overlap between these categories, given that, while a majority (76%) of British Muslims are Asian, Muslims were represented in 11 of the 15 ethnic groups recorded on the 2001 Census.¹²⁴ Pantazis and Pemberton argue that, based on the 'resident population', for 2006/07, 'Blacks' were stopped most (185 per 1,000 population), followed by Asians (179 per 1,000 population), then 'Other' (173 per 1,000 population), with 'Whites' being stopped least (54 per 1,000 population).¹²⁵ The high level of 'other' may mask further disproportionality.¹²⁶ By contrast, the MPS found that the statistics for London revealed limited disproportionality, with Asians slightly over-represented and Blacks slightly under-represented.¹²⁷ Nonetheless, the MPS highlighted the perception of disproportionality among the community, with young people interviewed as part of the 'London Debate' saying that 'stop and search is being targeted at young Muslim men'; 'stop and search is only used against immigrants or foreigners'; and that 'police...just make searches on ethnic minority groups'.¹²⁸ Similar views were voiced by participants in

¹²² COMMD.

¹²³ Nickels and others 'A comparative study of the representations of "suspect" communities in multi-ethnic Britain and of their impact on Irish communities and Muslim communities'; Mythen, Walklate and Khan "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety'; Liberty 'The impact of anti terrorism powers on the British Muslim population'; Peirce 'Was it like this for the Irish?'; Spalck, El Awa and MacDonald 'Police-Muslim Engagement and Partnerships for the Purposes of Counter-terrorism: An Examination (Summary Report)'.

¹²⁴ O'Beirne, M. 'Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey' (London, Home Office Research, Development and Statistics Directorate (no.274) 2004), TABLE 2.3; 8.

¹²⁵ Pantazis and Pemberton 'From the 'old' to the 'new' suspect community', 657.

¹²⁶ MPA 'Counter-terrorism: the London debate'.

¹²⁷ *ibid* 47-9.

¹²⁸ *ibid* 50-1.

Mythen and Walklate's focus groups.¹²⁹ The HAC, in 2004, stated that it did not think that Asians were being disproportionately targeted under section 44, however, it continued: '[n]onetheless, we accept that there is a clear perception among our Muslim witnesses that Muslims are being stigmatised by the operation of the Terrorism Act: this is extremely harmful to community relations'.¹³⁰ Just as the broader policing agenda impacts upon how people view stop and search, so the broader counter-terrorist agenda will impact upon how communities view section 44. It will be extremely difficult to alter the perception of discrimination without reasonable suspicion, whether or not statistical disproportionality falls – as is happening in the MPS.¹³¹

One community interviewee was a Pakistani Muslim who was active in her community and involved with one of the police / community groups. She said that section 44 was a major grievance among the Pakistani Muslim community: 'the problem with section 44 and why it causes the most problems and grievance is because people don't know why they're being stopped and they find it offensive that they're just being stopped on the mere basis that they're Pakistani Muslims, not because ...they might be implicated in a crime somewhere'.¹³² She contrasted section 44 with other stop and search powers, saying that, 'if people are stopped under other acts...they're not going to say we're stopped because we are Pakistani Muslims, more importantly than even Pakistani, they're not going to say we were stopped because we're Muslims, so it's not going to cause that much of a grievance'.¹³³ This links in with the difficulty, noted in Chapter 5.2, that some officers had in explaining the selection process for a suspicionless stop. The interviewee emphasised that religion is 'a very intimate subject', and argued that the psychological impact of being stopped under section 44 was not acknowledged: 'what about the severe humiliation knowing you've been stopped because you happen to outwardly look like a Muslim or a Pakistani?... it has an impact on you'.¹³⁴ This sense of embarrassment was also noted by the participants interviewed by Mythen and Walklate, one of whom said 'it's really embarrassing being questioned like that'.¹³⁵

¹²⁹ Mythen, Walklate and Khan "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety' 744-5.

¹³⁰ Home Affairs Committee, *Terrorism and Community Relations* [152-3].

¹³¹ See Figure 4.1.

¹³² COMME.

¹³³ COMME.

¹³⁴ COMME.

¹³⁵ Mythen, Walklate and Khan "'I'm a Muslim, but I'm not a terrorist': victimization, risky identities and the performance of safety' 744. Note that this quote is cited as relating to section 44, although it appears to refer to stop and question.

6.2.1.2) Other affected groups

The sections below deal other groups affected by the deployment of section 44.

6.2.1.3) GLBT communities

One interviewee, who was a member of police / community organisations in both police forces, representing, inter alia, GLBT communities felt that section 44 was ‘a very blunt tool’.¹³⁶ He said that it was being used against the GLBT community, in particular gay men: ‘the worst examples of [the misuse of section 44] are gay guys on, essentially cruising grounds or public sex environments...maybe late at night. It’s perfectly obvious they’re being stopped because the particular police officer takes a dim view of what they’re doing, but it’s perfectly legal...when asked “why am I being stopped?” “section 44, Terrorism Act”’.¹³⁷

The interviewee concluded that there were two major consequences of such stops: ‘there’s the negative bit on people’s feelings, the outrage’ and ‘it completely undermines PREVENT, because we’ve got a whole bunch of people who say ‘well, they’re just using it to stop people for whatever’.¹³⁸ While emphasising that this type of abuse of section 44 was carried out ‘by a few...rogue officers’ and that it ‘is not massive numbers, but there are enough numbers to keep us constantly worried about it’, this may cause a wider impact upon the community as the people who hear about this type of abuse of section 44 may feel alienated from the police.¹³⁹ In this manner section 44 undermines the broader objectives of CONTEST in so far as it casts doubt on the ‘true’ objectives of counter-terrorist law more broadly.

6.2.1.4) Protesters

A consistent line of criticism against section 44 has been its use against protesters. In evidence to the JCHR’s report, ‘Demonstrating respect for rights? A human rights approach to policing protest’, section 44 was cited as being misused in protest situations in seven different pieces of written evidence.¹⁴⁰ The use of section 44 against protesters simply because they are protesting is unlawful, undermines confidence in the broader counter-

¹³⁶ COMMA.

¹³⁷ COMMA.

¹³⁸ COMMA.

¹³⁹ COMMA.

¹⁴⁰ Joint Committee on Human Rights, *Demonstrating Respect for Rights?* (IIL 2008-09, 47-II). The submissions were by: Liberty (Ev 1, 158, 164), Justice (Ev 1, 149, 153), Aldermaston Women’s Peace Campaign (Ev77), the Campaign for Nuclear Disarmament (Ev 107), Justice not Vengeance (Ev 155), David Mead (Ev 169), Dr Michael Hamilton and Dr Neil Jarman (Ev 183). See also: Liberty ‘Casualty of War: 8 weeks of counter-terrorism in Rural England’.

terrorist strategy and infringes the rights to freedom of assembly and expression under Articles 10 and 11, directly and by virtue of the ‘chilling effect’. One interviewee stated that section 44 ‘[is] not about preventing terrorism, it’s just simply shutting people up for speaking up against the government, which is actually the most worrying part of this section 44, even being a Pakistani Muslim and worrying about things like that [discrimination] I would say that’s still number two on my concerns, number one is not being able to...peacefully demonstrate or to express opinions against what the government is doing’.¹⁴¹

The use of section 44 against Climate Camp protesters as they sat in a cafe prompted Earl Onslow to comment that ‘buying sausages in a café does not appear to be, on the face of it, a terrorist activity’.¹⁴² Among the other examples of such misuse are its use against Walter Wolfgang at the Labour Party Conference and its use against people wearing ‘slogan t-shirts’.¹⁴³ The fieldwork included an interview with an activist who protested regularly against the presence of American bases in the UK.¹⁴⁴ She recounted being routinely stopped under section 44 when near one such base.¹⁴⁵ While the military nexus could be argued to raise counter-terrorism concerns, the fact that the Home Office and MOD police knew her by sight and name, due in part to the fact that she had been involved in the campaign for nearly ten years, strongly suggests that its exercise against her was not related to terrorism.¹⁴⁶ The interviewee was always stopped when in her car: ‘then [the Home Office force] come in front, they follow you, a car behind and then another car overtakes so you’re boxed in’.¹⁴⁷ Such aggressive tactics may exert a chilling effect on the rights to free speech and assembly. The interviewee recalled section 44 being used against a 72 year old woman who was taken from her car and searched.¹⁴⁸ This woman was presumably known to local police, having lived locally for some decades. As Lord Carlile noted, the absence of reasonable suspicion does not mean you do not need a reason to use section 44.

Another aspect of the misuse of section 44 in relation to protests, flagged in the evidence to the JCHR, was officers demanding people’s details following a section 44 search. The interviewee recalled observing a family who had been taken from their car and stopped and

¹⁴¹ COMME.

¹⁴² Joint Committee on Human Rights, *Demonstrating Respect for Rights?* Q290.

¹⁴³ *Ibid.* Ev 106.

¹⁴⁴ COMMB.

¹⁴⁵ COMMB.

¹⁴⁶ COMMB.

¹⁴⁷ COMMB.

¹⁴⁸ COMMB.

searched under section 44 being then photographed by the police.¹⁴⁹ This reinforces the need for PACE Code A to be amended so that the police are obliged to inform people that they do not need to give their details, or any other information, as detailed in Chapter 5. It also underlines the need for public education and the usefulness of signage which details what the police can and cannot do at areas where section 44 is being carried out.

6.2.1.5) Photographers

A final group whose targeting under section 44 has been publicised is photographers. One senior MPS officer admitted 'there's a perception we're picking on photographers'.¹⁵⁰ The JCHR evidence included a submission by a photographer stopped under section 44.¹⁵¹ Other reported incidents include an artist being stopped under section 44 when painting a scene near an airport,¹⁵² a reporter being stopped when photographing the Gherkin, an amateur photographer stopped while photographing the Christmas lights in Brighton and another stopped when photographing a fish and chip shop.¹⁵³ Casting automatic suspicion upon such groups may infringe their right to freedom of expression or, depending on the context, freedom of assembly, although the case law focuses on photography for journalistic ends.¹⁵⁴ More basically, it is using counter-terrorist powers in non-counter-terrorist situations which undermines confidence in counter-terrorist powers as a whole, and PREVENT specifically, and is disproportionate, being unrelated to the objective of the legislation and not the minimum necessary intrusion into their rights.

One of the community interviewees was a professional photographer who had been stopped under section 44 and was involved in the march in Trafalgar Square in January 2010 protesting against the use of section 44 against photographers, which was attended by some 2,500 people.¹⁵⁵ He recounted being stopped on five occasions, usually after being

¹⁴⁹ COMMB.

¹⁵⁰ MPSSNR01.

¹⁵¹ Joint Committee on Human Rights, *Demonstrating Respect for Rights?* Ev 99.

¹⁵² Walker, P and Lewis, P, 'Anti-terrorism police stopped painter near airport' *Guardian* (London, 18th December 2010) <<http://www.guardian.co.uk/uk/2009/dec/18/antiterrorism-police-stop-painter-airport>> accessed 3rd August 2010.

¹⁵³ Batty, D, 'Photographers protest against police stop and search' *The Guardian* (London, 23rd January 2010) <<http://www.guardian.co.uk/uk/2010/jan/23/photographers-protest-stop-search-terrorism-police>> accessed 3rd August 2010; Rowlands, M, 'Media freedoms in the UK curtailed by police "culture of suspicion" and double standards' (Statewatch, 2008).

¹⁵⁴ *Van Hannover v Germany* (2005) 40 EHRR 1; *Campbell v MGN* [2004] UKHL 22.

¹⁵⁵ Batty 'Photographers protest against police stop and search'.

approached by a security guard who then called the police.¹⁵⁶ As a professional photographer he was in no way covert, carrying a tripod and usually a large camera.¹⁵⁷ He was subject to only one stop and search, the other encounters being ‘stop and accounts’, though section 44 was the power cited in all cases. This is a clear misuse of the power as section 44 does not permit officers to carry out ‘stop and accounts’.¹⁵⁸ On one occasion, after refusing to give the security guard details of what he was doing, on the basis that he was on public land, three officers and a riot van responded. On another occasion he was attended by three armed officers and ‘two bobbies on the beat’. This is, at the very least, a questionable allocation of resources.

The interviewee recounted one section 44 stop and search which occurred when he was photographing a church in London:

‘The police were called by the private security guards...in response to the information they were given, that is, there was an aggressive male in the building reception photographing members of staff and refusing to leave. All of that was untrue, apart from being aggressive and my aggression was in not telling them who I was. So when the police arrived, they knew there was no terrorist related activity going on...[I] told the police officer...that anybody stopped by the police wasn’t obliged to give any information ...and he said “well, be that as it may, what’s your name?”...[I refused] So he said, right I’m going to search your camera bag for terrorist-related paraphernalia...he obviously satisfied himself that there was no terrorist related material there. He then asked me for my name and then when I again refused he says “well I’m going to physically search you”. Having a bit of knowledge about this I decided this was not a particularly pleasant option...so I then gave him my information.’¹⁵⁹

This is intimidation in order to secure information that the police are not entitled to. Moreover, if the police were aware that there was no suggestion of terrorist activity they should not have used section 44.

When asked what could improve section 44, the interviewee responded ‘discretion and actually not treating photographers and artists as suspicious just because [they’re taking photos or painting or drawing]’.¹⁶⁰ Several officers disavowed stopping people for ‘simply

¹⁵⁶ COMMC.

¹⁵⁷ COMMC.

¹⁵⁸ C.f. Justice and Security (NI) Act 2007, section 21(1), discussed above, Chapter 5.4.2.

¹⁵⁹ COMMC.

¹⁶⁰ COMMC.

photographing', stating that it would depend on the context: if someone was photographing CCTV in a tube station, especially covertly, then this might prompt an officer to approach them.¹⁶¹ Another officer said she would approach the person and ask what they were doing, noting that architecture students, for example, could have an assignment photographing emergency exits or similar structures.¹⁶² If the explanation sufficed, then no section 44 would be carried out. This chimed with what the community desired: a bit of 'common sense'.¹⁶³ However, another community interviewee questioned where this would lead: 'an officer approaches you and [you] say "I'm an artist and I'm taking pictures because I'm going to sketch these when I get back home..."', let's suppose this person is you – you might be accepted, let's suppose it's a Pakistani guy who can't speak much English in which case the officer's going to turn around and say "you're an...artist? I don't think so", so do they then take that further and say "prove you're an artist"? In which case they're conducting a trial on the street...it's crazy'.¹⁶⁴

While photographing certain buildings or structures may indicate terrorist reconnaissance, there can be no simple correlation between the two. As noted by one interviewee, details of building's structural layout and floor plans are usually publicly available.¹⁶⁵ Maps of CCTV locations in various cities are available on-line, for example, the New York Civil Liberties Union mapped all CCTVs in the city in 2006.¹⁶⁶ Google Earth's 'street view' provides another source of publically available information that could be used in reconnaissance. All of this points to the disproportionality of treating all photographers as suspicious. In late 2009 the Home Office issued guidance underlining that section 44 does not entail a prohibition on photographing in an authorised area.¹⁶⁷

6.2.2) The encounter

In terms of the comportment of the officer during the encounter, there was some variation, among both the full length interviews and the five shorter interviews carried out straight after people had been stopped. Of the longer interviews, COMMD, who had been stopped

¹⁶¹ BTPSNR03; BTPSNR01.

¹⁶² MPSSNR02.

¹⁶³ COMMC.

¹⁶⁴ COMME.

¹⁶⁵ COMMC.

¹⁶⁶ NYCLU, 'Who's watching? Video surveillance in New York City and the need for public oversight' (NYCLU, New York 2006).

¹⁶⁷ Home Office 'Circular 012/2009: Photography and Counter-terrorism Legislation' (Home Office, London 2009).

and searched twice under section 44, said the police ‘were courteous, they were lovely’.¹⁶⁸ COMMA, referring to the misuse of section 44 against the GLBT community, said that the officers were ‘truculent’. COMMB found the officers to be ‘rude and aggressive...“do it”, sort of thing, “get out of the car”’.¹⁶⁹ Of the shorter interviews, one thought the officer was ‘quite abrupt’¹⁷⁰ while the other four interviewees were broadly satisfied with the encounter, stating variously that ‘it was fine’,¹⁷¹ ‘it was carried out fairly and discreetly’¹⁷² and it ‘was quite nice’.¹⁷³ The last comment was from a 16 year old male. When asked about whether the police were polite and whether he was happy with the encounter he answered: ‘I’d a good laugh’.¹⁷⁴ 9% of all MPS section 44 stops between January and October 2009, where the person gave their details, were carried out on under 21 year olds.¹⁷⁵ The interviewee’s response highlights that the police must pay particular attention to explaining the nature and potential consequences of the stop to young people, as well as adhering to PACE, Code A.¹⁷⁶

In terms of giving out stop forms and explaining the legal base of the power, all bar one of the ‘short’ interviewees were given a stop form and informed of the legal base.¹⁷⁷ However, the ‘long’ interviewees were on the whole negative regarding the information that police gave them during the encounter. CommE was stopped, although not on under section 44, and was not given a stop form.¹⁷⁸ CommC was given a form on all but one occasion during which the officer stated that they no longer needed to issue stop forms.¹⁷⁹ Although the

¹⁶⁸ COMMD.

¹⁶⁹ COMMB.

¹⁷⁰ COMMS1.

¹⁷¹ COMMS4.

¹⁷² COMMS5.

¹⁷³ COMMS3.

¹⁷⁴ COMMS2.

¹⁷⁵ Source: MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: Jan 2009’; MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: Feb 2009’; MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: March 2009’; MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: Apr 2009’; MPS Sample Borough, ‘Police and Community Safety Board: Annual Report 2009-2010’; MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: Jun 2010’; MPS, ‘Borough Breakdown of Stops and Searches Under the Terrorism Act: July 2010’.

¹⁷⁶ Home Affairs Committee, *Young Black People and the Criminal Justice System*, Ev 346 (Memorandum submitted by the Metropolitan Police Service) table 4.

¹⁷⁷ COMMS1, COMMS2; COMMS3, COMMS4, COMMS5.

¹⁷⁸ COMME.

¹⁷⁹ COMMC.

officers informed him of the legal base of the stop they then (illegally) demanded his details on a number of occasions.¹⁸⁰ This type of obfuscation is contrary to PACE Code A and the NPIA advice, and underlines the difficulty of ensuring control over street policing. COMMB was given a stop form but no information regarding the legal base of the stop, although she noted that it was several years ago and that now 'maybe they're a little bit more...careful about things'.¹⁸¹ When asked whether stop forms were given or asked for, ComMA replied 'no...our members who have been stopped are not really in a position to argue much'.¹⁸²

When asked whether they had heard of their Police Authority or the IPCC, two of the 'short' interviewees had heard of the IPCC but none had heard of their PA.¹⁸³ Given that the short interviews were carried out directly after the stop, the interviewees did not have an opportunity to read the 'stop leaflet', which lists organisations that can provide advice or to whom a complaint can be made.¹⁸⁴ In terms of complaints, most of the 'long' interviewees were pessimistic regarding their usefulness. COMMA highlighted the power differential between the police and the person stopped, saying, in relation to noting the officer's number and making a complaint: 'it's ok if you're a member of, you know, Tunbridge Wells Women's Institute and live on the high street but it's not down the back alleys and the police know that'.¹⁸⁵ He also noted that people would fear 'being picked on more' by the police and so not complain.¹⁸⁶ While he tried to challenge some of the stops, the lack of stop forms was a serious obstacle.¹⁸⁷ COMMC was aware of the IPCC and had made a complaint to the police force regarding one of his stops, specifically the fact that it was prompted by security guards who gave false information.¹⁸⁸ COMMD noted that when complaints were made in person at a station their effectiveness was undermined by delays and the fact that 'it's not a very nice environment'.¹⁸⁹ He contrasted the complaints procedure in relation to the police to that relating to doctors, election candidates or supermarkets where there is a choice of

¹⁸⁰ COMMC.

¹⁸¹ COMMB.

¹⁸² COMMA.

¹⁸³ COMMS1; COMMS5.

¹⁸⁴ Appendix B: BTP: Stop and Search Guide.

¹⁸⁵ COMMA.

¹⁸⁶ COMMA.

¹⁸⁷ COMMA.

¹⁸⁸ COMMC.

¹⁸⁹ COMMD.

service provider: 'with policing I have no choice'.¹⁹⁰ At the interview, COMMB showed copies of four letters of complaint which she wrote to the local Chief Constable, one of which was a follow-up to earlier correspondence. The complaints concerned three separate incidents. There was no response to any of the letters. When asked whether she would consider complaining to the IPCC, she replied: 'I think being realistic I wouldn't waste my time'.¹⁹¹

6.3) Assessment

This section will thread together the arguments from the preceding sections to conclude whether there is evidence of disproportionality or misuse in relation to section 44 and, if so, how this can be explained and what changes could be made to ameliorate the situation.

6.3.1) Disproportionality

None of the statistical limitations discussed above can fully account for the on-going statistical disproportionality evident in the section 95 data. Factors which might 'reduce' the disproportionality between 'Black' and 'Asian' people as against 'white' people include the under-reporting of stops, with officers wanting to 'do it by the book' in relation to BME communities, and the increase in population, particularly in relation to Asians, since the last census against which the proportion of stops are judged.¹⁹² Neither is likely to account for the substantial deviation between the census break-down and that of section 44. As discussed above, the 'available population' thesis does not fit well with the usage of section 44. This leads to the conclusion that section 44 is exercised in a manner that disproportionately impacts upon 'Black' and 'Asian' people. The fieldwork, in combination with some of the secondary literature, suggests that section 44 may also impact unevenly on other groups, such as 'protesters', 'photographers' and the members of the GLBT community, although the sample was too small to draw definite conclusions. As emphasised already, to a degree, the practice is irrelevant if there is a continuing perception of disproportionality as this will decrease the legitimacy of the power in the eyes of the community. The difficulty of altering such perceptions is underlined by the fact that, as noted by two interviewees, the public do not care under what power they are stopped, nor by

¹⁹⁰ COMMD.

¹⁹¹ COMMB.

¹⁹² Fitzgerald, M, 'Final Report into Stop and Search' (Metropolitan Police Authority, London 1999).

which force, but simply that they have been stopped by the police and that encounter influences their attitude towards all stop and search practices.¹⁹³

Aspects of the various explanations in section 6.2.2.1 above apply to the different manifestations of disproportionality. The targeting of GLBT people on cruising grounds appears to be, as was attested by the community interviewee, a case of some 'bad apples', who were acting far from supervisory oversight.¹⁹⁴ During the observation of the BTP force while they carried out section 44s, no member of an ethnic minority was stopped, however, the area in which the deployment was taking place had a substantial white majority. On the evidence of the police interviews, the 'profiling' of 'Muslims' or those appearing to be Muslims, also seems to be the province of a few 'bad apples'. Although none of the officers admitted profiling, some felt that they should be able to profile.¹⁹⁵ As noted already, the community sample was far too small to draw empirical conclusions whether or not any of the communities or groups were being disproportionately targeted. It seems highly unlikely that the association in much of the media, and occasionally among politicians, of 'Muslim' and 'Asian' or 'Arab' and 'Islamic terrorism' and the increasing levels of Islamophobia has not impacted upon public perceptions of what a terrorist 'looked like'. If the reflection of society thesis is accurate, then this is likely to have seeped through to at least some officers.

These theories at best account for only some of the uneven application of section 44. A better explanation is that these diverse groups constitute what Reiner terms 'police property'.¹⁹⁶ Discovering which characteristics of each group makes them susceptible to be treated as such requires disentangling the multiple-discriminations suffered by the communities or groups, whether cumulatively or intersectionally. Such disaggregation permits a closer investigation of the origins of the disproportionality while contesting the homogenisation of the various 'others' into one simple category which denies internal difference. This incorporates the various explanatory theses discussed above and permits accommodation of those who do not actually fall into a 'suspect' category but are perceived to fall into one. To take one example: Pakistani young men, they come from one of the most socio-economically deprived sections of society. In addition, being young men, they are more likely to come to the attention of the police in stop and search practices. Finally, being Muslim, they are more likely than, for example, young Norwegian men, to be additionally

¹⁹³ COMMF; BTPSNR04.

¹⁹⁴ COMMA.

¹⁹⁵ See Chapter 5.1.1.

¹⁹⁶ Reiner, *The politics of the police* 78.

impacted upon by counter-terrorist policies.¹⁹⁷ This suggests that in attempting to combat this disproportionality one must look at why the police target young men, why they target the socially deprived and why they target Muslims. It is impossible from this study to determine to what extent each factor influences the police but this thesis argues that this disaggregation points to the areas of accountability that can and should be strengthened.

6.3.2) Legal accountability

In terms of legal accountability, the misuse of section 44 as detailed by some of interviewees is ultra vires and would, if the facts were proven, succeed in a case for judicial review. A claim could also be brought for misfeasance in a public office, for damages arising for the misuse of public power whereby the holder of the public office deliberately or recklessness abused their power.¹⁹⁸ However, as noted by some interviewees, the difficulty is in proving the case when the encounter forms part of street policing. It has already been outlined how the routine use of section 44, in accordance with the limits set forth in TACT and PACE Code A infringes ECHR, Articles 5, 8, 10 and 11, albeit with a likely justification for the infringement of Article 5.¹⁹⁹ That discussion will not be rehearsed here again. An alternative route would be for the person stopped to sue the police in tort for false imprisonment, battery and/or assault. If proven, then ordinary damages would be awarded, with damages for false imprisonment starting at around £500 for the first hour.²⁰⁰ If police are proven to have acted in a 'high handed, insulting, malicious or oppressive manner' or to have humiliated the person, then aggravated damages are likely to be awarded of between £1,000 and £2,000.²⁰¹ Exceptionally, exemplary damages may be awarded if the police are deemed to have acted in an 'oppressive or arbitrary' way.²⁰² These figures are of course guidelines only and it is notable that they were set out in relation to arrest and detention,

¹⁹⁷ Department for Communities and Local Government 'The Pakistani Muslim Community in England: Understanding Muslim Ethnic Communities' (The Change Institute, London 2009) [1.4].

¹⁹⁸ *Three Rivers Council v Bank of England (No. 3)* [2000] 2 WLR 1220; *Three Rivers Council v Bank of England (No. 3) (Summary Judgement)* [2001] UKHL 16.

¹⁹⁹ See Chapter 4.4, Chapter 5.4.

²⁰⁰ *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515.

²⁰¹ *ibid*, 516.

²⁰² *ibid*, 516-7.

although there seems no reason why they would not be equally applicable to cases where stop and search powers were misused.²⁰³

Another possible avenue of legal recourse would be the Equality Act 2010 which protects the characteristics of, inter alia, race, religion or belief and sexual orientation from discrimination from, inter alia, the police.²⁰⁴ These characteristics clearly provide protection to Muslims, under the characteristic of religion, and to GLBT persons who are disproportionately targeted, under the characteristic of sexual orientation. There is a question whether 'Muslims' or 'British Muslims' constitute a 'racial group' and could therefore claim additional protection under the 'race' characteristic. A 'racial group' is defined as 'a group of persons defined by reference to race', which includes colour, nationality and ethnic or national origins.²⁰⁵ As the Equality Act came into force in October 2010 and there is no case-law to date, the following discussion will refer back to the definition in the Race Relations Act 1976, section 3(1), and related case-law. Section 3(1) differed from the Equality Act 2010, section 9 in one respect only: it included 'race' within the definition of a racial group.²⁰⁶

Research on religious affiliation, from the Home Office Citizenship Survey, underlines the heterogeneity of British Muslims, who are found in fourteen 'national' groups, in terms of national origins in a broad sense, not necessarily equating to either nationality or citizenship, with significant cultural, historical and linguistic variations among them.²⁰⁷ On the basis of ethnicity as recorded in the census, 76% of British Muslims are 'Asian', 6% are 'white', 3% are 'mixed', 4% are 'Black' and 8% are 'other'.²⁰⁸ It is evident from this survey that British Muslims cannot be said to form a racial group on the basis of colour or national origins.

British Muslims may still come within the protection of the Act if deemed to be an 'ethnic group'. In *Mandla v Dowell Lee* Lord Fraser defined an 'ethnic group' as one which regards itself, and is regarded by others as a distinct community by virtue of specific

²⁰³ *ibid.* See also: *Manley v Commissioner of Police of the Metropolis* [2006] EWCA Civ 879; *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773; *Rogers, Winfield & Jolowicz on Tort* [22.8-9].

²⁰⁴ Equality Act 2010, sections 4, 9, 10, 12.

²⁰⁵ Equality Act 2010, sections 9(1),(3). 'Caste' may be added as a characteristic by ministerial order (Equality Act, section 9(5)).

²⁰⁶ Race Relations Act 1976.

²⁰⁷ Department for Communities and Local Government, 'The Pakistani Muslim Community in England: Understanding Muslim Ethnic Communities', tables 2 and 3.

²⁰⁸ O'Beirne, M, 'Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey' (Home Office Research, Development and Statistics Directorate London 2004) table 2.3.

characteristics.²⁰⁹ Essential among these are: 1) 'a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; 2) a cultural tradition of its own, including family and social customs and manners'; other relevant, but non-essential, characteristics are: 'a common geographical origin, or descent from a small number of common ancestors'; 'a common language';²¹⁰ 'a common literature peculiar to the group'; 'a common religion different from that of neighbouring groups or from the general community surrounding it'; 'being a minority or being an oppressed or a dominant group within a larger community'.²¹¹ Applying this definition, Sikhs were held to be an ethnic group for the purposes of the Race Relations Act 1976.²¹² Also relevant is the historical age of the ethnic group.²¹³ It seems that a majority population can constitute an ethnic group.²¹⁴

It follows that 'British Muslims' are not an 'ethnicity', for although they have a common religion, ignoring differences, for example, between – or indeed within – Shi'ism and Sunnism, and common cultural traditions and history pertaining to Islam there are substantial cultural and historical differences among the various national and ethnic groups comprising British Muslims. This is underlined by the fact that the absence of protection for religious groups under the offences of 'racial hatred' in the Public Order Act 1986, in particular Muslims, was a motivating factor for passing the Racial and Religious Hatred Act 2006, which amended the Public Order Act. The same impetus was evident in the attempt to introduce religiously aggravated offences, offences of religious hatred and the incitement to religious hatred in the ATCS Bill 2001, although the clauses did not feature in the final Act.²¹⁵

It is possible that some of the sub-groups of 'British Muslims' could constitute a racial group for the purposes of the Equality Act. Pakistani and Bangladeshi Muslims would clearly constitute a 'racial group' on the basis of shared nationality. It also seems likely that a sub-

²⁰⁹ *Mandla v Dowell Lee* [1983] 2 AC 548, 562.

²¹⁰ Note that common language alone is insufficient to constitute a racial group (*Gwynedd CC v Jones* [1986] ICR 833).

²¹¹ *Mandla v Lee* 562.

²¹² Section 1(1).

²¹³ *Crown Suppliers v Dawkins* [1993] ICR 517.

²¹⁴ *Ealing LBC v Race Relations Board* [1972] 2 WLR 71, 364 (Lord Simon); *Northern Joint Police Board v Power* [1997] IRLR 610; *BBC Scotland v Souster* [2001] SC 458; *Gwynedd CC v Jones* [1986] ICR 833. C.f. *Commission for Racial Equality v Dutton* [1989] 2 WLR 17, 801.

²¹⁵ ATCS Bill 2001, Part V. Grimwood, G and Miller, V, 'The Anti-terrorism, crime and security Bill: Parts IV & V: immigration, asylum, race and religion' (HC Library (Research Paper 01/96), 2001).

group such as Indian Muslims would constitute an ethnic group as analogous to the *Mandla* ruling relating to Sikhs: they are distinct from the rest of the population in India in terms of their religion, language and significant aspects of their culture, and have a long shared history which, while not divorced from that of other Indians is nonetheless distinctive. Therefore, in addition to action against the police for the ultra vires use of section 44, it may be that such sub-groups of 'British Muslims' could bring a case under the Equality Act. However, under the present recording requirements, it would be extremely difficult for one of these sub-groups to adduce sufficient evidence for such a claim.

6.3.3) Community accountability

One of the central conduits between the community and the police are the PAs. One of the criticisms made of PAs in the Home Office's 'Policing in the 21st Century: reconnecting the police and the people' is that they 'remain too invisible to their public. The public do not know how to influence the way policing is delivered in their community, let alone get involved'.²¹⁶ This criticism seems valid, with none of the 'short' interviewees having heard of their PA. The PAs were initially hoped to herald the democratisation of policing and police accountability but have, on the whole, proven to be toothless and timid, with the MPA being a notable exception.²¹⁷ The MPA's 'London Debate' and the MOD Committee's internal inquiry into section 44 reveal that PAs (or their non-Home Office variants) can exert accountability over their force's use of section 44.²¹⁸ Nationally, the APA's 'Know Your Rights' card is a significant step forward in informing the public of their rights under stop and search.²¹⁹

Being a conduit between the public and the police is a central aspect of PA's responsibility, underlined by the fact that those members of the PAs and APA who were interviewed wished to be counted among the 'community stakeholder' category. However PAs are relatively technical organisations which can be, in comparison to the police, remote from the communities they serve. The police, being on the front-line, are in a better position to increase public awareness of PAs than the PAs themselves. Some easy ways of doing this would be to add details of the local PA to the stop form and to have visible links to the PA from the force website, as some forces do. A structural change that would bring greater oversight would be to require PAs to consider the force's adherence to the HRA, as the Northern Ireland Policing Board does in relation to the PSNI.

²¹⁶ Home Office, 'Policing in the 21st Century' [2.4].

²¹⁷ Kempa, M, 'Tracing the diffusion of policing governance models from the British Isles and back again' (2007) 8 *Police Practice and Research* 107, 114.

²¹⁸ MPA 'Counter-terrorism: the London debate'; MOD Police Committee 'MOD Police Committee's Annual Report 08/09' (MOD Police committee, 2008) [16-21]; MODPC.

²¹⁹ See Appendix B.1.

The Government has tabled a bill that would replace PAs with 'Police and Crime Commissioners', who are to be directly elected by the public with the aim of providing democratic accountability.²²⁰ Both the MPS and BTP are excluded from these plans, the former because they already have 'strong' local accountability, the latter because they are a non-home office force.²²¹ The Police and Crime Commissioners will be assisted by a Police and Crime Panel, established by the local authority or authorities, with ten members from the authority/authorities and two members co-opted onto the Panel.²²² This continues the movement from a practical accountability, which sought to exert control or require explanations for actions, towards managerialism and professionalism with a 'market-based "calculative and contractual" style of accountability', summarised by Reiner and Newburn as the move 'from PC Dixon to Dixon PLC'.²²³ The locally elected Commissioner will have a term of four years, with a maximum two term limit.²²⁴ They will have similar powers to authorities: *inter alia*, holding Chief Constables to account;²²⁵ ensuring the force is efficient and effective;²²⁶ agreeing a local strategic 'police and crime plan',²²⁷ and, appointing and removing Chief Constables.²²⁸

Ultimately both PA's activism and the success of community / police structures depends on the composition of its members and the interest of its communities. PAs tend to be trapped within well-worn tracks whereby the 'usual suspects' make their voices heard, but it is difficult to break beyond these confines to truly 'engage' with the public. Another problem, mentioned by one officer, is meeting fatigue.²²⁹ He had recently combined the various meetings into one to try and reduce the problem.²³⁰ Another problem that was noted is that people turn up when there is a problem, not when things are going smoothly,²³¹ which engenders a fire fighting response rather than more calculated long term strategy. All these

²²⁰ Police Reform and Social Responsibility Bill 2010, section 1. See also: Home Office, 'Policing in the 21st Century' Chapter 2.

²²¹ Police Reform and Social Responsibility Bill 2010, section 1(1).

²²² Police Reform and Social Responsibility Bill 2010, section 28; schedule 6, paragraph 3.

²²³ Newburn, T and Reiner, R, 'From PC Dixon to Dixon PLC: policing and police powers since 1954' [2004] Supp (50th Anniversary Edition) CrimLR 101, 113.

²²⁴ Police Reform and Social Responsibility Bill 2010, section 50(1); 65.

²²⁵ Police Reform and Social Responsibility Bill 2010, section 1(7-8).

²²⁶ Police Reform and Social Responsibility Bill 2010, section 1(6).

²²⁷ Police Reform and Social Responsibility Bill 2010, section 5.

²²⁸ Police Reform and Social Responsibility Bill 2010, section 38.

²²⁹ BTPSNR01.

²³⁰ BTPSNR01.

²³¹ BTPSNR01.

problems are likely equally to afflict the Police and Crime Commissioners. A dual strategy that exploits fixed structures, such as police-community structures, in addition to more general public awareness campaigns is needed to overcome these difficulties.

At the local level there has been a proliferation of community / police structures, with the MPS borough having a Crime and Disorder Reduction Partnership (CDRP), a Police and Community Safety Board (PCSB), an IAG, and neighbourhood policing teams. The CDRPs and PCSBs provide borough level accountability and feed into city-wide structures such as the MPA. The PCSB provides the community with a link between local government, in the form of the local Council, the MPA and the MPS, with representatives from each group on the board. In 2009-10, the PSCB held three executive and four public meetings, two of which were aimed specifically at young people, and four stop and search community monitoring group meetings.²³² In the minutes of PSCB meetings, held over a period of sixteen months, three presentations were given on stop and search.²³³ No particular issues regarding section 44 were raised, although the use of CJPO, section 60 in relation to knife crime and the use of stop and search in relation to drugs were discussed.²³⁴ In the minutes of a community question and answer session, stop and search was raised as one of nearly forty questions, though the focus was on section 60.²³⁵ It is notable that the locally agreed priorities among the twenty-odd safer neighbourhood teams focused overwhelmingly on anti-social behaviour and drug misuse.²³⁶

The MPS and the BTP both have IAGs, the BTP having a national IAG and an Independent Advisory Network centred on London which feeds into the national IAG. Members of IAGs are provided with access to some privileged information, notified in advance of some proactive operations, invited to observe the police and invited to attend some pre and post-operation briefings.²³⁷ Potentially they constitute a robust form of community accountability. One weakness is that, in the absence of any statutory requirement, they rely on police cooperation to invite them to the various operations and share information with them and to take regard of their recommendations.

²³² MPS Sample Borough, 'Police and Community Safety Board: Annual Report 2009-2010'.

²³³ PCSB 'Notes of the meeting on -- 2008' (PCSB, London 2008) [5]; PCSB 'Notes of the meeting on -- 2008' (PCSB, London 2008) [3]; PCSB 'Notes of the meeting on -- 2008' (PCSB, London 2008); PCSB 'Notes of the meeting on -- 2008' (PCSB, London 2008). *Note: this references, and those below, have been redacted to ensure the anonymity of the sampled borough.*

²³⁴ PCSB '--' (PCSB, London 2008).

²³⁵ PCSB '--' (PCSB, London 2009).

²³⁶ <http://www.met.police.uk/teams/--/index.php>.

²³⁷ <http://cms.met.police.uk/met/boroughs/-->.

In terms of formal structures, the MPS's system of 'stop teams' provides an example which could be adapted by other forces. There are 'stop meetings' at borough level, convened by the PCSB,²³⁸ 'which scrutinise their local borough for stop and search and they hold their local commander and the officers of the local station accountable for stop and search'.²³⁹ The information is brought together at force level within the 'stop and search action team' which oversees the implementation of stop and search policies and liaises with the MPA.²⁴⁰ This permits dialogue at local level which may identify borough issues while also encouraging a broader analysis at force level. In addition for section 44, as a counter-terrorist power, there are local counter-terrorist forums which, in the borough surveyed, worked primarily with businesses, local authorities and housing associations, explaining what was happening on the counter-terrorist front through meetings 'every 5 to 6 weeks'.²⁴¹ These meetings sometimes had guest speakers such as 'senior officers...[and] associate Professors from universities who've come in to talk about different things and different perceptions so within that area we try to explain the reasoning behind what we're doing'.²⁴² This separation into business and other communities is sensible as different constituencies have different needs and priorities, particularly in relation to counter-terrorism, and may play different roles in relation to the police. For instance, large businesses may be informed if there is a heightened threat of a particular type of attack so that they can be alert and provide feedback to the police. Providing information at borough and force level increases the likelihood that the information will be digested and permits the borough to focus on local issues while at force level more general information can be conveyed.

In addition to these formal structures, the borough was intending to do a 'road-show' at one of the sites where section 44 was deployed. The officer explained that this entailed setting up a stand and saying 'this is why we're doing it; here, come and speak to us...tell us if you want us to do it differently'.²⁴³ In a similar public awareness raising exercise, members of one of the BTP forces sometimes deployed posters explaining that section 44 was being used, what the power was when exercising section 44 and had signs on their vans explaining section 44.²⁴⁴ This type of public awareness raising, particularly in areas where section 44 is deployed frequently should be carried out by all forces. One pitfall of increasing public awareness is that constant information tends to be 'normalised'. As one officer noted, no

²³⁸ PCSB 'Notes of the meeting on -- 2008' (PCSB, London 2008) [5.2].

²³⁹ MPSSNR01.

²⁴⁰ MPSSNR01.

²⁴¹ MPSSNR02.

²⁴² MPSSNR02.

²⁴³ MPSSNR04.

²⁴⁴ BTPFL03.

one really pays attention to the various automated announcements at railway stations or in trains.²⁴⁵ Varying the method of communication may help – using posters, ‘road-shows’, stop leaflets, websites and occasional public awareness campaigns on the television or radio.²⁴⁶ This type of ‘on the spot’ public awareness raising is particularly important in order to ensure communication with the transient communities stopped under section 44.

Tied into this must be increased transparency regarding how section 44 is being used. In this the MPS have shown best practice by publishing, on a time lag of three-months or so, borough data on stops and search, including section 44, broken down by officer defined ethnicity, self-defined ethnicity, age, gender and whether it was a section 44(1) or section 44(2) search. They have also, albeit after a FOI request, begun publishing some authorisation data, providing details of the length of the authorisation and the date it was confirmed by the Home Office. Although the degree to which perceptions of disproportionality can be challenged is questionable, the most effective way of doing so is by transparency regarding the use of section 44 and publishing as much information as possible regarding its exercise. A similar approach to publishing a break-down of stop and search data should be adopted by all forces.

6.3.4) Complaints

In relation to complaints, there was a sense of resignation among the interviewees – ‘what’s the point?’²⁴⁷ The difficulty in ‘proving’ a complaint given the ‘street policing’ nature of stop and search aggravates this sense of powerlessness. While the IPCC serve as an independent body to which the public may turn it is a small organisation with limited resources which means, despite the priority put on stop and search by the IPCC’s Mike Franklin, that it cannot handle all the ‘routine’ stop and search complaints. The IPCC has requested that all forces pass any section 44 complaints to it. However, the forces are under no statutory duty to do so. The PAs, as mentioned above, suffer from a lack of visibility among the community and have, like the IPCC, limited resources and multiple functions. They can and should be more prominent in dealing with complaints, in particular ensuring that any training is carried out and reviewing any potential systemic problems.

The bottom line is that it is likely that very few of the people who are unhappy with the stop and search encounter complain. One interviewee said, ‘I don’t want us to keep focusing on complaints I want us to have constant feedback flows so that...it wouldn’t be a case of “we’ve only got four complaints”, it would be “we’re actually going to seek those people

²⁴⁵ BTPSNR01.

²⁴⁶ BTPSNR01; MPSSNR04.

²⁴⁷ COMMS1.

and get feedback”²⁴⁸ He suggested that the stop forms which had details included be dip-sampled and those people contacted and asked ‘three or four questions’.²⁴⁹ This is an excellent suggestion which would enable forces, and PAs, to determine how the community felt they were performing in relation to stop and search rather than focusing merely on the ‘number’ of complaints, which is likely to be unrepresentative. Moreover, it would provide an opportunity for community engagement and positive feedback regarding any aspect of the encounter that the person stopped felt was carried out well. This type of ‘dip sampling’ could be carried out by the community liaison officer. Such sampling would have an inherent flaw in that it could only reach those persons who had given their (accurate) details, perhaps indicating satisfaction with the encounter or ignorance of the law. Nonetheless, it would be an improvement on the current approach and its sampling failings could be counteracted, to a degree, by combining it with other approaches, such as observations by IAGs or other independent groups.

6.3.5) Other forms of oversight

In addition to accountability, there are three other main changes which could provide additional oversight in relation to section 44. The first is to issue more detailed guidelines, whether in the form of PACE, Code A or Home Office Circulars or guidance from the NPIA. Suggestions for such improvements have been detailed in Chapters 4.5 and 5.5. The second response is through training. Training on stop and search is carried out during police training at Hendon. One of the officers had one full day on section 44: ‘about what to search for, how to search a bag, how to search a vehicle’.²⁵⁰ In addition to this some refresher and/or additional training on search powers generally and/or section 44 specifically was given to at least some of the officers.²⁵¹ Two BTP officers mentioned watching a DVD on section 44.²⁵² Officers were also given briefings on the intra-net on section 44, in particular on changes to operations, and in relation to counter-terrorism generally.²⁵³ One senior BTP officer noted that cultural training was included: ‘we have a whole briefing section on the intranet around section 44 and the reasons for doing it, the issues around, terrorists are not all brown, wearing turbans and beards and Islam covers...so we do all of that and we do a lot of work around the Sikhs and the use of the kurpan and the 7 Ks and all of that...don’t

²⁴⁸ COMMD.

²⁴⁹ COMMD.

²⁵⁰ MPSCO1.

²⁵¹ MPSFL02; BTPFL01.

²⁵² BTPFL02; BTPFL03.

²⁵³ BTPSNR04; MPSSNR02.

use dogs in a Mosque to search it unless we've really, really got good reasons...and the taking off of the shoes...and all the things around Ramadan that we need to be aware of'.²⁵⁴

After the initial training period most 'refresher' training appears to be via the intranet, as do most briefings – indeed, one of the BTP forces was briefed purely through self-briefings over the intranet.²⁵⁵ None of the officers had heard of anyone being required to undergo additional formal training, following a poor encounter or complaint, although some said that a more senior officer would 'have a word'.²⁵⁶ It would be beneficial to formalise the requirement of additional training for officers who are deviating from the desired approach to the encounter, be it in their attitude towards the public, or their completion of the stop form etc., especially given the emphasis on 'self-briefing' and 'self-training' which could result in some officers continuing bad practices.

A final change would be to increase contemporaneous oversight by superiors. The MPS and one of the BTP forces interviewed routinely deployed officers using section 44 in teams with a sergeant present. For forces that do not do so, the deployment of a sergeant alongside PCs, at least occasionally, would be beneficial, enabling them to identify, as necessary, any points of practice that could be improved. However, limited resources mean that this will not routinely be possible within all forces. The nature of street policing means contemporaneous oversight will always be of limited impact as, even if a sergeant is present, they cannot monitor the actions of all their team simultaneously.

6.4) Conclusion

Despite the provisos regarding the section 95 statistics, the disparity in the statistics is such that it is apparent that 'Black' and 'Asian' people are disproportionately targeted by section 44 in comparison to 'white' people, especially given the inapplicability of the 'available population' thesis to section 44. The fieldwork, and some secondary literature, suggests that there are additional 'communities' who are disproportionately impacted upon by section 44. The extent of these practices is unclear. It is the extraordinary discretion inherent in section 44 which enables it to be abused, whether by 'rogue officers' targeting gay 'cruising grounds' or more systematically against 'Asians' or 'Black' people. The absence of a requirement of reasonable suspicion reinforces the perception among British Muslims, in particular Asian Muslims, that the reason they are being stopped is that they 'look' Muslim/ 'Asian'. Some of the suggestions in relation to accountability in terms of 'giving an account' of the authorisation and deployment of section 44, discussed in Chapters 4 and 5, might reduce its use against protesters and it must be hoped that places such as Hampstead

²⁵⁴ BTPSNR04.

²⁵⁵ BTPSNR01.

²⁵⁶ See Chapter 5.2.1.

Heath are not covered by the patchwork authorisation. However, it is difficult to see how the perception that people are being targeted because they 'look' Muslim can be challenged without introducing some form of reasonable suspicion. Despite these difficulties, improved public awareness of how section 44 is deployed and greater transparency from forces should lead to improved levels of trust between the police and communities.

Chapter 7) Conclusion

7.1) Introduction

This final Chapter draws together the threads of the various arguments made in the preceding Chapters. The first section reflects critically on the thesis. The subsequent section summarises the main conclusions and recommendations regarding how section 44 should be amended so that it adheres to the framework principles. The following section considers how these proposals compare with the amended power under TACT, section 47A, which is the same as the amended power proposed under the Protection of Freedoms Bill 2010-11.¹ The final section highlights areas of continuing concern.

7.2) Critical reflection

The socio-legal approach of this thesis has enabled a detailed and nuanced analysis into how section 44 is used by the MPS and BTP and for what perceived ends, as well as how it ought to be used to adhere to the framework principles. The case-study approach to the two forces provides an in-depth picture of their usage of section 44 and, while conclusions cannot be necessarily drawn regarding the use of section 44 by other forces, some of the best practice which has been highlighted should be applied across the board. Moreover, the focus on the MPS and BTP was warranted by their substantial use of section 44, the two forces accounting for over 85% of the total section 44 stops carried out between 2005/06 and 2007/08.²

While the interviews of community representatives permitted areas of potential concern to be highlighted, it was not possible to qualitatively examine in depth the 'whole' 'community'. It would make an interesting study to investigate further the various communities and groups highlighted within Chapter 6 as being disproportionately impacted upon by section 44 to determine how widespread such practices are. Similarly, as part of a study into the perceptions of Muslim communities towards counter-terrorist policing, it would be interesting to see whether section 44 can be disaggregated from other stop and search powers and whether stop and search as whole can be disaggregated from other policing powers and what the impact of each is upon the community's perception of the police.

¹ Section 60.

² BTP, 'Annual Report: 2008-09'; BTP, 'Annual Report: 2007-08'; BTP, 'Annual Report: 2006-07'; BTP, 'Annual Report: 2005-06'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2007/08'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System 2006/07'; Ministry of Justice, 'Statistics on Race and the Criminal Justice System - 2006'; Home Office, 'Statistics on Race and the Criminal Justice System - 2005'.

It would also be interesting, but was beyond the scope of this work, to carry out a comparative study, in terms of current and historical laws, of stop and search powers which do not require reasonable suspicion. Relevant jurisdictions would be the Republic of Ireland and South Africa, which are both common law countries that used emergency legislation which provided broad policing powers. The USA and Australia could also provide an interesting comparison in terms of their considerably more recent legislation against terrorism. In addition, it would be interesting to analyse whether the US Constitution enables more effective accountability of police stop and search, with particular reference to Fourth Amendment.

7.3) Principal research findings

7.3.1) How did the powers of stop and search develop historically?

Chapter 3 surveyed police powers to stop and search from the Vagrancy Acts to the present. This historical study revealed two major trends and two perennial complaints. One trend was the use of the powers to ‘control’ the streets, targeting the ‘police property’: those groups at the margins of society or who were viewed as ‘problematic’. These ranged from itinerant vagrants or ‘strangers’, to the local poor, and immigrant communities. In Northern Ireland this saw counter-terrorist stop and search powers used primarily against the minority Catholic population. A second trend was the use of the powers against sub-criminal behaviour, which was evident in the later Vagrancy Acts but has been avoided post-PACE. The two perennial complaints concerned excessive police discretion and the disproportionate targeting of certain groups or communities. There is a clear overlap between the two trends and complaints – broad discretion enables the disproportionate targeting of ‘problem’ groups, which also flows from the use of the powers to ‘control’ the streets. Similarly, the criminalisation of sub-criminal behaviour provides the police with greater discretion than would ordinarily be afforded them and feeds back into a loop, enabling the disproportionate use of the power. It is important to note that while there was clear evidence of disproportionality in respect of certain powers at certain times, the perception of disproportionality can be just as damaging to police-community relations as actual disproportionality.

While PACE was a significant improvement on ‘sus’ and section 66, the Macpherson Report evidences the on-going difficulties in achieving a balance whereby police have the power to stop and search short of arrest, which requires a wide discretion, and effective accountability and oversight, which would ensure that the power is used proportionately. Stop and search powers are situated within ‘street policing’, meaning that either the discretion must be curbed *ex ante* or that it must be accounted for *post facto*. It is not routinely possible for there to be

effective oversight at the time the power is deployed. Where the power is not limited by reasonable suspicion, the balance is tilted towards post facto accountability.

There is clear evidence that stop and search powers can be exceptionally damaging to police-community relations where there is a perception, and/or reality, of the disproportionate use of the powers. It should also be noted that 'street policing' powers are often conflated – as 'sus' and section 66 were – in the minds of the public.

7.3.2) How is section 44 used and how ought it be used?

Chapters 4 and 5 considered how section 44 was authorised and deployed and how it ought to be authorised and deployed in order to adhere to the framework principles. Section 44 is used primarily for the objectives of disruption and deterrence and intelligence gathering. Neither TACT nor the accompanying 'soft' regulations exclude section 44's use for deterrence and disruption but its use for intelligence gathering is far more dubious, and may raise issues under the ECHR, Article 6 and/or 8, depending on the facts.

The authorisation process is insufficiently robust to permit consideration of the proportionality of the authorisation, as evidenced by the *Gillan (ECtHR)* case. This flows primarily from the low 'trigger' of 'expedient', which is exacerbated by the ineffectiveness of the safeguards. On the evidence available, ministerial approval appears to act as a rubber stamp. The MPS' 'rolling' authorisation reveals the inadequacy of the temporal and geographical limits, while the *Gillan (HL)* case highlights the limits of judicial review. These failings are further aggravated by the lack of transparency regarding the authorisation process which in turn undercuts such community accountability as exists. Community accountability is also weakened by the fact that it is recommended, not required, that forces engage with the community and that forces are not required to inform their PAs when an authorisation is in place, nor the PAs of other forces whose area overlaps with their authorisation area.

It follows that of the framework principles, the authorisation process adheres only in part to effectiveness and efficiency in relation to CONTEST. It is not in accordance with the law. It does not provide for adequate accountability. These two failings aggravate the perception of those who argue that section 44 is disproportionately deployed and those who argue that it is used for non-counter-terrorist related ends, thus undermining the 'Prevent' strand of CONTEST. This undercuts the adherence of the power to the CONTEST strategy, notwithstanding that its proper deployment may further the objectives of the 'Protect' strand and, to a considerably lesser degree, the 'Pursue' strand.

There are various improvements that could be made to the authorisation process so that it adheres, at least more closely, to the framework principles. Central to these is raising the

'trigger' to 'necessary'. The preferred option would be simply to raise the trigger to necessary. A second option would be to implement a two-tier approach whereby the trigger for high-risk sites, which are authorised because of their vulnerability, is 'reasonable for the protection of the public', while it is raised to 'necessary' for all other areas. Judicial oversight should replace ministerial oversight. There should also be far more detailed data provided publicly regarding the authorisation process. This would in particular enable closer community accountability which should be strengthened further by requiring rather than permitting community consultation, whether before or after the authorisation and deployment. Forces should also be required to inform other forces and their PA when their authorisation area overlaps.

Section 44 is primarily exercised on the basis of location, intelligence, deterrence, the person's behaviour and, to a far lesser degree, external events. As with its historical predecessors, excessive discretion is the key concern in relation to the deployment of section 44. The usual discretion associated with 'street policing' powers is aggravated in the case of section 44 due to the explicit absence of suspicion and the exceptionally broad nature of the object of the search. It was notable that a number of officers voiced their disquiet at the breadth of the discretion, particularly in relation to the consequential difficulties in explaining their selection process to the person stopped.³ An area of particular concern is the use of section 44 stops to gather intelligence through questioning the person stopped. There is, again, insufficiently detailed data released to enable effective oversight, although the publication of detailed borough data by the MPS is an improvement.

It follows that the deployment of section 44 infringes the three framework principles. Its routine use violates the right to privacy under the ECHR, Article 8, and is likely to also violate the right to liberty under Article 5.⁴ Depending on the facts, the exercise of section 44 may also violate the right to a fair trial,⁵ the right to freedom of expression and assembly,⁶ and the prohibition on discrimination.⁷ The potential for the disproportionate application of section 44 and the perception among some communities that it is applied disproportionately severely undercuts the 'Prevent' strand of CONTEST by alienating people from the police and the broader counter-terrorist strategy. This, like the authorisation process, significantly undercuts any success the exercise of section 44 has towards the

³ See Chapter 5.

⁴ *Gillan (ECtHR)*.

⁵ ECHR, Article 6.

⁶ ECHR, Articles 10, 11.

⁷ ECHR, Article 14.

'Protect' and 'Pursue' strands, with the extremely low hit-rate reinforcing the fact that 'Pursue' is, at best, a secondary objective.

Improving the adherence of the exercise of section 44 to the framework principles is dependent on implementing the recommendations above in relation to the authorisation process. At the very least, the trigger must be raised if there is to be any possibility that the deployment of the power complies with human rights. Presuming the recommendations to have been acted upon, further improvements in relation to the exercise of section 44 include amending PACE Code A to require that officers inform the person stopped that he or she does not need to respond to any question unrelated to the search and requiring a minimum amount of detail be recorded in the stop forms. If general regulation of CCTV is not forthcoming, then officers should be cautioned regarding their use of CCTV in relation to section 44 in a Home Office circular or in the NPIA 'Practice Advice' or similar. The concerns raised around the misuse of section 44 at protests could be addressed, to some degree, through more detailed recording requirements on the stop form and the publication of the data.

7.3.3) How does section 44 impact upon the community?

Chapter 6 analysed how section 44 impacts upon the 'community'. While the statistical evidence of disproportionality must be understood as subject to a number of provisos, none of these individually or collectively account for the disparate use of section 44 against 'Black' people and 'Asians'. In addition, the fieldwork indicated that several communities and groups felt disproportionately targeted by the power: Asians, Muslims, members of the LGBT community, protesters, and photographers. This broad range covers some ground already covered in other research and highlights some new areas of concern and suggests that multiple discriminations may be at play whereby various different factors intersect to make the person more likely to be targeted.

It follows that section 44, when used disproportionately, infringes the framework principle of human rights on the basis of unjustified discrimination and, depending on the circumstances, also infringes the freedoms to expression and assembly. If groups or communities are targeted because of their religion, gender or sexual orientation, this will be unlawful under the Equality Act 2010. The detrimental impact on the group or community's perception of counter-terrorist powers when section 44 is used or perceived as being used disproportionately or in non-counter-terrorist situations significantly undercuts any efforts made under Prevent and more broadly risks damming the flow of information to the police. As outlined above in relation to the authorisation and deployment of section 44, community accountability is inadequate.

Changes must start with amendments to the authorisation process and deployment of the power. Some recommendations in relation to bolstering community accountability have already been mentioned. Additional changes should include a pro-active approach to the complaints system whereby persons who have been stopped are sought out and asked their opinion on the encounter, greater training for officers, and more contemporaneous oversight by superiors (where this does not already happen). None of these singly or cumulatively can eliminate the possibility that section 44 will be used to disproportionately target specific communities or groups or be used in non-counter-terrorist situations. However, these recommendations would provide greater oversight, thereby enabling trends to be identified at an early stage and for remedial action to be taken. It should also make it easier for the police to challenge false perceptions of disproportionality.

7.3.4) Is it possible to reform section 44 so as to comply with the normative principles?

This research question is addressed in the commentary below, with conclusions drawn in section 7.4.2.

7.4) Section 44: the future

This penultimate section will consider the future of section 44 in the light of the Government's proposals in the Protection of Freedoms Bill 2010/11 and the amendment of section 44 using a remedial order.⁸ The remedial order, under the IIRA, section 10, can be used to amend legislation if it contravenes the ECHR and the relevant Minister considers there to be compelling reasons to make recourse to the remedial order, which will usually relate to time constraints. In relation to the amendment of section 44, the remedial order was used so as to bridge the operational gap which existed between the suspension of the 'ordinary' exercise of section 44 in July 2010 and the proposed amendment of the power under the Protection of Freedoms Bill 2010/11.⁹

The first part, below, will outline the Government's proposals and critique them against the recommendations made in the preceding Chapters. The final part will highlight areas of continuing concern.

7.4.1) Section 47A

The Government's proposals in the Protection of Freedoms Bill 2010/11 mirror exactly the changes made to section 44 by means of the 'The Terrorism Act 2000 (Remedial) Order 2011' (Remedial Order), which repeals sections 44 – 47(G), replacing them with section

⁸ 2011, SI 2011/631.

⁹ Explanatory Memorandum to the Terrorism Act 2000 (Remedial) Order 2011, no.631.

47A.¹⁰ As the Code of Practice is available for the remedial order, the following discussion will focus on that source of reform, while providing the relevant references to the Protection of Freedoms Bill as well. The Code, which like PACE is admissible as evidence in court though a breach of the Code constitutes neither a civil nor criminal wrong of itself, provides further details on the authorisation requirements.¹¹

The Remedial Order raises the authorisation ‘trigger’ in two ways. First, the authorising officer must ‘reasonably suspect’ that an act of terrorism will take place and, second, the officer must consider the authorisation to be ‘necessary’ to prevent acts of terrorism. This incorporates the recommendation that the ‘trigger’ be raised to ‘necessary’ to adhere to the requirement of the ECHR and adds an extra hurdle, which potentially strengthens oversight via judicial review. This also appears to be the minimum required by the CTITF’s guide to stopping and searching persons, which states that the decision to stop and search person must be ‘necessary to prevent acts of terrorism’.¹² There is no reference to the imminence or otherwise of the act of terrorism nor is there an explicit requirement that the act of terrorism relates to the authorisation area. However, the Code states that a general high threat from terrorism is insufficient grounds of itself as a basis for an authorisation.¹³ This, and the requirement that the power be necessary to prevent the act of terrorism, suggests a required correspondence between the threat and the authorised area. A site’s vulnerability may be taken into account but cannot be the sole reason for the authorisation.¹⁴ The Code explicitly states that the usefulness of the power in terms of public reassurance, deterrence or intelligence-gathering are insufficient bases upon which to found an authorisation.¹⁵ The Remedial Order also reinforces the internal limits upon the power by requiring that the temporal and geographical limits to the authorisation be no more than is necessary to prevent the act of terrorism, thereby providing statutory bite to the recommendations previously contained in the NPIA ‘Practice Advice’ and the Home Office Circular.¹⁶ The temporal

¹⁰ Prevention and Suppression of Terrorism: The Terrorism Act 2000 (Remedial) order 2011, SI 2011/631.

¹¹ Home Office, ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ [1.2.3]; TACT, section 47C(2)-(3).

¹² CTITF Working Group on Protecting Human Rights while Countering Terrorism, ‘Basic human rights reference guide: the stopping and searching of persons’ [14].

¹³ Home Office, ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ [3.1.5].

¹⁴ *ibid* [3.1.5(b)].

¹⁵ *ibid* [3.1.6].

¹⁶ TACT, section 47A(1)(b)(ii-iii).

maximum is cut in half to fourteen days.¹⁷ The second stage of the authorisation process, Ministerial confirmation, is largely unchanged, with the exception that the Minister may now substitute a more restricted area.¹⁸ The Code acknowledges the possibility of 'short-term' authorisations and echoes the NPIA's 'Practice Guidance'.

The Code requires 'detailed' intelligence to back up the authorising officer's reasonable suspicion that an act of terrorism will take place. It is likely that this will result in little change from the current approach, where intelligence elements are routinely referenced. The temporal and geographical limits are tightened, with force-wide authorisations being permitted only in 'exceptional' circumstances.¹⁹ 'Rolling' authorisations are explicitly prohibited, however, it is unclear how this prohibition will be enforced given that forces can apply for new authorisations once the old one has expired.

In terms of community accountability, the Code requires Home Office and Scottish forces to notify any non-Home Office forces in whose area an authorisation has been issued and vice versa.²⁰ Each force 'should' also inform their PA, or equivalent.²¹ This is a significant improvement which will increase the ability of communities, via their PA, to hold forces to account for their use of the power. There is, however, no automatic referral to the local PA or to the IPCC for 'rolling' authorisations, as was suggested in Chapter 4. The requirement in PACE Code A that forces, in consultation with their PA, make arrangements for the community to scrutinise records of stop and search is reproduced in the Code.²² One novel requirement in the Code is that where section 47A affects section of the community 'with whom channels of communication are difficult or non-existent, these should be identified and put in place'.²³ This seems to refer to the 'transient' communities who were identified in Chapter 4 as being affected by section 44. This is a clear improvement, however, it remains to be seen how these new channels of communication will be forged and how effective they will be.

¹⁷ TACT, schedule 6B, paragraph 6.

¹⁸ TACT, schedule 6B, [7(4)(b)].

¹⁹ Home Office, 'Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000' [3.2.5].

²⁰ *ibid* [3.6].

²¹ *ibid* [3.6].

²² *ibid* [5.5.3].

²³ *ibid* [6.1.2].

The object of the search under 'section 47A' is evidence that the vehicle is being used for terrorism or that the person is a terrorist.²⁴ This is somewhat more circumscribed than articles which could be used in connection with terrorism but it remains an exceptionally broad term, because of the breadth of section 1 and section 41 of TACT. The Code requires officers to be reminded in briefings that the object of the search is for objects which connect that person or vehicle with terrorism.²⁵ However, this does not significantly narrow the field particularly in relation to a search of persons, where most objects found on a person or in their belongings that could be used for terrorism will prompt the suspicion that that particular person is a terrorist. Moreover, there is again an explicit absence of suspicion: while the officer may only search for evidence of terrorism or that the person is a terrorist, they need no suspicion to prompt the search. Therefore, the officer's discretion remains nearly completely unfettered within the authorisation area.

There has been an attempt to circumscribe this discretion by listing four 'indicators' which should be considered when selecting whom to stop. The first is 'geographical extent', that is, is the area within the authorisation area? This is less of an indicator than a legal requirement. The second is behaviour, which chimes in particular with the BTP's use of section 44 under strand one. The third is 'clothing', specifically whether the clothing could conceal relevant evidence of terrorism. This 'indicator' is likely to pour fuel on the allegations that the power is used disproportionately to target specific groups, notably Muslims, and is unnecessary: if someone appears to be concealing something, whether in their clothing or elsewhere, this comes under 'behaviour' and may, on the facts, be sufficient for a section 43 stop. The final indication is 'carried items' which may 'conceal an article that could constitute evidence' of terrorism. This is extremely vague – presumably any bag, even if relatively small, could conceal such evidence, which suggests that anyone carrying anything may be stopped. These indicators add nothing to the NPIA 'Practice Advice', which listed relevant criteria as being: the individual; his or her location; or a combination of the two and provided little practical guidance to officers regarding the selection process.

The Code reminds officers of the need to explain their actions to the person who has been stopped, mirroring the NPIA's 'Practice Advice'.²⁶ The Code states that briefings should provide officers with 'a form of words that they can use when explaining the use of

²⁴ TACT, section 47A(4).

²⁵ Home Office, 'Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000' [4.2.6].

²⁶ *ibid* [1.1.6]; NPIA 'Practice Advice on Stop and Search in Relation to Terrorism' [2.3].

...section 47A'.²⁷ The Code provides a list to help officers to explain the use of the power, however, the final point – ‘why the person or vehicle was selected to be searched’ is, as outlined in Chapter 5, the core difficulty: how can officers explain the selection process for a power that does not require suspicion of any offence?²⁸

It remains a requirement to provide a stop form, unless wholly impracticable, or rather, a stop form or receipt must be offered to the person.²⁹ The Code is somewhat contradictory on this point, stating at one stage that the receipt or form must be given if it is requested,³⁰ while later stating that the person must be asked if they want a copy of the receipt or form.³¹ The former is clearly undesirable as members of the public may be unaware of their right to request a form and may therefore not do so. The latter option is less desirable than the previous requirement under PACE that a copy of the record ‘must be given immediately to the person searched’.³² In cases where it is alleged that the officer refused to give a stop form, the retort will be that the person did not want or request, it, and it will be exceedingly difficult to prove either way. This unnecessarily weakens one of the major forms of oversight over section 47A. In terms of content, the form must contain the person’s self-defined ethnicity, the date, time and place of search, the officer’s warrant number, that the search took place under section 47A, and why the person was selected.³³ This is positive in that it ensures some degree of uniformity. However, the details required were the minimum inputted by officers anyway so if there is any change in officers’ reporting it will be a reduction in the detail recorded.³⁴ While the Code notes that persons who are stopped do not need to provide their details, there is no requirement that officers inform the person stopped of this.

²⁷ Home Office, ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ [4.2.7].

²⁸ See Chapter 5.2.

²⁹ Home Office, ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ [5.3.1].

³⁰ *ibid* [5.2.1(d)].

³¹ *ibid* [5.3.1].

³² PACE, Code A [4.2] (Code issued under Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Code A) (No.2) 2008, SI 2008/3146).

³³ Home Office, ‘Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000’ 5.4.1.

³⁴ See Chapter 5.2.1.

7.4.2) Continuing concerns:

It is clear that section 47A goes some way to addressing the concerns raised in the *Gillan (ECtHR)* case and more generally. The raising of the 'trigger' to 'necessary' is a key improvement. The addition of a second layer to the trigger by way of the requirement that the authorising officer 'reasonably suspects' an act of terrorism will take place may further restrict the granting of authorisations, although it seems largely dependent on the degree of oversight exercised by the Minister or on the judicial interpretation, if judicial review arises, in relation to the requirement or not of imminence and the degree of proximity required between the suspected act and the authorised area. If section 47A is to be a restricted tool, used only in specific areas where there is an imminent risk of a terrorist attack, then this should be explicit in the authorisation trigger. Fourteen days is overly long for such a targeted power. However, even on its own, raising the trigger to 'necessary' permits consideration of the proportionality of authorisation, therefore going some distance towards ensuring the authorisation process is 'in accordance with the law'. Another concern is the on-going possibility of 'short-term' authorisations. These need to be more tightly restricted so that they are used for genuinely 'short' authorisations rather than to avoid ministerial over-sight, as recommended in Chapter 4.

Even if raising the trigger of itself addresses the concerns voiced in *Gillan (ECtHR)* in relation to the authorisation process, there remain outstanding issues regarding accountability and adherence to CONTEST, specifically in terms of ensuring that sections of the community are not alienated by the use of the power, which would undermine the 'Prevent' strand. One on-going concern is the Ministerial oversight. This lacks transparency and appears to be a rubber-stamping exercise. At the least records of the authorisations applied for, rejected and modified, and the grounds on which they were modified, must be published on a time-lag annually. This will enable some evaluation of the level of scrutiny that is occurring. The preferable option would be judicial review, as detailed in Chapter 5. Even if the current changes suffice to answer the concerns in *Gillan (ECtHR)*, the exceptional nature of the power is such that it can be argued that a higher level of scrutiny is required rather than 'just' ensuring legality. Judicial review would ensure independent oversight with some degree of transparency, although it is likely that most of the underlying intelligence will be from closed source materials.

In relation to community accountability over the authorisation process, the fact that PAs should be informed when section 47A is authorised in their area, whether by their own force or another, is an improvement. However, in common with the information to be provided to communities, the language in the Code continues to be permissive rather than imperative. Forces should have to inform the relevant PA of an authorisation and should have to consult with their communities on their use of section 47A, whether through their PAs, CDRPs or

other police-community groupings. In order for such engagement to be meaningful, the community must have access to details of the authorisations, in terms of the numbers applied for, rejected or modified, the temporal and geographical limits, and the number of stops carried under each. Only if such information is provided can any meaningful assessment of the authorisations be undertaken. Such information should be made publicly available, on a time-lag and with such redactions as necessary to ensure national security, whether to protect sources or to hamper 'pattern-spotting'.

Turning to the deployment of section 47A, the object of the search is slightly more restricted than under section 44, through its connection to the specific vehicle or person. However, it continues to be 'a very wide category which could cover many articles commonly carried by people in the streets.'³⁵ There is still an explicit absence of suspicion, whether reasonable or not. Therefore the officer retains a virtually unfettered discretion as to who to select to stop and search and can still search for an extraordinary wide class of objects. Section 47A has not meaningfully limited 'the clear risk of arbitrariness in the grant of such a broad discretion to the police officer'.³⁶ It is therefore at least questionable whether the deployment of section 47A would be deemed to be proportionate. The difficulty in restricting the discretion of the officer in deploying the power is another reason why all means of increasing accountability over the authorisation process should be adopted, such as judicial rather than ministerial authorisation. This is also why additional transparency and community engagement must be prioritised as a requirement rather than being optional. The reporting methods, suggested in Chapters 4 and 5, whereby the type of authorisation would be broken down may not be as appropriate to section 47A, depending on its use. Further research should be undertaken to identify the types of authorisation that are occurring and the authorisations should thereafter be broken down into these types. It is also imperative that officers continue to be required to give the person stopped the stop and search form. This is a flawed method of accountability which can be circumvented with relative ease but it remains one of the few 'independent reports' from the encounter. Additionally, stop and search forms should be 'dip-sampled' on a quarterly basis as a pro-active approach to complaints. The findings from these should be fed-back to the relevant unit through briefings, with good practice disseminated force-wide, and to the community through the relevant police-community partnerships and PAs.

³⁵ *Gillan (ECtHR)* [83].

³⁶ *ibid* [85].

7.4.3) Is it possible to reform section 44 so as to comply with the normative principles?

The final research question asked whether: *it is possible to reform section 44 so as to comply with the normative principles?* Following from the comments above, and the conclusions of the other research questions, the answer must be no, or at least not to a satisfactory degree. It is arguably possible to alter section 44 so that it complies with human rights. However, this would require amending the power so that it can be exercised with reasonable suspicion, which merely replicates section 43. Moreover, amending section 44 in this manner would undercut the justifications for the power, thereby undermining its proportionality and, consequentially, its adherence to human rights. The police also need to, and as yet have not, proven the need for section 44, certainly in terms of its present deployment. Lord Carlile has stated that there is ‘little or no evidence that the use of section 44 has the potential to prevent an act of terrorism as compared with other statutory powers of stop and search’.³⁷ One of the PA interviewees also doubted its necessity, arguing that ‘the risks from [the detrimental impact on community-police relations] outweigh the positives’.³⁸

It is not possible to exert close accountability over the power. The discretion required for section 44 is to fulfil its operational goals is such that it necessitates closer accountability over the power than would be required with, for example, a stop and search power that required the officer to have reasonable suspicion the person stopped had committed an offence. The question of adherence to CONTEST is far more difficult to quantify but there is at least anecdotal evidence that the exercise of section 44 is contributing to negative perceptions of the police and of counter-terrorist policies more broadly. It may be worth remembering Lord Scarman’s arguments against aggressive law enforcement which may bring marginal gains in law enforcement at the cost of public tranquillity.³⁹ One could add to public tranquillity the cost of intelligence lost through poor community-police relations.

It is notable that among the police sample many said that improved public awareness or education regarding what the objectives of section 44 were would best improve section 44.⁴⁰ One senior officer said: ‘if we’re going to have this legislation which is so controversial let’s tell everybody why we’ve got it and not be scared to do that’.⁴¹ Given that section 47A is in force and it appears likely that relevant sections of the Protection of Freedoms Bill 2010/11

³⁷ Lord Carlile, ‘Report on the operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006’ [130].

³⁸ PA02.

³⁹ Lord Scarman, ‘The Scarman Report’ [4.57].

⁴⁰ BTPFL01; BTPFL02; BTPFL03; BTPFL10; MPSFL01; MPSSNR04; MPSSNR06.

⁴¹ BTPSNR02.

will be passed, this is something that the police should urgently address if they want to reduce the friction around the deployment of section 47A and the proposed section 43B. There should be an open and honest discussion with the public whereby the police can attempt to justify their need for the power and can also listen to the concerns of the public. This will not suffice to bring the power within the framework principles of this thesis but it may serve to lessen the detrimental impact it has on community-police relations and reduce the tension that front-line officers have to deal with when exercising the power. The importance of such a discussion, for police and the public, was clearly stated by one officer:

‘we need a robust policy that will stand up to scrutiny, even if it’s not pretty and even if it’s not nice for certain areas of the community. It’s got to be a strong and tough policy that police officers can fall back on and use without any worry or concern that it’s going to affect them personally – as in complaints – but that’s just from the police point of view. The public: all the same reasons. The public need a robust policy that they can ask about and expect to be told the truth even if they don’t like it’.⁴²

7.5) After section 47A?

It remains to be seen whether section 47A will be used in a similar manner to section 44. It is curious that the Code explicitly excludes authorising the power for use for deterrence or reassurance or intelligence-gathering and that the vulnerability of the site cannot of itself justify an authorisation. On the basis of the findings in this thesis, section 47A should hardly be used at all. While its use to search vehicles for suspect devices, as suggested in the Macdonald Report, is credible, in relation to stops of persons, the power is not an arrest tool, unless looking for a needle in a haystack is an accepted justification.⁴³ Given intelligence gathering and deterrence are excluded bases, all that remains is disruption. However, attempting in practice to separate disruption from deterrence is futile – indeed, the two concepts were generally mentioned in one breath by officers.⁴⁴ If section 47A continues to be widely used, even if its usage is less than a quarter of that of section 44, it is hard to conceive how this will be lawful if used for objectives other than deterrence, intelligence or reassurance.

The evolutionary path of stop and search powers appears to be as follows: extensive use of the power with minimum oversight followed by a crisis which prompts and/or adds credence to existing complaints, the outcry then leading to investigation and reform: ‘sus’ – Brixton

⁴² BTPSNR02.

⁴³ Lord Macdonald, *Review of counter-terrorism and security power: a report by Lord Macdonald of River Glaven QC* (Cm 8033, 2011) 4.

⁴⁴ See Chapter 4.1.

riots – PACE; PACE – Macpherson Report – stop forms (increased accountability); section 44 – *Gillan (ECtHR)* – section 47A. It remains to be seen what crisis will prompt the next evolutionary stage from section 47A and whether it will survive in a more curtailed form or be assigned to the judicial scrapheap, though the forthcoming Olympic Games in London, during which the power to stop without reasonable suspicion would undoubtedly be welcomed by the police, suggests it has not yet run its course.

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APPENDICES

Appendix A: Fieldwork

A.1: Interview schedules

The interview schedules for front-line officers, authorising officer and community and related stakeholders are reproduced below. Variants on these basic schedules were used for specific stakeholders, for example, the interview schedule used for Lord Carlile combined aspects of all three. The introductory, biographical and concluding sections were included in all schedules but, to avoid repetition, are included only in the first schedule below. For the same reason, the 'prompts' in the sub-paragraphs are included only once.

A.2: Front-line officers

Introduction

Thank you for agreeing to participate in this interview. As indicated in my previous contacts with you, my PhD thesis at the University of Leeds concerns stop and search under section 44 of the Terrorism Act 2000. It aims to assess the role, use and impact of stop and search under section 44 of the Terrorism Act 2000. Part of my research is empirical, involving qualitative interviews with sample groups of the police, community and national stakeholders. The purpose of this interview is to investigate how section 44 is exercised, the systems of accountability which govern it and how it impacts upon the public. It is important for me to gather information from these interviews so that a proper analysis of section 44 can be carried out. It is a contentious power, having for instance been criticised annually by Lord Carlile, the Government's reviewer of counter-terrorism legislation, but without knowing its actual role and impact it is impossible to judge these criticisms or to suggest how to resolve them.

I do not expect to be given information about individual cases or data which is sensitive in any way. I am interested in general policy and how it is applied. I expect the interview to take approximately one hour. This interview is subject to your consent, so you can refuse to answer any question or withdraw from the interview at any time and for whatever reason, although I hope that you will not feel the need to do so. Some of the questions may have different responses, depending on whether you are answering as an individual or in your professional capacity or as a representative of an organisation. It would be very helpful in these situations if you can clarify how your answers would differ between the 'personal' and 'official' capacities.

I would like to tape-record this interview. This is because (i) recording means I do not have to slow our conversation to take notes; and (ii) it allows me to undertake analysis in a more systematic way. Is that acceptable?

Biographical:

First of all, I would like to ask you for some basic biographical information.

1. Gender?

2. Age range? (< 30, 30-39, 40-49, 50-59, 60+)
3. What is your current post?
4. How many years experience do you have in this role?

Section 44 in general:

This section of the interview will focus on the general policy behind section 44, putting it in a strategic, tactical, or operational setting:

5. What do you think are the key objectives of section 44?
 - a. Intelligence gathering/ disruption...?
 - b. Arrests for criminal prosecution?
 - c. Any other?
 - d. How does it achieve these?
 - e. What is the balance between the objectives – which is the most important in your opinion?
6. How does it fit into the CONTEST strategy?

Section 44: operations

Next, I want to ask some questions around the actual operation of section 44 on the ground. The purpose of these questions are to build a picture of how the power is actually exercised, and again the checks and balances – whether they are effective.

7. What factors prompt the use of section 44 in a particular case?
 - a. Intelligence? (General information; suspect description; known criminal)
 - b. An event?
 - c. Location? (Hot spot etc.)
 - d. Time? (I.e. unusual to be in that location at that time)
 - e. Appearance of the suspect? (Clothing, ethnicity, age, gender) Do you ever use racial profiling? If so, in what circumstances?
 - f. Behaviour of the suspect?
 - g. Vehicular search? (Type, age of car; age or ethnicity of driver)
 - h. Any others?

8. If you imagine that some of these factors are present, what might prompt you not to carry out a section 44 stop and search?
 - a. Safety
 - b. Fear of causing/aggravating community tension
 - c. Balancing priorities (another urgent call comes is, etc.)
9. What constitutes a 'good' stop and search under section 44?
 - a. Arrest?
 - b. Intelligence gathering?
10. What makes an officer good or bad at stop and search?
11. What advantages and disadvantages does section 44 have over other stop and search powers?
 - a. When is it most appropriate and least appropriate?
 - b. When is it most effective and least effective?
 - c. Do you think that the police use 'authorised' stop and search powers when they might not be appropriate because of the absence of a requirement of reasonable suspicion? Is this tied in any way to the 'support' that the police are given in exercising their discretion? If so, is it preferable to 'support' police' discretion or to use 'authorised' stop and searches?
 - d. Do the police take a different approach to 'authorised' powers of stop and search to s.1 PACE or is it assimilated?
 - a. Do you think there is any correlation between the use of such powers and the force's approach to police discretion? (I.e. do you think less 'support' to police' discretion leads to a reliance on 'authorised' stop and search?)
 - b. If so, is it preferable to 'support' police' discretion or to use 'authorised' stop and searches?
12. How does the Human Rights Act 1998 impact upon stop and search powers in general and section 44 specifically?
13. Have you been given any training on section 44?
 - a. Any training on stop and search in general?
 - b. Was it effective?

- c. How long did it last?
- d. Was it repeated?

14. Are the regulations and paperwork surrounding the use of section 44 workable/manageable?

- a. Are mistakes made?
- b. How much detail is put into a stop and search form?
- c. Is it always completed on the spot?

15. What information is given to the person stopped and searched?

16. What do the police do with the stop and search forms afterwards?

- a. Is there any collation? At force, regional or national level? Are the forms computerised?
- b. Is there any follow-up or audit? Any focus on legality/effectiveness/impact on public confidence and trust?
- c. How is intelligence dealt with? Does it go to district/regional/CTU?
- d. Is policy reviewed or revised in the light of actual operations?

17. Have you any experience of sanctions being imposed for an improper stop and search?

- a. If so in what circumstances? What were the sanctions?

Concluding questions:

Finally, I want to ask some concluding questions of a general nature about section 44.

18. What would improve the use of section 44?

- a. Should it be amended – if so in what way(s)?
- b. Should the policies around its use be changed – if so in what way(s)?

19. Could the objectives behind s.44 be better achieved by other changes/reforms in law or practice? If so, what?

20. Have you any further comments which have not been raised in this interview?

Thank you very much for taking the time to participate in this research. A summary of the findings will be available on request.

A.3. Authorising police officers

Section 44 in general:

1. What do you think are the key objectives of section 44?
2. How do these fit into the CONTEST strategy?

The authorisation of section 44:

Next, I want to ask some questions around the theme of the authorisation of stop and search under section 44. My purpose in this is to find out how the process actually works and how the checks and balances (i.e. paperwork!) fit in and if they are effective.

3. What advantages and disadvantages does section 44 have over other stop and search powers?
 - a. When is it most appropriate and least appropriate?
 - b. When is it most effective and least effective?
4. What factors prompt the authorisation of section 44?
 - a. What is the role of intelligence – general or specific?
5. If you imagine that some of these factors are present, what could prompt you not to use section 44?
 - a. Community issues/tension?
 - b. Prioritisation?
 - c. Safety?
6. It has been suggested that section 44 is used by some forces 'without full consideration' of whether other powers are adequate and that authorisations should be more critically examined. What do you think should be considered before authorising section 44?
7. In general, do the authorisations use the maximum or minimum in terms of geographical spread and time?
 - a. What factors would limit the geographical spread / time?
8. Has an authorisation ever been modified to alter the geographical spread or time?
 - a. How? (Larger/smaller; shorter/longer?)
9. Are the regulations and paperwork surrounding the use of section 44 workable/manageable?
 - a. Are mistakes made? (As happened in South Wales, Sussex and Greater Manchester...)
 - b. How long does it take to fill in the paperwork for an authorisation?

- i. How much detail is required?
 - ii. How many people are involved?
 - c. Have there been any difficulties liaising with the National Joint Unit or the Home Secretary?
 - i. Have either ever asked for more information, etc.?
10. It has been suggested that the use of section 44 should be halved. Do you agree?
- a. Is section 44 used too much or too little?
 - b. How frequently is it used in this force?
11. Do forces ever coordinate the use of section 44? E.g. with the British Transport Police?
12. Do you inform all officers when section 44 is operative?
- a. How?
13. How does the Human Rights Act 1998 impact upon stop and search powers in general and section 44 specifically?

Section 44: operations

- 14. What factors prompt the use of section 44 in a particular case?
- 15. What constitutes a 'good' stop and search under section 44?
- 16. Have you any experience of sanctions being imposed for an improper stop and search?

Accountability: community:

Next, I want to ask some questions around the relationship between the police and the community, in particular around the communication between the two.

- 17. What are the main systems for communication / liaison with the community?
 - a. Role of the police authority?
 - b. Police-community partnerships?
- 18. Is section 44 discussed with the community?
 - a. Prospectively/retrospectively?
 - b. Local level or strategic level (steering groups...)?
 - c. Is the community informed of its rights under section 44? How it is to be used etc.

- d. If it is not discussed with the community, why not? Should it be?
- e. Is policy reviewed or revised in the light of actual operations?

A.4 Community and related stakeholders

Section 44 in general:

1. What do you think are the key objectives of section 44?
2. What advantages and disadvantages does section 44 have over other stop and search powers?

Accountability: community:

3. What are the main systems for communication / liaison between the police and the community?
4. Is the authorisation of section 44 discussed with the community?
5. It has been suggested that section 44 is used by some forces 'without full consideration' and that authorisations should be more critically examined. What do you think should be considered before authorising section 44?
6. Is the deployment of section 44 discussed with the community?
7. How does section 44 impact upon the community?

The exercise of section 44:

8. What factors prompt the use of section 44 in a particular case?
9. It has been suggested that the use of section 44 should be halved. Do you agree?
10. What constitutes a 'good' stop and search under section 44?
11. What is the purpose of stop and search forms?
 - a. Are they effective (why)?
12. What information is given to the person stopped and searched?
 - a. Stop and search form?
 - b. Information regarding basis of power, person's rights...?
13. What means are there to challenge or review a section 44 stop and search?
 - a. How effective are these means?

A.5 Data quality manager schedule

Stop and search forms:

These form a key form of accountability and to be able to assess their effectiveness it is necessary to know how they are monitored, collated etc. This is what I hope to find out in this interview.

1. What is the process for collating stop and search forms?
 - a. Is it by borough or force?
 - b. Do you liaise with other forces or feed into national databases (e.g. section 95 statistics on race and the Criminal Justice System)?
2. How much information is normally put into a section 44 stop form?
 - a. What type of information?
 - b. Is it consistent across boroughs?
3. Do you think the quality of data would benefit from increased / decreased information?
 - a. If so what type of information?
4. Do you think that the present stop forms are an improvement on the previous ones?
5. Do you agree with the proposed system of 'receipts'? Would it make a difference?
6. Do you think that the quality of data would benefit from minimum standards regarding what must be put into the stop forms in relation to section 44?
7. Who can access the information in the database?
 - a. MPS?
 - b. MPA?
 - c. Other forces?
 - d. Communities?
 - e. Government?
 - f. Should they be able to?
8. Are there 'compliance' procedures for the stop forms?
 - a. What are these?
9. What would constitute a discrepancy?
10. How are discrepancies flagged/followed up?

a. Is the borough/force informed?

b. Have sanctions ever been recommended? By whom?

11. Is intelligence from the stop and search forms fed back to SO15 or other branches?

a. How?

12. Have you any further comments which have not been raised in this interview?

A.6 Lord Carlile

1. What do you think are the key objectives of section 44?
2. How does it fit into the CONTEST strategy?
 - a. Is the borough/force informed?

The authorisation of section 44:

3. What advantages and disadvantages does section 44 have over other stop and search powers?
4. What factors prompt the authorisation of section 44?
5. You have been suggested that section 44 is used by some forces 'without full consideration' of whether other powers are adequate and that authorisations should be more critically examined. What should be considered before authorising section 44?
 - a. Would a change in the law from authorisation when 'expedient' to one where 'necessary' be beneficial in ensuring forces consider the relevant issues?
6. If you imagine that some of these factors are present, what might or should prompt authorising officers not to use section 44?
7. In general, do the authorisations use the maximum or minimum in terms of geographical spread and time?
8. Has an authorisation ever been modified to alter the geographical spread or time?
9. Are the regulations and paperwork surrounding the use of section 44 workable/manageable?
 - a. Has the Home Secretary ever rejected any authorisations?
10. Would the publication of the number of authorisations per force benefit transparency, accountability, the considered use of the power?
 - a. Would it help to publish the 'type' (i.e. intelligence; location; protest)?
11. Do forces ever coordinate the use of section 44? E.g. with the British Transport Police; MOD?
12. How does the Human Rights Act 1998 impact upon stop and search powers in general and section 44 specifically?
13. The MPS have recently launched a pilot where 'Level 1' sites are permanently designated (high risk, transport hubs, iconic sites); 'Level 2' respond to specific intelligence. Is this an improvement?

- a. Could it be rolled out nationally?
- b. Could it be incorporated into law?

Section 44: operations

- 14. Your last report refers to persons who are 'so far from any known terrorist profile'. Is there a terrorist profile? If so, should this be used?
- 15. What factors prompt the use of section 44 in a particular case?
- 16. What constitutes a 'good' stop and search under section 44?
- 17. Do you know of cases in which sanctions were imposed for an improper stop and search?

Accountability: community:

- 18. What are the main systems for communication / liaison with the community?
- 19. Are the Police Authorities informed? Why? Why not? When?
- 20. Is section 44 discussed with the community?

A7: Description of research handed to short interview participants

RESEARCH

I am carrying out research into stop and search under the Terrorism Act, section 44 at the School of Law, University of Leeds. The research will explain and assess the role, use and impact of stop and search under section 44. Section 44 is important as it is the main site of interaction between the public and police in terms of counter-terrorism and is contentious due to the absence of any requirement of reasonable suspicion.

As part of this research I am carrying out fieldwork with the police and 'community'. I am completing the police sample at present and am looking for members of the public who use the railways and would be willing to be interviewed about stop and search under section 44. All participants will be anonymised in the research. The interview should take twenty to thirty minutes.

For more details or if you have any queries, please contact me, Genevieve Lennon, at law5gl@leeds.ac.uk.

A8: Consent Form**Consent Form****Policing terrorist risk: stop and search under section 44 Terrorism Act 2000**

- I have received information and been given an opportunity to ask questions about this research.
- I understand the purpose of the research and how I will be involved.
- I understand that the data obtained will be held in confidence and that my identity will not be divulged in the final report.
- I understand that the recording of the interview and any paper or electronic transcripts will be destroyed at the end of the project.
- I understand that I may refuse to answer any question.
- I understand that I may withdraw my involvement in the research at any time and for any reason.
- I understand that the interview will be recorded and electronically transcribed.
- I understand that the findings of the research will be incorporated into your research findings.
- I agree to participate in a research interview.

Name (block capitals):

Signature: _____

Date: ____ / ____ / ____

A9: Sample of tree nodes used in NVivo analysis

Parent Node	Community	
	Child Node	Community police bodies
	Child Node	Discussion before or after deployment or authorisation
	Child Node	Disproportionality
	Child Node	Encounter information given politeness
	Child Node	Review
Parent Node	HRA	
	Child Node	Training
Parent Node	Sanctions or review	
Parent Node	What would improve the use of s.44	
Parent Node	S.44 – General	
	Child Node	Advantages and or disadvantages of s.44 over other stop and search powers
	Child Node	Objectives of s.44
	Child Node	S.44 and CONTEST

Parent Node	S.44 Authorisation	
	Child Node	Geographical Limits
	Child Node	NJU
	Child Node	Notification of other forces or PAs
	Child Node	Paperwork
	Child Node	Reasons not to authorise s44
	Child Node	Role of Intelligence
	Child Node	Temporal limits
Parent Node	S.44 Deployment	
	Child Node	Factors prompt stop
	Child Node	Interview person stopped
	Child Node	Reasons to not carry out s.44
	Child Node	Stop and search forms
	Child Node	What makes a good stop

Appendix B: Police materials

B.1: APA 'Know your rights'



This guide tells you what happens if you are stopped by the police.

For more detailed information, including legal definitions, translations into alternative languages and different formats go to www.apa.police.uk or contact your local police authority.

What is 'stop and account'?

'Stop and account' is when an officer stops you and asks you:

- what you are doing;
- why you are in an area or where you are going; or

- why they stopped you;
- what they are looking for; and
- your right to a receipt.

The officer can ask you to take off more than an outer coat, jacket or gloves, and anything you wear for religious reasons, such as a face scarf, veil or turban, but only if they take you somewhere out of public view. You can ask that the officer who searches you is the same sex as you. **It does not mean you are being arrested.**

- what you are carrying.
- A police officer or police community support officer (PCSO) does not have the power to force you to stay with them if you are stopped and asked for your actions.

Who can carry out a 'stop and account'?

- A police officer, or
- a PCSO.

A PCSO must be in uniform but a police officer does not have to be. They must show you their identity card if not in uniform.

What is recorded and your right to a receipt

If you are searched you have the right to a receipt and the officer must record the following details:

- your name or a description of you (only if you are searched);
- how you describe your ethnic background;
- when and where you were stopped or searched;

What is recorded and your right to a receipt

If you are stopped the officer will only record your ethnicity and you will be given a receipt showing the date and time you were stopped, and the officer's name and details.

What is 'stop and search'?

You can be stopped and searched when an officer has reasonable grounds to suspect that you are carrying:

- drugs, weapons or stolen property; or

- items which could be used to commit a crime.

Sometimes officers can stop and search you within a specific area without any reasonable grounds if it is believed that:

- serious violence could take place, or offensive weapons are being carried or have been used; or
- a terrorist threat has been identified.

The officer must explain this to you and must be searching for weapons or items which could be used in connection with terrorism.

A screening (knife) arch is not a stop and search. You can't be forced to go through, but refusal may result in further officer action or even a full search.

Please note that an officer can confiscate cigarettes or alcohol in view (even if it is in a container) if you are underage. This is not a stop and search.

Who can 'stop and search' you?

- A police officer who must be in uniform if the search is related to terrorism or serious violent crime – if they are not in uniform, they must show you their identity card; or

- a PCSO, but only if the search is related to terrorism, they are in uniform and with a police officer.

How should a stop and search be carried out?

Before you are searched, the officer must take all reasonable steps to ensure that you understand:

- that you must wait to be searched;
- what law they are using and your rights;
- their name and ID number;
- the station they work at;

What can you do if you are unhappy about how you were treated?

The officer should treat you fairly and with respect. If you are unhappy with how you were treated, you can complain. If you feel you were treated differently because of your race, age, sexual orientation, gender, disability, religion or faith, you can complain. It will help if you keep the receipt that the police gave you.

You can get advice about how to make a complaint from:

- a police station;

- your local police authority;
- a Citizen's Advice Bureau;
- the Independent Police Complaints Commission;
- the Equality and Human Rights Commission; or
- a solicitor.

The police welcome feedback on your experience – contact your local police authority or take the survey at www.apa.police.uk/policestops

 Published by the APA
© November 2009

Remember, if you are stopped by the police, you have rights

The officer who stops you must:

- treat you with dignity and respect;
- give you the reason why you have been stopped;
- give you their details, including name, police number and station; and
- give you a copy of the stop/search form;

You have the right to complain if you have not been treated fairly.

For more detailed information, translations into alternative languages and different formats go to www.apa.police.uk or contact your local police authority.

Remember, if you are stopped by the police, you have rights

The officer who stops you must:

- treat you with dignity and respect;
- give you the reason why you have been stopped;
- give you their details, including name, police number and station; and
- give you a copy of the stop/search form;

You have the right to complain if you have not been treated fairly.

For more detailed information, translations into alternative languages and different formats go to www.apa.police.uk or contact your local police authority.

B.2: MPS Stop and search form (old)

WEST YORKSHIRE POLICE **CRIMESTOPPERS**
 10800 555 111

Please complete ALL sections in BLOCK CAPITALS
 Please tick appropriate box(es)

Stop Stop and Search Unattended Vehicle Search
 Directions to Leave a Locality

To be completed in all cases

Name:
 Description:

Date of birth: Gender: Male Female
 Address: Postcode:

Self-defined ethnicity: Officer-defined ethnicity:
 Self-defined ethnicity 'Not Stated' code where SDE not provided: **N**
 Date: Start time: Finish time:

Place first stopped (show nearest junction):

Town and district: Beat No:

Reason/object:

Police officers only - all searches

Place searched (if different):

Authority for stop and search:
 S.1 PACE: S.23 Drugs: S.60 Weapons:
 S.43(1) Terrorism: S.44(1) Terrorism: S.44(2) Terrorism:
 Other (specify):

Grounds for search (if S.60, S.43 or S.44, details of property found):

Vehicle searched? Details:

VRM: Driver? Passenger?

Injury/damage caused? Details:

Outcome (plus offence if arrested):

PCSOs only - detention and/or search

Was the power of detention used? Yes: No:
 Search after detention for dangerous articles? Yes: No:
 Search for alcohol: Search for tobacco:
 Was force used during detention/search? Yes: No:
 (If 'Yes', then a 'Use of Force' form must be submitted)

As a result of the search, what was found?

Outcome: Arrested Yes: No: If 'Yes', state reason:

Directions to Leave a Locality only

Location excluded from:

Map and written supporting information given to offender? (not compulsory) Yes: No:
 Required to leave locality: Immediately: Within 15-30 mins:
 Within 1 hour: Other: Excluded from locality for up to hours
 (not to exceed 48 hours) from the start time of this record.

To be completed in all cases

Officer(s) details: Station name:

Copy provided? Yes: No: If 'No', state reason:

For Officer Use Only

ANPR Stop: Hotspot: PPO: Op name:

Supervisor (Rank, collar number, name and signature):

Supervisory action:

166 WHITE: Police Copy - YELLOW: Person's Copy (Revised 1-1-08)

WEST YORKSHIRE POLICE **CRIMESTOPPERS**
 10800 555 111

Please complete ALL sections in BLOCK CAPITALS
 Please tick appropriate box(es)

Stop Stop and Search Unattended Vehicle Search
 Directions to Leave a Locality

To be completed in all cases

Name:
 Description:

Date of birth: Gender: Male Female
 Address: Postcode:

Self-defined ethnicity: Officer-defined ethnicity:
 Self-defined ethnicity 'Not Stated' code where SDE not provided: **N**
 Date: Start time: Finish time:

Place first stopped (show nearest junction):

Town and district: Beat No:

Reason/object:

Police officers only - all searches

Place searched (if different):

Authority for stop and search:
 S.1 PACE: S.23 Drugs: S.60 Weapons:
 S.43(1) Terrorism: S.44(1) Terrorism: S.44(2) Terrorism:
 Other (specify):

Grounds for search (if S.60, S.43 or S.44, details of property found):

Vehicle searched? Details:

VRM: Driver? Passenger?

Injury/damage caused? Details:

Outcome (plus offence if arrested):

PCSOs only - detention and/or search

Was the power of detention used? Yes: No:
 Search after detention for dangerous articles? Yes: No:
 Search for alcohol: Search for tobacco:
 Was force used during detention/search? Yes: No:
 (If 'Yes', then a 'Use of Force' form must be submitted)

As a result of the search, what was found?

Outcome: Arrested Yes: No: If 'Yes', state reason:

Directions to Leave a Locality only

Location excluded from:

Map and written supporting information given to offender? (not compulsory) Yes: No:
 Required to leave locality: Immediately: Within 15-30 mins:
 Within 1 hour: Other: Excluded from locality for up to hours
 (not to exceed 48 hours) from the start time of this record.

To be completed in all cases

Officer(s) details: Station name:

Copy provided? Yes: No: If 'No', state reason:

166 WHITE: Police Copy - YELLOW: Person's Copy (Revised 1-1-08)

B.3: MPS Stop and search form (new)

METROPOLITAN POLICE SERVICE Form 5090(X)

Family name* [REDACTED]

First Name(s)* STEVEN
*(if name not given, use space to give a description)

Sex M F DoB 20 01 1968 A/Age 40

IC Code 1 SDE Code WT Height 5'10"

Address [REDACTED] - Waddington
CLITHEROE - Lancaster Post Code BB7 7

Vehicle Type _____ VRM _____

Stop & Account Behaviour Action Possession of an item Presence in area

Search Grounds SECTION 44 METRO POLICE ACT

Stop/Search	Search (if different location)
Date <u>16 09 2008</u>	<input type="text"/>
Time <u>10 45</u>	<input type="text"/>
Loc'n <u>D/S BRITISH MUSEUM</u>	<input type="text"/>
BOCU Code <u>57</u>	BOCU Code <input type="text"/>

Stop Only Code Search Code 5 Outcome Code 1 Arrest Code

Person Only Y N Vehicle Y N Damage caused Injury caused

Searching/Stopping Officer PAUL SMITH 5064 + 4824

Warrant/Pay No. 17915977 B(OCU) Ek Team/Unit T2100

MP 126/08 Copy for person stopped

B.4: BTP stop and search form

BRITISH TRANSPORT POLICE FIS No. _____

STOP/SEARCH RECORD OF PERSON/VEHICLE Ref no _____

Last Name _____ First Name(s) _____

Address: _____

Postcode _____

DOB: / / Place of Birth _____ Sex: M/F* Tel: _____

Description of person stopped/searched _____ Hair: _____

Clothing: Upper: _____ Lower: _____

Footwear: _____ Build: _____

Height: _____ Other: _____

PNC ID Code _____ Self defined ethnic classification _____

If ethnic classification not stated, reason: Called away Public Ord situation

Declined Couldn't understand Details: _____

IF ENCOUNTERED/STOP ONLY COMPLETE "B" BELOW

IF STOP AND SEARCH, COMPLETE "A" BELOW

A SEARCH RECORD

The Authority for the stop and search was (please the box that applies)

(These sections of the relevant Acts are summarised on the cover)

S.1 S.23 S.47 S.139B S.60

S.43 S.44(1) S.44(2)

Other Power Please specify: _____

Clothing removed? Yes No

If yes, list items _____

Intimate parts exposed: Yes No

Place first stopped (show a junction and approximate distance from): _____

The search took place on: Date: / /

Between _____ 24 hour clock and _____ 24 hours clock

at _____ (place)

Object(s) of Search:- Stolen Property: Going Equipped: Drugs:

Weapons: Firearms: Other: Details: _____

Grounds for authority _____

Vehicle searched? Yes No

Vehicle details: _____

(Make/Colour/Model/VRM)

Vehicle attended? Yes No If No, leave notice

Damage caused? Yes No

If vehicle/person searched property found? Yes No

Details: _____

Arrested? Yes No Custody Record No: _____

Offence: Stolen Prop: Going Equip: Drugs: Weapons:

Firearms: Other: Details: _____

B ENCOUNTER/STOP ONLY RECORDED YOU HAVE NOT BEEN SEARCHED

Reason: _____

Outcome: _____ Date: _____

Between _____ 24 hour clock and _____ 24 hours clock

at _____ (place)

Vehicle present? Yes No Index no: _____

COMPLETE IN ALL CASES

Officers stopping or searching: _____
(Name, Rank, Number and Station, Number of Counter, Terrorism stop/search)

Signed: _____ PRINT NAME: _____

(Officer completing record)

Copy of record supplied at time of stop/search? Yes No If No, reason: _____

appropriate box

Search Criteria

Officer Discretion Planned Operation Incident Reported

Property Found Yes No Prop No: _____

Injury caused Yes No Damaged Caused: Yes No

Details: _____

Additional Information: _____

CRO No: _____ PINS No: _____

DISPOSAL

Charge Reported Bail 47(3) NFA/Reprimand/Final

Warning/Caution

Statement of authorisation issued under: _____ appropriate box

* Section 60 Criminal Justice and Public Order Act 1994

* Section 43 The Terrorism Act, 2000

* Section 44 The Terrorism Act, 2000

HORT/1 issued Yes No

VDRS issued Yes No

Endorsable fixed penalty issued Yes No

Specimen of breath required Yes No

ROOM FOR LOCAL FORCE REQUIREMENT

Monitored by (print name and number) _____

You are signing to state that all necessary details have been entered and comply with the relevant legislation and that the provisions of force policy have been adhered to.

BRITISH TRANSPORT POLICE FIS No.

STOP/SEARCH RECORD OF PERSON/VEHICLE Ref no _____

Last Name: _____ First Name(s): _____

Address: _____

Postcode _____

DOB: ____/____/____ Place of Birth: _____ Sex: M/F* Tel: _____

Description of person stopped/searched Hair: _____

Clothing: Upper: _____ Lower: _____

Footwear: _____ Build: _____

Height: _____ Other: _____

PNC ID Code _____ Self defined ethnic classification _____

If ethnic classification not stated, reason: Called away Public Ord situation

Declined Couldn't understand Details: _____

IF ENCOUNTERED/STOP ONLY COMPLETE "B" BELOW

IF STOP AND SEARCH, COMPLETE "A" BELOW

A SEARCH RECORD

The Authority for the stop and search was (please the box that applies):

(These sections of the relevant Acts are summarised on the cover)

S.1 S.23 S.47 S.139B S.60

S.43 S.44(1) S.44(2)

Other Power _____ Please specify: _____

Clothing removed? Yes No

If yes, list items: _____

Intimate parts exposed: Yes No

Place first stopped (show a junction and approximate distance from): _____

The search took place on: Date: ____/____/____

Between _____ 24 hour clock and _____ 24 hours clock

at _____ (place)

Object(s) of Search:- Stolen Property: Going Equipped: Drugs:

Weapons: Firearms: Other: Details: _____

Grounds for authority: _____

Vehicle searched? Yes No

Vehicle details: _____ (Make/Colour/Model/VRM)

Vehicle attended? Yes No If No, leave notice

Damage caused? Yes No

If vehicle/person searched property found? Yes No

Details: _____

Arrested? Yes No Custody Record No: _____

Offence: Stolen Prop: Going Equip: Drugs: Weapons:

Firearms: Other: Details: _____

B ENCOUNTER/STOP ONLY RECORDED YOU HAVE NOT BEEN SEARCHED

Reason: _____

Outcome: _____ Date: ____/____/____

Between _____ 24 hour clock and _____ 24 hours clock

at _____ (place)

Vehicle present? Yes No Index no: _____

COMPLETE IN ALL CASES

Officers stopping or searching: _____

(Name, Rank, Number and Station. Number if Counter Terrorism stop/search)

Signed: _____ PRINT NAME: _____

(Officer completing record)

Copy of record supplied at time of stop/search? Yes No If No, reason: _____

Requirements before and after search

- Police officers are required to use powers of stop and search fairly and without prejudice. They are also required to be as considerate and courteous as possible whilst maintaining their own and public's safety.
- Stop and search powers allow police to search you, anything you may be carrying and any vehicle you may be in.
- When exercising these powers police officers can use reasonable force to detain and search you but they are only allowed to use force if you have been given the chance to co-operate, where appropriate, but have refused.

WHAT THE POLICE OFFICER MUST DO

- Before using any search power the police officer must take reasonable steps to inform you of:
- their name (except for terrorism searches) and the police station they are from;
 - the purpose of their search;
 - the legal power they are exercising;
 - the grounds and authorisation for the search; and
 - that you are entitled to a full copy of the record of the stop or search now unless wholly impracticable.
- If the police officer is in plain clothes:
- they are required to show you their warrant card.
- If the search is in public the police officer can require you to take off only:
- your outer coat, jacket or gloves
- If a more thorough search is necessary, it must be conducted:
- out of public view; and
 - by an officer of the same sex as you.
- If you have any comments about the stop or search, you may contact your local police station.

Explaining Police Powers to Stop or Search You... Know Your Rights!

GENERAL CONTACT

The police can stop you or any other person during the course of their duties. They do not need to suspect you of having committed any offence to do this.

SEARCHES REQUIRING REASONABLE SUSPICION INCLUDE:

- Sec 1 Police and Criminal Evidence Act 1984
- Sec 23 Misuse of Drugs Act 1971
- Sec 47 Firearms Act 1968
- Sec 43(1) Terrorism Act 2000

The police have the power to detain you, and/or your vehicle, for the purposes of a search if they have reasonable grounds to suspect that you have with you:

- Stolen goods
- A knife, pointed or bladed article or other offensive weapon
- Articles that can be used for burglary, theft or deception
- Illegal or prohibited drugs
- A firearm
- Anything which may constitute evidence you may be a terrorist

Before detaining you for the purpose of a search for the above items, the police must have reasonable grounds for suspecting the item will be found. They cannot detain you for the purpose of a search on personal factors alone e.g. just because you are:

- Young
- From an ethnic minority
- Dressed in a particular way (unless you fit the description of someone suspected of having committed an offence nearby)

Your vehicle may also be searched under these powers when it is unattended. If so a notice must be left in or on it by the searching officer stating that notice has been left, the name of the police station that an application for compensation for any damage caused may be made to the police station. You can apply for a copy of the search record within 12 months.

STOP AND SEARCH UNDER TERRORISM POWERS OR IF VIOLENCE IS ANTICIPATED

- Sec 60 Criminal Justice and Public Order Act 1994
- The police also have powers to detain you and/or your vehicle if it is with you and to search for offensive weapons and dangerous instruments. If it is believed that incidents involving serious violence may take place in the locality, or that persons are carrying dangerous instruments or offensive weapons in the locality, a senior officer must give written authority which will be held at the police station.

- Sec 44(1) and 44(2) of the Terrorism Act 2000

There are also powers to stop and search vehicles and their occupants (44(1)) and pedestrians (44(2)) in an area, if a senior police officer authorises it, to prevent acts of terrorism.

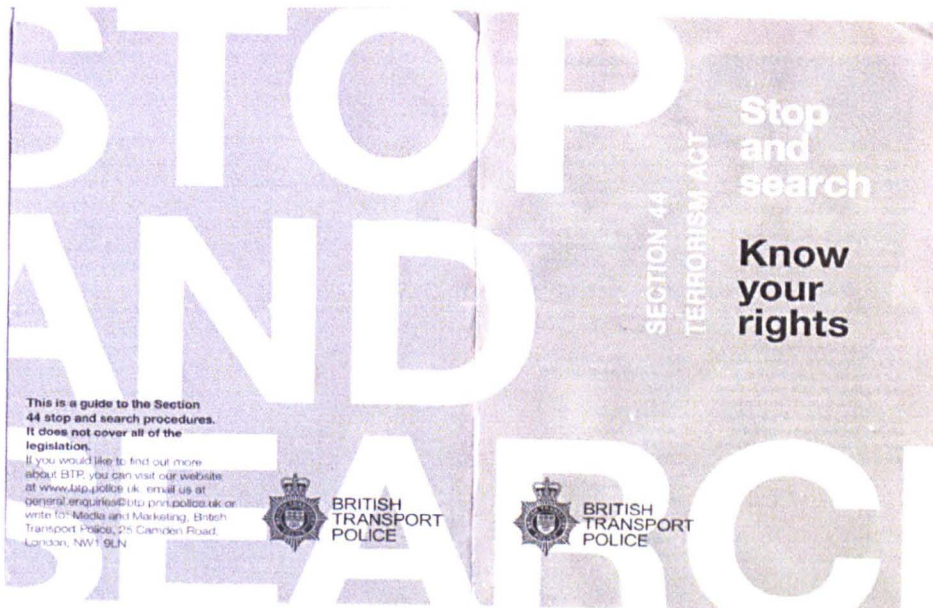
For these three powers, the officer does not have to have reasonable grounds to suspect the individual stopped or searched of carrying dangerous instruments or offensive weapons or of involvement in the anticipated violence or terrorism. However these powers may only be used by police officers in uniform.

STOPPING A MOTOR VEHICLE ON THE ROAD

- Sec 163 Road Traffic Act 1988
- A police officer in uniform can also stop any vehicle and speak to the driver. They do not need to suspect you of having committed an offence. They can also require you to produce your driving documents for the vehicle at a police station if you are not able to show them at the time, if they do it is you will be issued with a different document.

The power to stop a motor vehicle does not give a right of search. If the police want to search your vehicle they have to do so under one of the above powers.

B.5: BTP: 'Stop and search: know your rights: section 44 Terrorism Act'



This is a guide to the Section 44 stop and search procedures. It does not cover all of the legislation.

If you would like to find out more about BTP, you can visit our website at www.btp.police.uk, email us at general.enquiries@btp.police.uk or write to: Media and Marketing, British Transport Police, 25 Camden Road, London, NW1 0LN.



BRITISH
TRANSPORT
POLICE



BRITISH
TRANSPORT
POLICE

Stop and search provides British Transport Police (BTP) with an essential tool to detect and prevent crime, gather intelligence and make our communities safer.

Stop and search powers usually require officers to have reasonable grounds to suspect an offence has been committed before conducting a search.

Searches under Section 44 of the Terrorism Act 2000 are an exception to this. This leaflet explains why this search power is used and what you can expect if you are stopped and searched under this legislation.

If you have been searched today under this power it does not mean that police think you are a terrorist. It is impractical to check everyone, as happens at airports, so we use Section 44 powers as part of a wider security regime to keep the rail system safe for everyone.

What is a Section 44 stop and search?

Section 44 of the Terrorism Act 2000 provides police with the power to search any person or vehicle within a defined geographical area, without the need to have any grounds to suspect an offence. This power can only be used if there is an authorisation in place. This authorisation lasts for a maximum of 28 days and must be approved by the Home Secretary. The police have to justify why the power is needed, which areas should be included and for how long it will be in place. Each time the authorisation is renewed it must be justified.

Under this legislation, a police officer may stop you and search:

- you
- your clothes
- your vehicle
- anything you are carrying on your person or in your vehicle.

All stops and searches must be conducted:

- legally
- courteously
- respectfully
- fairly

Section 44 powers are used as part of:

- searches based on intelligence
- searches based on suspicious behaviour
- Proactive Search Operations

We use Section 44 to help keep the rail system secure. We do not select people simply because of their ethnicity or religion.

What happens if I am stopped and searched?

Before you are searched the officer should tell you:

- that you must wait to be searched
- the legislative power that allows the search and your rights
- their identity
- the station they work at
- what they are looking for
- that you have the right to be given a form showing details of the stop and search.

You must:

- stop when requested
- stop your vehicle when requested
- comply with the search.

If you fail to co-operate or deliberately obstruct a search, you will have committed an offence and could be arrested.

What if I am in a vehicle?

Your vehicle can be stopped at any time and searched under Section 44, as long as a current authorisation is in place.

The officer may search:

- the vehicle
- the driver of the vehicle
- any passengers in the vehicle
- anything in or on the vehicle or carried by the driver or passenger

If your vehicle is unattended it may still be searched. In this case, the search form will be left with your vehicle to notify you that the search has taken place.

Your right to a form

If you are stopped and searched, the officer must fill in a form and offer it to you straightaway unless they are called away to an emergency. In this case, you can obtain a copy from British Transport Police anytime within 12 months.

Once the search has been completed you are not obliged to remain with the officer whilst the form is being filed in.

The officer will write down:

- a description of you and/or your vehicle
- your ethnic background
- that you were searched under Section 44 of the Terrorism Act 2000
- when and where you were stopped and searched
- the names and/or numbers of the officers involved in the search

The officer will ask you for your name, address and date of birth. You do not have to give this information if you do not want to unless the officer says they are reporting you for an offence. If this is the case, you could be arrested if you don't tell them.

You will also be asked to say what your ethnic background is from a list of the national census categories which the officer will show to you. You do not have to say what it is if you don't want to, but this information is used to verify that BTP is not stopping and searching people simply because of their race or ethnicity.

Why is it done?

Our aim in using Section 44 stop and search is to deter, disrupt and prevent terrorism. The threat of terrorism is real and serious and BTP has a duty to protect everyone from this threat. We believe that these powers are necessary to achieve this. We recognise that this is a unique power and we continually review how we use it to ensure it is appropriate.

Who can stop you?

- a uniformed police officer
- a uniformed Police Community Support Officer (PCSO)

Only a police officer can search you. PCSOs may search your possessions and vehicle, but only when under the direct supervision of a police officer.

Where can I be stopped and searched?

You can be stopped and searched under Section 44 if you and/or your vehicle are within the geographical area defined by the authorisation that has been granted by the Home Secretary. If you are in a public place, the officer will only ask you to take off your coat or jacket and your gloves,

unless the officer believes you are using your clothes to hide your identity.

If the officer asks you to take off any headwear or anything you wear for religious reasons, such as a scarf, veil or turban, they must take you somewhere out of public view. This does not mean you are being arrested. It is best practice in this case for the police officer who is searching you to be of the same sex as you, however, this cannot always be guaranteed.

If you are asked to remove more than the items mentioned above, then this must be done out of public view and the search must be conducted by an officer of the same sex as you.

What happens to the information?

All the information collected is put onto an intelligence database and can be shared with other law enforcement agencies. The length of time that the data is retained is currently under review by the police service as a whole.

Terrorism can only be overcome by the police and community working together. We thank you for your cooperation today.

How can I make a complaint?**You should not be stopped and searched solely based on:**

- your race, age, sexuality, gender, disability, religion or faith
- the way you look or dress, the language you speak
- your past criminal record

If you are unhappy with how you were treated or if you feel you were treated differently because of any of the above, you can make a complaint. It will help if you keep the form that BTP gives you.

You can get advice from, or make a complaint to:

- a British Transport Police station
- the British Transport Police Authority
- a Citizen's Advice Bureau
- your local Race Equality Council
- The Independent Police Complaints Commission
- The Equality and Human Rights Commission
- a legal advisor

If you have difficulty understanding English, or if you are deaf, British Transport Police must take reasonable steps to ensure that you understand your rights.

B.6: Authorisation pro-forma

Authorisation to Stop and Search – S.44 under the Terrorism Act 2000

[To be confirmed by the Secretary of State within 48 hours of time of authorisation]

- S.44 (1) Terrorism Act 2000
- S.44 (2) Terrorism Act 2000
- S.44 (1) & (2) Terrorism Act 2000

1) **Name of Force:**

--

2) **Type of Authorisation applied for:**

Written <input type="checkbox"/>	Oral <input type="checkbox"/>
----------------------------------	-------------------------------

3) **Authorisation to run until:**

Time:	Date:
-------	-------

4) **Location where powers to apply (please specify):**

Whole Force Area <input type="checkbox"/>	Map Attached <input type="checkbox"/>	
Designated Force Area <input type="checkbox"/>	Map Attached <input type="checkbox"/>	

5) **Reason for exercising S.44 powers:**
 Authorising Officers should only use the power in "specific and exceptional circumstances"
 (please see Explanatory Notes for more detail).

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6) **Authorising Officer:**
 Authorising Officers must hold substantive or temporary ACPO rank. Officers acting in ACPO ranks may not authorise the use of S 44 powers.

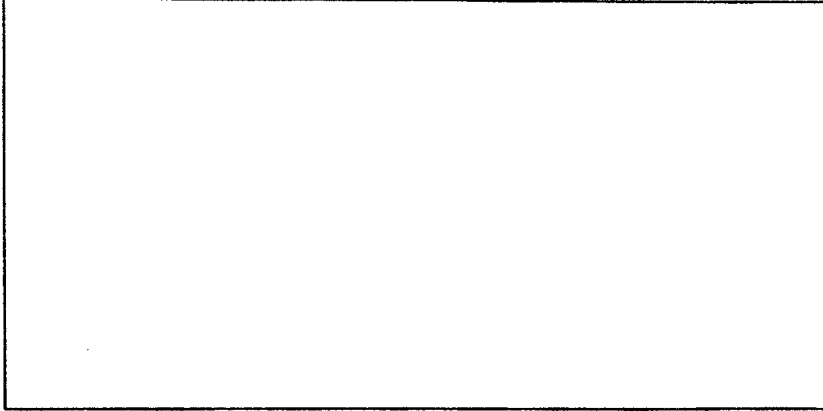
Signature.....	Time Signed.....
Print Name/Rank.....	Date Signed.....

7) **Police Force Contact and Telephone Number:**

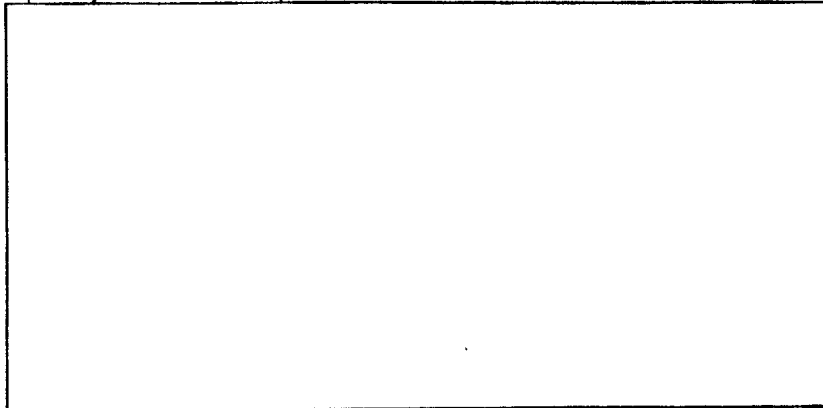
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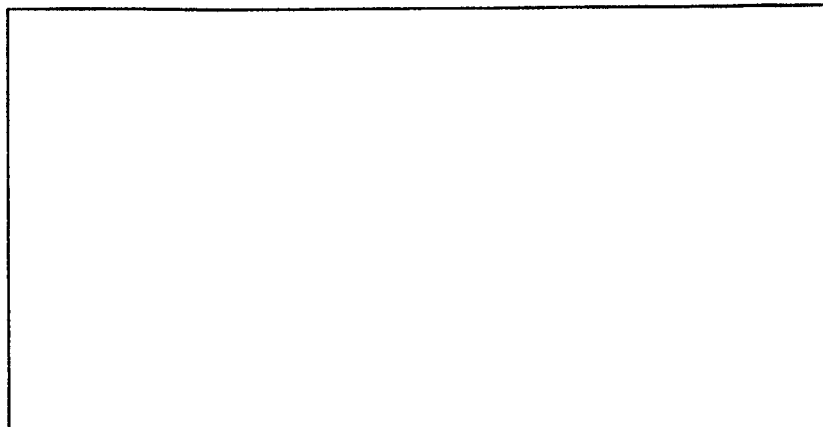
- 8) **Ongoing assessment of the terrorist threat:**
Authorising Officers should have some awareness of how the ongoing threat relates specifically to this authorisation (see Explanatory Notes for more details).



- 9) **New Information and/or circumstances over period of authorisation:**
Information relating to recent events specific to the force that are relevant to this Authorisation (see Explanatory Notes for more details).

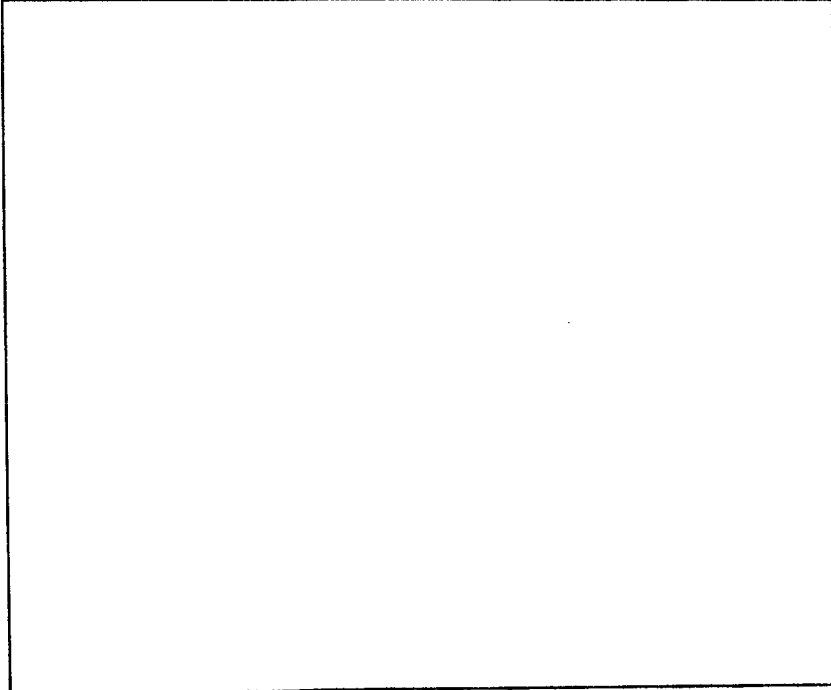


- 10) **The use of S.44 of the Terrorism Act 2000 rather than other powers of stop and search.**
(see Explanatory Notes for more details).

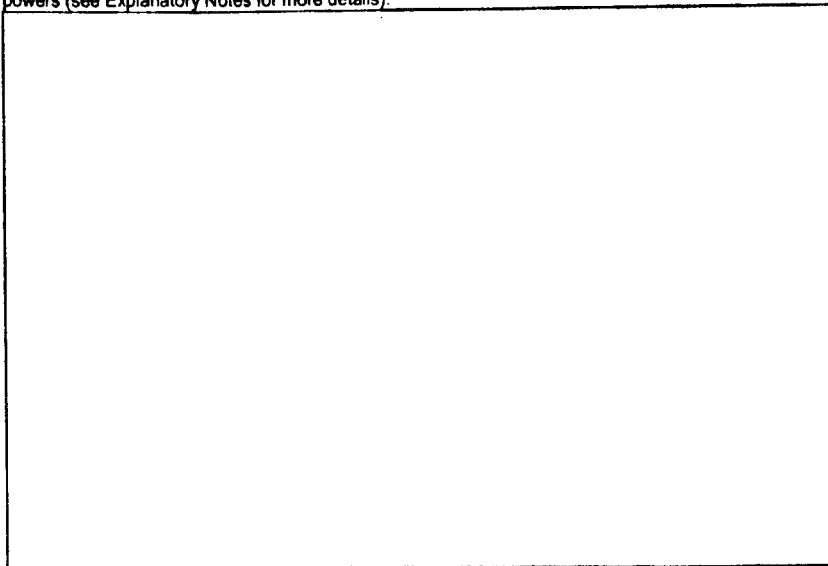


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- 11) **Description of and reasons for geographical extent of time of authorisation:**
Authorising Officer should identify the geographical extent of the Authorisation and should outline the reasons why the powers are required in a particular area (see Explanatory Notes for more details).



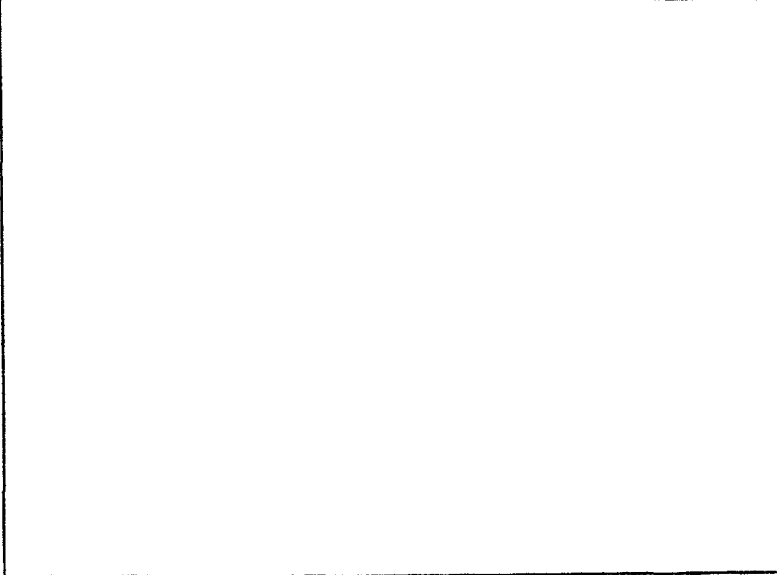
- 12) **Details of briefing and training provided to officers using the powers:**
The force should demonstrate that all officers involved in exercising Section 44 powers receive appropriate training and briefing in the use of the legislation and understand limitations of these powers (see Explanatory Notes for more details).



NOT PROTECTIVELY MARKED UNTIL COMPLETED

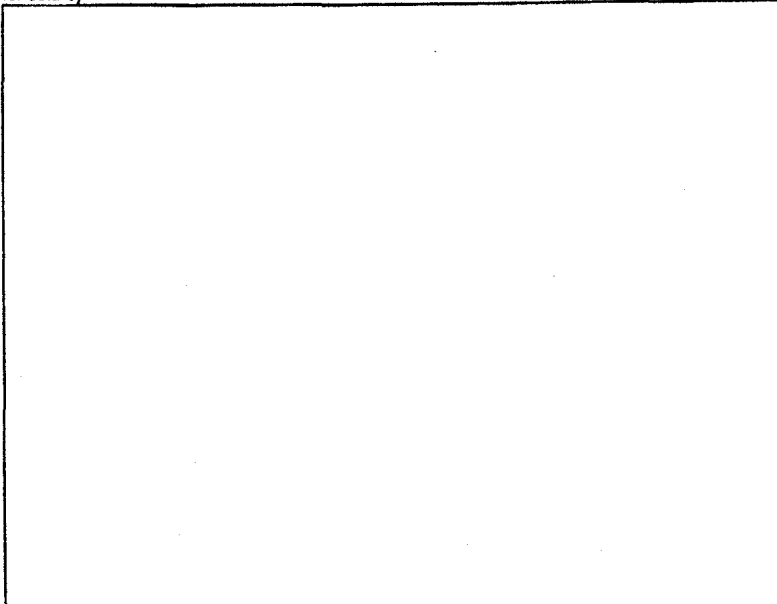
13) Practical Implementation of powers:

To include arrangements review procedures where applicable, and the type of operations that the power will support e.g. ANPR, armed patrols, road checks, security of vulnerable sites, MANPADs etc (see Explanatory Notes for more detail).



14) Community Impact Assessment and Consultation:

A Community Impact Assessment (CIA) should be completed by all forces prior to a S.44 Authorisation being confirmed. The Authorising Officer should provide details (see Explanatory Notes for details).



Explanatory Notes to Authorisation to Stop and Search under S.44 of the Terrorism Act 2000

Point 8	<p><u>Ongoing assessment of the terrorism threat</u></p> <p>Threat Assessments from International Terrorism and Dissident Irish Republican Terrorism are provided by JTAC and Security Service. Assessments of the threat to various aspects of the UK infrastructure, such as aviation, transport, military establishments are available and if necessary should be sought.</p> <p>A high state of alert may seem enough in itself to justify an authorisation of powers, it is important to set out in the detail the relation between the threat assessment and the decision to authorise.</p> <p>See section 3.1.6 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 9	<p><u>New Information and/or circumstances over the period of the Authorisation</u></p> <p>Information relating to recent events that are specific to the forces' Authorisation nominated for S.44 powers. Under this section an Authorising Officer should identify any current situations where terrorist activity may have increased and there is evidence to suggest this.</p> <p>See section 3.1.5 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 10	<p><u>The use of S.44 of the Terrorism Act 2000 rather than other powers of stop and search,</u></p> <p>Authorising officers should state the reasons for seeking to authorise S.44 Terrorism Act 2000 powers and why other powers of stop and search are insufficient.</p> <p>See section 3.1.5 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 11	<p><u>Description of and Reasons for Geographical Extent of an Authorisation</u></p> <p>A map identifying the geographical extent the powers will cover over the period of the Authorisation should be clearly defined. If an Authorising Officer is applying for S.44 powers across the whole force area, this should be simply stated on page 1 of the Authorisation Form. The Force should attach a map where necessary for the Minister to see clearly where the powers will apply and its boundaries.</p> <p>Intelligence relating to a particular region/area; vulnerable sites; transport networks and events such as a party conference are examples of when it might be necessary for a force to apply for S.44 powers. Operational requirements such a planned terror arrest, which dictate that the powers are necessary, is another example of when S.44 can be sought.</p> <p>However, powers should only be authorised where they can be justified on the grounds of preventing acts of terrorism and under S.43 of the Terrorism Act 2000 "A constable may stop and search a person whom he reasonably suspects to be a terrorist....." would be a more appropriate use of legal powers.</p> <p>See section 3.1.4 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 12	<p><u>Details of Briefing and Training provided to Officer using S.44 Powers</u></p> <p>Authorising Officers should provide a detailed outline of what training has been provided to officers involved in the use of S.44 powers. An officer may not be involved in day-to-day anti-terrorist police work where as other officers involved in the use of exercising S.44 powers may be deployed in specific anti-terrorist operations. This information should be routinely included and updated as when necessary. For guidance on briefing and tasking officers, consult section 2.4 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p> <p>See section 2.4 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 13	<p><u>Practical Implementation of Powers</u></p> <p>Authorising Officers should provide details of how the powers will be implemented. This should include arrangements for review procedures where applicable, and the type of operations that the power will support e.g. ANPR, armed patrols, road checks, security of vulnerable sites.</p> <p>See section 2.3 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>
Point 14	<p><u>Community Impact Assessment and Consultation</u></p> <p>Authorising Officers should provide details of the community impact assessment completed in with regards of the application.</p> <p>See section 1 and section 3.1.1 of the NPIA Practice Advice on Stop and Search in Relation to Terrorism.</p>

B.5: Tests applied to data in MPS Stops Database¹

Field in Stops database	Data Quality tests applied
Person Forename	Name contains invalid characters (e.g. numerals, invalid punctuation marks)
	Name is entered as 'Unknown' or 'N/A' or some variant
	Form indicates that person gave their name, but the field is blank or shown as 'N/A', 'REFUSED', 'ANONYMOUS' or some variant.
	Form indicates that person gave their name but only a single initial is entered.
Person Surname	Name contains invalid characters (e.g. numerals, invalid punctuation marks)
	Name is entered as 'Unknown' or 'N/A' or some variant
Forename & Surname	Are the same
Age / DoB	The Age entered is inconsistent with the DoB.
	DoB and Age are both blank
DoB	Year of Birth is pre 1900
	Is later than or the same as the Date of the Stop
	Not entered
Age	Age is <= 9 years
	Age is > 75 years
	Is recorded a 0
Gender	Is recorded as Unknown

¹ Source: Data Quality Manager.

Gender / Person Forename	The Person's gender is inconsistent with the Person's gender e.g. Mary recorded as Male or Barry recorded as Female (we have list of names/genders that we are reasonably confident should agree).
Self-Defined Ethnicity (SDE)	Is blank or not recorded (where the reason for it not being recorded is given as one of the 'N' codes: N1 – Where the officer's presence is urgently required elsewhere N2 – Situation involving public disorder N3 – When the person does not appear to understand what is required N4 – Where the person declines to define their ethnicity
	Is not recorded (i.e. is blank on the form – no reason for not recording the SDE is given)
Ethnicity (IC Code)	Is recorded as 'Unknown'
SDE & IC Code	Are inconsistent e.g. SDE indicates 'Black or Black British' and IC code indicates 'White Northern European'
Vehicle Registration Mark	Vehicle is stopped, but registration mark is not recorded (field is blank)
Officer Surname	Name contains invalid characters (e.g. numerals, invalid punctuation marks)
	Is blank
	Is entered as 'Not Known', 'Not Recorded' or some variant.
Officer Warrant number	Is blank
Date of Search	Is blank
	Is pre 1996 or is invalid
Date of Stop (or Search)	Timeliness – entered onto the system between 7 & 21 days after date of stop

	Timeliness – entered onto the system more than 21 days after the date of the stop.
	Is blank
Outcome/Subject of Search	Outcome is inconsistent with Subject of Search e.g. Only Searched a vehicle, but outcome is shown as either Arrest, Verbal Warning, Advised (i.e. relevant to a person not a vehicle).
	Outcome is applicable to an adult only, but the Person stopped has an age of < 16 years – for Outcome code 7 – ‘Directed to leave alcohol related crime or disorder locality.
Outcome	Outcome indicates an arrest, but no arrest details given (e.g. reason for arrest).
Reason for Arrest	Is Counter-Terrorism
Location of Search	Is blank