PROTECTION OF FREEDOMS BILL

Written Evidence to
House of Commons Committee Stage

1. The Northern Ireland Human Rights Commission (the Commission) is the national human rights institution (NHRI) for Northern Ireland. It was created in 1999 under the Northern Ireland Act 1998, pursuant to the Belfast (Good Friday) Agreement of 1998.\(^1\) The Commission is accredited with ‘A’ status by the UN International Co-ordinating Committee of NHRIs.\(^2\) It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,\(^3\) and advising on whether a Bill is compatible with human rights.\(^4\) In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.

2. The Commission will focus its comments on the stop and search powers within the Protections of Freedoms Bill. Many other aspects of the Bill, including provisions for DNA retention, do not extend to Northern Ireland following the devolution of justice, and the Commission will provide evidence to the Northern Ireland Assembly on such matters

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\(^1\) The Commission’s powers were modified by the Justice and Security (Northern Ireland) Act 2007.
\(^2\) The UK has two other accredited NHRIs: the Equality and Human Rights Commission for Great Britain, except in respect of matters devolved to Scotland, which has established the Scottish Human Rights Commission. The present submission is solely on behalf of the Northern Ireland Human Rights Commission.
\(^3\) Northern Ireland Act 1998, s69(1).
\(^4\) As above, s69(4).
in due course.

**Modification of UK Stop and Search powers**

3. Clause 58 would repeal the ‘section 44’ stop and search power introduced under the Terrorism Act 2000 (TACT) which allows police to randomly search persons without a requirement for individual reasonable suspicion. The power can be exercised in a designated area where it is considered ‘expedient for the prevention of acts of terrorism’ and is intended only to be exercised to search for articles which could be used in connection with terrorism.

4. This Commission has consistently raised concerns that the existence of such an unfettered power could lead to its arbitrary exercise and/or its deployment in a discriminatory manner. In July 2010, in *Gillan and Quinton v UK* the European Court of Human Rights found that the power failed the legal certainty test under ECHR Article 8 (the right to respect for private life) in that the powers were “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”. The present Bill would introduce a replacement stop and search power. The same test applies to this power, namely whether it is compatible with the rule of law in a democratic society by affording sufficient safeguards to prevent its exercise in an arbitrary fashion.

5. It is worth emphasising that the violation of ECHR Article 8 found in *Gillan* was not under the test of ‘necessary in a democratic society’, where limitations are considered in relation to their proportionality to the legitimate aim they serve. In that context, the actual effectiveness or ineffectiveness of powers such as s44 would be considered. Rather s44 failed the “in accordance with the law” test, that legislation must be sufficiently clear and foreseeable to enable the individual to regulate their conduct. The Court held:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.

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5 *Gillan and Quinton v UK* (app no 4158/05) para 87.
6 As above, para 77.
6. There are tightly defined genuine ‘emergency’ circumstances where it is possible to exercise temporarily, through the time-limited suspension of certain treaty obligations, counter-terrorism powers which would normally infringe on human rights standards, such as the right to private life. Rather than introducing ‘permanent’ powers a threshold must be met of a genuine emergency for which the temporary measures are strictly required; it is therefore only in these circumstances that powers which would otherwise infringe standards such as Article 8 should be introduced.7

7. Clause 60 and schedule 5 of the present Bill would introduce a new permanent power to stop and search people or vehicles without individual reasonable suspicion. The power permits a senior police officer to grant an authorisation, if the officer “reasonably suspects that an act of terrorism will take place”, and considers that the “authorisation is necessary to prevent such an act”. The specified zone for the authorisation can be no greater than is necessary to prevent such an act; and the duration of the authorisation can be no longer than is necessary to prevent such an act, with the maximum period being 14 days. Following an authorisation, the power can only be exercised to search for evidence of terrorism. As with s44, the Secretary of State would have oversight powers to cancel an authorisation or shorten its duration; these powers would also now allow the Minister to restrict the geographical area of the authorisation. A Code of Practice must be issued, which a court or tribunal may take into account in relation to a constable’s failure to have regard to it. The new proposed power therefore has greater safeguards on the face of the Bill than s44 and some additional oversight. However, there are questions as to whether it will be feasible in practice to verify compliance with some of the authorisation criteria.

7 Article 15 of the European Convention on Human Rights permits temporary derogations from a number of rights in the Convention in time of war or other public emergency threatening the life of the nation, provided that the derogation only is to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Under the United Nations human rights system, the UK is also party to the International Covenant on Civil and Political Rights (ICCPR), Article 4 of which also contains a derogation provision.
8. The oversight power of courts and tribunals in relation to having regard to the Code of Practice appear to apply only to a constable’s decision to conduct an individual search. It does not apply to the original decision of the senior police officer to grant an authorisation (having determined that the ‘generalised’ reasonable suspicion actually arises), despite the exercise of authorisation power also being covered by the Code of Practice. The role that schedule 5 would give to the Secretary of State in providing oversight to authorisations is only permissive: restrictions “may” be instigated but there is no duty to do so, if the authorisation criteria have not been met. In relation to oversight of s44 TACT authorisations, shortly before the suspension of use of the power the Police Service of Northern Ireland (PSNI) confirmed to the Commission that while there was dialogue in respect of the necessity of applications, the PSNI was not aware of any instance where the Secretary of State had actually refused or curtailed an authorisation.\(^8\) In addition to the question of whether a member of the Executive is the appropriate person to provide such oversight, the more general effectiveness of this particular safeguard is therefore questionable. A Council of Europe human rights committee has urged monitoring of the s44 authorisations with particular care to ensure that their granting is not purely an administrative exercise.\(^9\)

9. Unlike the 14-day time restriction, while it should be “no greater than is necessary”, there is nothing on the face of the Bill which directly restricts the geographical area. This contrasts with the one square kilometre limit proposed in an unsuccessful amendment to s44 during the passage of the Crime and Security Bill in the previous Parliament. Just before the suspension of s44, the PSNI confirmed that an authorisation for its use was in place for the whole of Northern Ireland, and had been in the past, although the PSNI stressed there had also been times when some policing areas and districts had not had an authorisation in place.\(^10\) Authorisations can only be published retrospectively, if at all, and presuming that the rationale is intelligence-led, the reasoning is unlikely to be set out. Should an authorisation under the new power also cover the entire jurisdiction, or large parts of the same, it is difficult to see how the area being “no greater than necessary” could be effectively challenged.

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\(^8\) PSNI correspondence to Commission, 17 May 2010.  
\(^10\) PSNI correspondence to Commission, 17 May 2010.
10. In relation to other safeguards, there is no explicit requirement on the face of the Bill for ethnic monitoring (which in Northern Ireland would presumably include grounds of “community background”). The individual search requirement also relates back to the concept of “terrorism” which is broadly defined in legislation.

11. **The Commission remains concerned that there are insufficient safeguards to prevent the powers being exercised arbitrarily.**

**Modification of Northern Ireland Stop and Search powers**

12. The Justice and Security (Northern Ireland) Act 2007 (JSA) provides specific powers for this jurisdiction. Section 21 allows the stopping and questioning of any person or vehicle by the police or military about identity and movements, without individual reasonable suspicion (or an authorisation). Section 24 and schedule 3 allow stop and search in a public place by the police and military for munitions and transmitters, without individual reasonable suspicion.\(^{11}\) Since the discontinuation of use of the s44 TACT power in July 2010, there has been a corresponding rise in the use of the section 21 and 24 JSA powers, although the overall number of stops has reduced.\(^{12}\) As ECHR Article 8 is also engaged by questioning powers, the lack of a reasonable suspicion requirement or other limitations leaves both s21 and the s24 stop and search powers susceptible to similar challenge as that brought in *Gillan*, that is, that they are not in accordance with the rule of law in a democratic society.

13. The s24 stop and search power would be amended by the present Bill.\(^{13}\) The amendment would limit the power to the military, and remove it from the police. The removal of such an unfettered power from the police is welcome. Its continued permanent availability to the military (rather than the power being a time limited emergency power) is of concern, and, should it be used, likely to face challenge.\(^{14}\)

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\(^{11}\) Along with a power to stop and search on private property, where there is individual reasonable suspicion.

\(^{12}\) PSNI quarterly statistics indicate the use of s21 and s24 JSA, and combined use of both, rose from 255 instances in the quarter before s44 TACT suspension (April-June 2010) to 5,535 in the most recent quarter (October-December 2010); s44 had been used 6,992 times in its own right in the April-June 2010 period, and a further 1,849 times in combination with s21. Source: Central Statistics Unit, PSNI.

\(^{13}\) Para 1, Schedule 6.

\(^{14}\) During the passage of the JSA 2007, the Commission voiced concerns as
14. The present Bill would amend JSA 2007 to introduce a s24 replacement stop and search power for the police in Northern Ireland, without individual reasonable suspicion. The power is drafted in a similar manner to the s44 TACT replacement power, with the authorisation and individual stop exercise tied more precisely to a search for munitions or transmitters rather than to suspicion related to “acts of terrorism”.

15. With this power, in the event of a judicial review or other legal proceedings relating to an authorisation, the Secretary of State may prevent the challenge by issuing a certificate stating that the authorisation was justified and that the “interests of national security are relevant to the decision”, with appeal only to a special tribunal.

16. Although the introduction of some safeguards is reassuring, the Commission remains concerned that they are insufficient to prevent the powers being exercised arbitrarily.

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regards this and other powers being vested in the military on a permanent basis. If a situation were to arise in Northern Ireland, or indeed in Great Britain, requiring the deployment of the armed forces with quasi-policing powers, such powers could be made available through emergency provisions that were in place for a strictly limited period.

15 Para 2, Schedule 6.
16 A Tribunal established under section 91 of the Northern Ireland Act 1998.