



Home Office

Counter-Terrorism and Border Security Act 2019

Response to the Home Office Consultation on the Code of Practice for Schedule 3 (to the Counter-Terrorism and Border Security Act 2019) and modifications to the existing Code of Practice for Schedule 7 (to the Terrorism Act 2000)

8th June 2020



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978-1-5286-1813-7
CCS0320304068

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Introduction and contact details

This document is the post-consultation report for the consultation paper, ‘Consultation on the Code of Practice for Schedule 3 (to the Counter-Terrorism and Border Security Act 2019) and modifications to the existing Code of Practice for Schedule 7 (to the Terrorism Act 2000).’

It covers:

- the background to the consultation
- a breakdown of responses by group
- a summary of the consultation responses
- a detailed response to the specific questions raised in the consultation
- the next steps following this consultation

Further copies of this report, the consultation paper and revised drafts of the Codes of Practice to which this response relates can be obtained by contacting the Counter-Terrorism Ports Powers Team at the following email address:

Email: Schedule3and7codes@homeoffice.gov.uk

These documents are also available at

<https://www.gov.uk/government/consultations/codes-of-practice-for-officers-detaining-individuals-at-ports>

Alternative format versions of this publication can be requested using the above email if required.

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Home Office at the above address.

Background

The consultation paper ‘Consultation on the Code of Practice for Schedule 3 (to the Counter-Terrorism and Border Security Act 2019) and modifications to the existing Code of Practice for Schedule 7 (to the Terrorism Act 2000)’ was published on 25 February 2019.

It invited comments on a draft Code of Practice for new powers under Schedule 3 to the Counter-Terrorism and Border Security Act 2019 (“the 2019 Act”) to stop, question, search and detain a person at a UK port or the Northern Ireland border area for the purpose of determining whether they are, or have been, engaged in hostile activity. The Schedule 3 powers were introduced to support efforts to strengthen UK defences against hostile state activity. They were announced on 14 March 2018 as part of a package of measures in response to the attempted assassination of Sergei and Yulia Skripal in Salisbury, which led to the poisoning of Detective Sergeant Nick Bailey, Charlie Rowley and Dawn Sturgess.

It also invited comments on the revised Code of Practice for the similar powers under Schedule 7 to the Terrorism Act 2000 (“the 2000 Act”), the revisions having been occasioned by changes to the 2000 Act made by the 2019 Act. Both Codes of Practice set out the processes and safeguards governing the exercise of these counter-terrorism and counter-hostile activity ports powers by ports and border officers. They give detail on how these powers should be used, including examples and additional clarity to ensure the highest standards of professionalism and compliance.

Under paragraph 57 of Schedule 3 to the 2019 Act and paragraph 5 of Schedule 14 to the 2000 Act, before laying the respective draft Codes before Parliament, the Secretary of State must publish a draft of the Code, consider any representations made about the draft, and where appropriate, modify the draft in light of any such representations. The consultation intended to fulfil those requirements in respect of the Schedule 3 and Schedule 7 Codes of Practice.

As part of the consultation, the Home Office invited comments on whether the Schedule 3 and Schedule 7 Codes are sufficiently clear to ensure the effective, fair and proportionate use of these powers.

In particular, we wanted to know how well:

- Both Codes clarify the types of engagement that officers are able to undertake with the general public during the ordinary course of their duties and the questioning that is only permitted during an examination;
- Both Codes explain the rights and obligations of the examinee, including any restrictions to those rights and associated safeguards;
- The Schedule 3 Code explains the new powers of retention of articles and copies of material taken from them, including the safeguards, timescales and information provided to the examinee;

- Structural changes made to the Schedule 7 Code of Practice makes the document clearer and more accessible for those following the Code in the exercise of their powers.

The consultation period closed on Friday 5 April 2019 and this report summarises the responses, including how the consultation process influenced the further development of the Codes of Practice.

Consultation Responses

We received eight responses to the public consultation split between individuals working for public authorities, media groups and oversight bodies.

We also received a response from the new Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, who was not in post during the public consultation period but asked the Home Office for the opportunity to comment on the draft Schedule 7 Code. Mr Hall's submission was received on Wednesday 4 September and has also been considered as part of this consultation response. His response was also published on the website for the Independent Reviewer of Terrorism Legislation on Friday 6 September.¹

The consultation complied with all aspects of the Cabinet Office consultation principles.

Table of Respondents

The following table lists the responses that were received during the public consultation period.

Type of respondents	Number of responses
Public authorities	3
Media groups	2
Oversight bodies	3

¹ <https://terrorismlegislationreviewer.independent.gov.uk/new-draft-schedule-7-code-of-practice-my-response-to-consultation/>

Principal comments and proposed changes

1. Having given careful consideration to the representations received during the course of the consultation, we intend to make some changes to the draft Schedule 3 and 7 Codes of Practice. These include substantive changes, as well as minor and typographical changes. Further details of where we intend to make these changes are provided below.
2. We also received representations relating to issues that did not fall within the scope of the consultation. For example, suggestions concerning changes to the Act or procedural practices of the police with regards to complaints. Further detail on these are also provided below.
3. Please note that references in the response below to the draft Schedule 7 and draft Schedule 3 Codes concern the drafts that were published for consultation in February 2019 (unless stated otherwise). References to the “revised” draft Codes concern the latest drafts of the Codes laid alongside this response on 8th June 2020, which will be considered by Parliament in due course.

Schedule 3 article retention process and timeframes

Issues raised by respondents

4. A number of respondents commented on the provisions under Schedule 3 that provide a mechanism for retaining, using and potentially destroying an article (paragraphs 11(2)(d) and (e) and 12-16 of Schedule 3), or using copies of confidential material (paragraphs 17(3)(d) and (e) and 18-21), subject to the authorisation of the Investigatory Powers Commissioner.
5. Some of the responses sought a clearer explanation of the process and timeframes underpinning the mechanism. One respondent suggested that the Code needed to focus on the time period allowed for affected parties to provide representations, rather than when the Commissioner would start to consider them. It was highlighted that it would be unusual for a Code of Practice that is intended for frontline officers to set deadlines by which a court is expected to perform its functions, and which have no basis in the primary legislation. A further recommendation was made to alter the language of the draft Code to indicate that a decision of the Investigatory Powers Commissioner or a Judicial Commissioner would be made and communicated “as soon as reasonably practicable”. The respondent also suggested that it would be helpful if representations could be provided in one batch and for the time period for providing representations to begin on the same date that the examining officer provides the retention notice to the person whose article or copies have been retained.

6. Some respondents identified a drafting error at paragraphs 72, 84, 102 and 114 of the draft Schedule 3 Code that would commence the two-week appeal window (or three-day window in urgent cases) at the point of the decision of the Judicial Commissioner, rather than at the point a notification of the decision has been sent to affected parties. The issue being that there might be a delay between the decision and when it is communicated to the affected parties, leaving them with less time than intended to make an appeal. One respondent also asked for a worked example of the time period for making representations and decision-making under the urgency condition, so that it is clearer for officers and the general public (paragraphs 79 and 109 of the draft Code).
7. Further responses from organisations representing the media recommended that representations made by the police or Home Secretary in relation to a retained article or copy should be shared with the person from whom the article or copy was taken (or their representatives). They also suggested that if a subsequent retention power is used by an examining officer, including in the event of a decision by the Commissioner, the person should be informed immediately of the power and details of how to appeal and associated timescales. One respondent suggested that the examining officer should await confirmation of a decision by the Commissioner where the decision went against the person's representations and might be the subject of an appeal.
8. Finally, one respondent expressed concern about the urgency provisions, suggesting that their use should be carefully monitored and that the Schedule 3 Code should stress their exceptional nature.

Government response

9. Having considered the comments above, we agree that the Code should reflect any timeframes provided for in the primary legislation but should not go further and require the Investigatory Powers Commissioner or his office to perform their functions by set deadlines. After consultation with the office of the Investigatory Powers Commissioner, we have made changes throughout the sections of the draft Code relating to the retention of articles under Schedule 3, paragraph 11(2)(d) and (e), and in relation to copies, paragraph 17(3)(d) and (e) (urgent and non-urgent), to ensure that where a time period is not defined or required in the primary legislation, the function of the Commissioner will be carried out "as soon as reasonably practicable". We have also amended the (non-urgent) four-week period for representations to commence on the date the notice is provided to the person whose article or copy has been retained by the examining officer. The 2019 Act does not allow the Code to mandate affected parties to provide their representations in one batch; rather, paragraphs 13(1) and 19(1) of Schedule 3 require the Commissioner to specify a time period within which representations must be submitted and provide that the Commissioner must have regard to any representations made by an affected party within that period.

10. We have fixed the drafting error that was identified at paragraphs 72, 84, 102 and 114 of the draft Code (now paragraphs 73, 85, 107 and 119) to ensure the appeal window in urgent and non-urgent cases begins on the date of the notification to affected parties of the decision of the Judicial Commissioner. We have also provided worked examples of the time period for making representations and decision-making under the urgency condition, so that it is clearer for officers and the general public. These are included as footnotes in the relevant paragraphs of the revised draft Code.
11. Where an article or copy is subsequently retained under a different power, including after the Investigatory Powers Commissioner has made a decision in relation to the article or copy, the draft Schedule 3 Code already requires the officer to inform the person in writing (see paragraphs 63, 67, 73, 85 and 97). Where the article or copy has subsequently been retained under the urgency condition, the officer should also attempt to contact the person by phone (see paragraph 63, 78 and 108 of the draft Code). We have now made further changes to the draft Schedule 3 Code to ensure that where an officer does subsequently retain an article or copy, they inform the person “as soon as reasonably practicable”. Where the officer subsequently retains an article or copy under paragraph 11(2)(d) or (e) or 17(3)(d) or (e), the person will be provided with a notice of retention which includes information about the process and timescales. The route of appeal for retention under paragraph 11(2)(a)-(c) or 17(3)(a)-(c), however, is to make a complaint to the Chief Officer of the force responsible, the details of which are available in the draft Code of Practice and public information leaflet provided to the individual, or through an application for a judicial review. Paragraph 64 of the draft Schedule 7 Code also already requires the examining officer to inform the person of the power under which their property is retained if the intention is to retain it beyond the conclusion of the examination.
12. With regard to the suggestion to require the police or Home Secretary to provide their representations to the person whose article or copy has been retained under paragraph 11(2)(d) or (e) or 17(3)(d) or (e) of Schedule 3, we are of the view that there may be some cases where this could create significant risk to national security and undermine the utility of the powers. These powers will be targeted against hostile actors who are working for, on behalf of or otherwise in the interests of a hostile state. It would be irresponsible of any government to put the safety of its citizens at risk by providing the examinee with potentially very sensitive information.
13. In response to the suggestion that the examining officer should await a notification of a decision from the Investigatory Powers Commissioner before taking action against an article or copy (where it has been retained under paragraph 11(2)(d) or (e) or 17(3)(d) or (e) of Schedule 3), we have made the necessary change to achieve this. The current draft would allow the examining officer to take any action that has been authorised by a Judicial Commissioner against the article or copy if the Investigatory Powers Commissioner has not notified affected parties that an appeal has been received within the two-week appeal period (or three-day period in urgent cases). We agree with the suggestion that it would be safer for the Code to specify that no action

can be taken after the decision of a Judicial Commissioner (as distinct from a decision of the Investigatory Powers Commissioner) until the Investigatory Powers Commissioner has confirmed that there has been no appeal or, if there has been an appeal, until the outcome of the appeal is notified.

14. Finally, we are of the view that the draft Code does not need to further express the urgent nature of the urgency condition. The test for use of the urgency condition is clearly set out at paragraphs 74 (in relation to an article) and 104 (in relation to copies of confidential material) of the draft Code and will be subject to the oversight of the Investigatory Powers Commissioner.

Handling of protected material and sources

Issues raised by respondents

15. The responses received from organisations representing the media raised issues relating to the handling of protected material and sources under both Schedule 7 and 3 powers. One respondent highlighted that one of the grounds under the Police and Criminal Evidence Act 1984 (“PACE”) that needs to be satisfied in order to obtain a production order in respect of journalistic material is belief that an indictable offence has been committed, which is a higher threshold than the provisions under Schedule 3. The respondent cited the *Sanoma* (ECHR) [91] (n26) judgment to emphasise that ‘authorisation should be sought in advance of access to the journalist’s material being obtained’. The retention powers under Schedule 3 would currently allow an officer to seize and copy confidential material without prior judicial authorisation but retention and use of such material is subject to the authorisation of the Investigatory Powers Commissioner.
16. Both respondents took issue with the current drafting at paragraphs 67-69 of the draft Schedule 7 Code and 88-90 of the draft Schedule 3 Code, stating that the provisions encourage examining officers to examine protected material without authorisation, thereby violating Article 10 rights. They also warned that post-factum review cannot restore confidentiality when it is destroyed, citing *Telegraaf Media Nederland* (ECHR) (No 67) [101]. Finally, one respondent felt that officers should not be allowed to retain protected material for the purpose of separating it from material that can be examined (for example, a hard drive with multiple files and folders).
17. One respondent suggested that the Codes should incorporate references to the Human Rights Act 1998 and the European Convention on Human Rights throughout, as well as include further references in the draft Schedule 3 Code (within the sections on production of information, searches and detention) to the provision at paragraph 40 that would prohibit an officer from asking a question that would reveal a journalistic source without judicial or independent scrutiny. They also recommended replicating the same provision and references within the draft Schedule 7 Code.

18. Finally, one respondent recommended that in a situation where an officer intends to seize and examine confidential material under Schedule 3 (subject to the authorisation of the Investigatory Powers Commissioner), the officer should immediately notify the Commissioner of any assertion that the material includes journalistic material or that the person has a journalistic connection.

Government response

19. The Government agrees that it is important for confidential material to be subject to greater legal protection and appropriate safeguards to prevent unnecessary, disproportionate or arbitrary exposure through the use of examination powers. That is why officers are (from paragraph 89 of the revised draft Schedule 3 Code) prohibited from reviewing such material unless they believe there are reasonable grounds to retain an article or copy it under paragraphs 11(2)(d) and (e) or 17(3)(d) and (e) of Schedule 3, which require the independent authorisation in advance (or immediately after, in urgent cases) of the Investigatory Powers Commissioner to the retention and use of the material. These safeguards are sufficient to protect against unwarranted intrusion into Article 10 rights during a Schedule 3 examination. The protections were constructed in light of the proposition in the Court of Appeal judgment in the case of R (David Miranda) v Secretary of State for the Home Department and others [2016] EWCA, Civ 6, in which it was held that “prior judicial or other independent and impartial oversight (or immediate post factum oversight in urgent cases) is the natural and obvious adequate safeguard” in cases involving State interference with journalistic freedom.
20. In addition to the safeguard of Investigatory Powers Commissioner authorisation to the retention and use of material which is held or copied under paragraphs 11(2)(d) and (e) or 17(3)(d) and (e), a further safeguard would then apply in respect of confidential material, because the Commissioner will only authorise the retention and use of such material (having considered representations from all affected parties) if satisfied that arrangements are in place that are sufficient for ensuring that the material is retained securely and where satisfied that the material will be used only so far as necessary and proportionate for an exhaustive list of “relevant purposes” – where use is necessary in the interests of national security or the economic well-being of the United Kingdom so far as those interests are also relevant to the interests of national security; or for the purpose of preventing or detecting serious crime; or for the purpose of preventing death or significant injury.
21. To strengthen the Article 10 safeguards even further, we have made clear in the Codes that ‘protected material’ under Schedule 7 and ‘confidential material’ under Schedule 3 must include material which identifies or confirms a “source of journalistic information”. The Government is now considering whether to amend the definition of “confidential material” in paragraph 12(10) of Schedule 3 to make this clear on the face of the legislation.

22. The policy intent behind the provisions that were contained at paragraphs 67-69 of the draft Schedule 7 Code and 88-90 of the draft Schedule 3 Code was to ensure the careful handling of material subject to greater legal protection, while simultaneously mitigating the risk of terrorists and hostile actors abusing these safeguards to avoid security checks. First, the language sought to clarify that the examining officer was not bound to take at face value every claim by a person that their article contained confidential material, and that steps could be taken to verify such claims. Second, the language sought to ensure, through provision of a separation process, that the presence (or assertion of presence) of such material could not prevent the examining officer from reviewing material which is examinable and not subject to the same protections. The Government takes seriously the threat and capability of terrorists and hostile actors to use these safeguards to frustrate an examination.
23. However, we have made amendments to these paragraphs in both Codes to make clear the principle and expectation that officers must treat such material with care to minimise the risk that the material is seen by the examining officer or any other officer involved in the examination. In particular, after considering representations made by the Independent Reviewer of Terrorism Legislation, we have sought to provide further clarity on how the separation process and associated safeguards will work, which has been modelled on the Serious Fraud Office's processes for separating legally privileged information from other material acquired in the course of an investigation. Such processes having been considered by the High Court in *McKenzie, R (On the Application Of) v Director of the Serious Fraud Office [2016] EWHC 102* (also see below section from paragraph 60). Given the rise in use of electronic equipment with sometimes terabytes of data, we do not feel that the presence of protected material should prevent frontline officers from examining material that is not protected in the course of fulfilling their statutory obligation to protect our citizens and prevent crime. This is particularly serious in the context of powers to counter terrorism and hostile state activity.
24. Further consideration of these paragraphs and the annual report of the Independent Reviewer of Terrorism Legislation on the Terrorism Acts has prompted review of the safeguards for special procedure material as defined by section 14 of PACE 1984, which includes material acquired or created in the course of any trade, business, profession or other occupation with an express or implied confidentiality undertaking and non-confidential journalistic material. The Government is of the view that preventing such a broad category of business documents from being considered as part of a counter-terrorism or counter-hostile state activity examination is open to abuse. With regard to non-confidential journalistic material, the Government maintains the position taken during passage of the Schedule 3 powers, that only material which is held in confidence, including information which may confirm or identify a confidential source, should be subject to greater legal protection. The revised version of the draft Schedule 7 Code (paragraph 73), therefore, would allow retention, examination and use of confidential business material subject to appropriate safeguards – namely, the authorisation of an officer of the rank of at least superintendent who has no connection

to the examination. An authorising officer may only give such an authorisation where satisfied that arrangements are in place that are sufficient for ensuring that the material is retained securely, and the material will be used only so far as necessary and proportionate for the purpose of retention.

25. We also understand the concerns raised with regard to the urgency condition and the post-factum review of the Investigatory Powers Commissioner but remain of the view that this mechanism and its safeguards are sufficient to ensure the powers are appropriately safeguarded against arbitrary exercise. The provisions under paragraph 14 of Schedule 3 are clear that the urgency condition will not be met unless there is an urgent need for the article to be examined or otherwise used for the purpose of preventing the carrying out of a hostile act, or death or significant injury, or for the purpose of mitigating the risk of any such act, death or injury occurring. It must also be the case that the time it would take for the requirements of the standard authorisation process to be complied with in relation to the article would not enable such use to take place with sufficient urgency. Use of the urgency condition must be authorised by a senior officer of a rank no lower than a superintendent who is not directly involved in the exercise of any powers under Part 1 of Schedule 3. Furthermore, if after receiving representations from the affected parties the Commissioner decides to cancel the authorisation, they may, in the case of an article, direct that it is destroyed or returned to the person from whom it was taken, and they may further direct that all reasonable steps are taken to secure that any information derived from the article is destroyed (see paragraph 16(6) of Schedule 3). In the case of a copy, they may direct that the copy is destroyed, and all reasonable steps are taken to secure that any information derived from the copy is also destroyed (see paragraph 22(6) of Schedule 3).
26. We have made several of the suggested changes to incorporate the expectation that the powers are exercised in accordance with the Human Rights Act 1998 and with respect for the European Convention on Human Rights. These can be found at paragraphs 6 and 24 of the revised draft Schedule 7 Code and paragraphs 6 and 23 of the revised draft Schedule 3 Code. We have also made further references to the safeguard to prohibit questioning that would reveal a journalistic source at paragraphs 51 and 127 of the revised draft Schedule 3 Code and have replicated the safeguard and associated references at paragraphs 42, 52 and 80 of the revised draft Schedule 7 Code so that it applies equally to both powers. We have also made clear in all of these paragraphs that the safeguard applies with respect to information subject to legal privilege.
27. Finally, where an article is retained under paragraph 11(2)(d) or (e) of Schedule 3 or a copy of that article or material on it includes or consists of confidential material under paragraph 17(3)(d) or (e), the examining officer will notify the Investigatory Powers Commissioner as soon as reasonably practicable as required under paragraphs 12(2) and 18(2) of Schedule 3. In response to suggestions made by one respondent, we have explicitly mandated in the draft Schedule 3 Code that the officer must, in that notification, detail whether any confidential material had been identified as being on or

comprising the article, or in the case of copies, that confidential material has been identified as being contained in the copy (see paragraphs 66, 77, 100 and 111 of the revised draft Schedule 3 Code). As the thresholds for use of these retention powers concern the material rather than the individual, we are satisfied to leave it to the examining officer's discretion what further information they provide about the person.

Availability of and access to information

Issues raised by respondents

28. A number of the responses were concerned with ensuring that any individual subject to examination (their legal representative or named person) under Schedule 3 or Schedule 7 is provided with access to relevant information to inform them of the applicable procedures, obligations and safeguards. It was suggested that this should include the opportunity to access the Codes and any other relevant literature at any point during the examination (or mandated provision of the Code to each examinee), as well as the availability of any such literature via relevant agency websites. One respondent added that this should also include availability of multi-lingual posters and leaflets to aid non-English speakers or individuals whose first language is not English.
29. Some responses made more specific suggestions about the information that the person under examination should be given. For example, the person should be informed that although it is only a detained person who has the right to access a solicitor and contact a named person, a person who is examined but not detained can also request a solicitor or a named person at any point during the examination and this will be granted at the officer's discretion. Furthermore, the officer should inform the person as to whether their oral answers to questioning can or cannot be used as evidence in criminal proceedings. The responses received from organisations representing the media also made the point that access to specialist media lawyers and organisations may be needed and should be granted. They also suggested that safeguards for protected material should be explained within any publicly available material. One further suggestion was to include the definition of 'hostile activity' on the Schedule 3 notice of detention at Annex A to the draft Code as the term is less easily understood than 'terrorism'.

Government response

30. The Government agrees that the provision and availability of information about these powers and their associated obligations and safeguards play an important part in ensuring that the powers are exercised fairly and proportionately. It is existing practice in the context of Schedule 7 powers for the police to provide a copy of the Schedule 7 Code of Practice to any examinee on request and to ensure the availability of the Code online (it is also available on the relevant gov.uk website). This will continue and will also be the case for Schedule 3; indeed paragraph 7 of the draft Schedule 7 Code

and paragraph 8 of the draft Schedule 3 Code requires the codes to be available where the powers are exercised. We are of the view, however, that mandating provision of a copy of the Code to every single examinee would be unnecessary given that the vast majority of examinations under Schedule 7 have completed within an hour and usually consist of light-touch questioning.

31. As with existing practice under Schedule 7, paragraph 34 of the draft Schedule 3 Code and paragraph 36 of the draft Schedule 7 Code requires the duties and rights of a person under examination to be displayed prominently, alongside an explanation of the powers, in a place where the person will be able to read them. Furthermore, paragraphs 33 of the draft Schedule 3 Code and 35 of the draft Schedule 7 Code mandate the examining officer to offer the person a public information leaflet at the commencement of an examination and paragraphs 120 and 74 of those respective draft Codes require the officer to give any person detained under the powers a notice of detention.
32. The existing information leaflet for Schedule 7, which is produced by the police, already explains that an examinee may request a solicitor and access to a named person at any point during the examination and that request may be acceded to at the examining officer's discretion. The Government and the police will ensure that this clarification continues to be provided as part of the new information leaflet for Schedule 7 and is replicated in the leaflet for Schedule 3. We will also ensure that the leaflets include information to explain when oral answers given in response to questioning can and cannot be used in subsequent criminal proceedings to reflect the new statutory bar. We made the suggested changes to the "duties under examination" and "detention" sections of both revised draft Codes of Practice so that officers should also inform examinees verbally. Finally, in response to the suggestion of one respondent, we have made explicit provision in the revised draft Codes to ensure that the notice of detention is provided at the beginning of detention.
33. Where access to a solicitor/named person is granted in response to an examinee's request, or where the right of a detainee to that access is exercised, the officer will not specify who the examinee or detainee should consult. It will therefore be possible for a journalist or any other person to contact specialist legal representation or their employer if they wish to do so. We will ensure that information about the safeguards for protected material are also included in the information leaflet. With regard to the suggestion that all information materials are provided in several languages, we are satisfied with the existing practices of the police in relation to Schedule 7 where officers are able to provide the notice of detention in multiple languages. Where the person's understanding of English is limited, paragraph 34 of the draft Schedule 3 Code and paragraph 36 of the draft Schedule 7 Code specifies that every reasonable effort should be made to communicate the relevant information, using someone who can act as an interpreter. Indeed, where the person cannot understand English, paragraphs 47 and 49 of those respective draft Codes mandate the officer to make all

reasonable efforts to obtain the assistance of another person who is able to communicate effectively with the person.

34. Finally, in response to the suggestion of one respondent, we have included the definition of 'hostile activity' on the Schedule 3 notice of detention (Annex A to the draft Code) as it may not be as easily understood by the general public as the meaning of "terrorism".

Complaints and record-keeping

Issues raised by respondents

35. The representations of one respondent focused on the issue of complaints and the need for a robust process to handle public complaints regarding application of the Schedule 7 and 3 powers and officer conduct. Specific suggestions included having a complaints process for each port with a named officer leading how they are handled; stakeholder feedback triggering a review of an officer's accreditation; and using the Codes of Practice to reinforce that complaints are a positive opportunity for learning and to improve public confidence. A further suggestion was that the Codes should require for information about the complaints process to be clearly visible in areas where powers are likely to be used.
36. A number of respondents also commented on the need for proper record keeping of examinations and detentions. Some respondents went further by proposing that these records should be analysed to identify disproportionality or the inappropriate use of powers, or more specifically, to monitor use of the powers against journalists and others linked to the media. One respondent suggested setting a 12-month period for holding records rather than leaving it open-ended. They also suggested publishing local data to demonstrate how frequently the powers are being used in order to increase local confidence in the police. A final recommendation was that where a senior officer decides, in the event of an emergency, to deploy non-accredited officers, the decision should be clearly recorded.

Government response

37. After consultation with the police, it is clear that established practices for the handling of complaints are already in operation and to direct anything further would fall beyond the remit of these Codes of Practice. Currently, any person who wishes to make a complaint after being subject to a Schedule 7 examination is able to do so by contacting the Chief Officer of the police force whose jurisdiction the port falls under. Each police force has a process for handling such a complaint, which will have been designed to comply with national standards. Any person can also complain directly to the Independent Office for Police Conduct for England and Wales; the Police Investigations and Review Commissioner for Scotland; or Police Ombudsman for Northern Ireland. The above information and associated contact details are currently made available to any person examined or detained through the public information

leaflet, public information posters that are displayed at ports and within the Schedule 7 Code of Practice, which must be made available where the powers are exercised. This will continue for Schedule 7 and will be replicated for Schedule 3.

38. With regard to record-keeping, officers currently designated to exercise Schedule 7 powers are already required to record information about examinations and detentions. For example, paragraph 43 of the existing Code of Practice (published March 2015) requires records of examinations and detentions to be kept for statistical or reference purposes in the event of a complaint. This requirement had been replicated in the draft Schedule 7 Code and draft Schedule 3 Code at paragraphs 70-71 and 116-117 respectively. Both draft Codes stipulate that these records must be held for as long as judicial challenge or a complaint about the use of the powers can be made. Given that judicial challenges can take many years to progress through the courts, it is important any relevant records continue to be held to support the conclusion of any specific case. That is why we do not intend to allow for records to be deleted after a period such as 12 months.
39. Furthermore, the draft Schedule 7 and 3 Codes (paragraphs 19 and 17 respectively) do already mandate that any decision made to deploy non-accredited officers in the event of an emergency must be documented by the relevant Chief Officer. Paragraphs 18 and 16 of the respective draft Codes also stipulate that any non-accredited officer must receive a briefing on the powers prior to deployment and their exercise of the powers must be supervised by an accredited examining officer.
40. The police also have an established compliance framework in place and analytical mechanisms to identify trends in the use of the powers and support the maintenance of national standards. Further bespoke or thematic analysis may be undertaken at the discretion of the Independent Reviewer of Terrorism Legislation in the case of Schedule 7, or the Investigatory Powers Commissioner for Schedule 3, both of whom are required (under section 36 of the Terrorism Act 2006 and paragraph 62 of Schedule 3 to the 2019 Act respectively) to provide the Home Secretary with an annual report on the exercise of the powers. Should further analysis into the use of the powers against journalists or media representatives be needed, it is within the gift of the Reviewer or Commissioner to take forward but not for these Codes of Practice to require.
41. Finally, the Government does not intend to publish local data to reflect how the powers are being used in local jurisdictions. To do so would be damaging to UK national security as it would provide those engaged in terrorism or hostile activity with a picture of where the UK is focusing its counter-terrorism and counter-hostile activity efforts and capability. It would support such individuals in their planning where they intend to travel and are concerned about UK security checks.

Training and materials given to officers

Issues raised by respondents

42. There were a number of suggestions concerning the training of officers who will exercise Schedule 7 and 3 powers. One respondent recommended that officers should receive regular refresher training. Another focused more specifically on training and training materials relating to journalists and confidential material and suggested that the Home Office and College of Policing should consult media law specialists on these areas. The same respondent recommended that the Codes and any related training should instil officers' awareness and understanding of Article 10 ECHR rights and journalistic protections. It made specific suggestions as to where references to these rights could be included in the Codes.
43. One respondent commented on Annex C of the draft Schedule 3 Code, which has been designed to provide more background about the types of conduct that might amount to 'hostile activity' that the Government and operational partners are concerned about. The respondent felt that references to journalists within this Annex should be removed as it creates a presumption of disbelief and mistrust of any journalist that may be examined under the powers. A further suggestion was that the Annex should set out the statutory conditions for use of the powers.
44. Another respondent suggested that it would be useful to provide more information about the arrangements for children who are travelling with the person selected for examination under these powers. They also recommended detailing other powers available at UK ports that might be available in respect of persons not captured by the scope of Schedule 7 or 3. A different respondent felt that it would be useful to include how the powers apply to diplomats.

Government response

45. Training standards and the accreditation programme for those exercising Schedule 7 or 3 powers will be set and governed by the College of Policing on behalf of the National Police Chiefs' Council. The training and accreditation of examining officers is a national programme delivered at a local level by a force or a group of regional forces. Refresher training already exists for those exercising Schedule 7 powers, which will also be the case for those using Schedule 3. Examining officers must be re-accredited every two years, which consists of a refresher course and a pass/fail exam. It is also common for more bespoke training to be offered where issues arise in the course of exercising these powers. If any media organisations or specialists are interested in engaging with the police on their training programmes or materials, they should contact the College of Policing directly.
46. We have taken forward the suggestion to amend Annex C to the draft Code and ensure the statutory conditions for use of Schedule 3 powers are set in their proper context. We do not agree, however, with the assertion that Annex C creates mistrust

of journalists. The wording of Annex C paragraph 5 explains that “it is not uncommon for hostile actors to pose as tourists, business people, or even journalists and lawyers, as these professions can help facilitate access to information, individuals or organisations that might otherwise be unwilling to engage.” The reference to journalists is included in a list of possible professions or situations that a hostile actor might use to cover their activity and does not single out that particular profession in any way. The statement is a reflection of the experience of our operational partners whose daily duties are to protect the UK from hostile state activity.

47. With regard to the suggestion to include more information about arrangements for children who are travelling with an examinee or the application of powers to diplomats, these issues are broader than the remit of the Schedule 7 and 3 Codes of Practice. Officers receive separate training on how to respond to safeguarding issues or treat representatives of foreign governments. It is our view that it would be unnecessary for these Codes to attempt to replicate that guidance or create anything bespoke relating to those issues for the exercise of these powers. We are also of the view that the Codes need not detail other police powers that are available for situations that fall out of the scope of the Schedule 7 and 3 powers.

Minor and typographical

48. We have made a number of changes to address minor or typographical points within both draft Codes that were raised by some of the respondents. These included lifting the definition of hostile activity from the footnote in paragraph 1 of the draft Schedule 3 Code into the main text; clarifying under the ‘law enforcement engagement with the public’ section of both draft Codes that no offence is committed where a person does not comply with the public engagement of an officer; clarifying in the introduction of each draft Code that the provisions of the other Code (in addition to the other related pieces of legislation that are listed) do not apply; and, clarifying that the power to make copies under either power can only be exercised by a constable.
49. We also introduced references throughout the draft Codes to the primary legislation that the provisions reflect or to relevant areas within the draft Codes themselves. We have also dealt with a handful of typographic and drafting errors.
50. We felt that two specific suggestions that were made in the consultation responses were unnecessary as the intended effect has already been achieved. The first concerned a suggestion to lift the definitions of protected material under either power from the footnote to the main text. After consultation with the police it was clear that this would provide no further benefit to the examining officer in terms of their understanding or application of the Codes. The second was a suggestion to make it clear in both Codes that the review officer should make direct contact with the individual or their solicitor and take all steps to ensure that the examining officer complies with the relevant Code. It is our view that through paragraphs 111 and 112 of

the draft Schedule 7 Code and paragraphs 159 and 160 of the draft Schedule 3 Code, this is already the case.

Issues out of scope or dealt with through passage of the Act

51. There were a small number of responses which asked for amendments to the Terrorism Act 2000 and Counter-Terrorism and Border Security Act 2019. These have either already been addressed during Parliamentary passage of the Counter-Terrorism and Border Security Bill as was and/or are outside of the scope of the consultation. The suggested amendments included creating a 'screening' regime that would compel individuals to comply with screening checks for the purpose of determining whether they should be selected for an examination under either power; prohibiting the disclosure of journalistic sources; and providing the right to a solicitor before detention.
52. A further suggestion for inclusion in the Codes (rather than amendments to the Acts) included mandating examining officers to provide a reason to any person selected for examination as to why they were chosen. In effect, this would amount to requiring the officer to demonstrate reasonable suspicion, which is something that Parliament rejected through passage of the Bill. Indeed, in the final stages of the Bill's passage, it was accepted that there were compelling arguments against introducing a test of reasonable suspicion given how significantly such a change would undermine the utility of the powers and their contribution to protecting the UK from terrorism and hostile activity.

Submission of the Independent Reviewer of Terrorism Legislation on the draft Schedule 7 Code

Issues raised by the Independent Reviewer

53. The Independent Reviewer of Terrorism Legislation, Jonathan Hall QC, had not been appointed at the time of the public consultation but asked the Home Office for the opportunity to comment on the draft Schedule 7 Code. Mr Hall's comments, which are equally applicable to the draft Schedule 3 Code, are considered below.
54. Two of the points raised focused specifically on ensuring that the provisions of the draft Code more accurately reflected the language of the law. The first point concerns the distinction between engagement with members of the public during the course of an officer's duties and the point at which an examination begins. The second point considers the view of the Supreme Court in the case of *Beghal* regarding the extent to which protected characteristics can be used to inform the selection of a person for examination. In both cases, suggestions were offered that more closely align the language of the draft Code to the law and relevant judgment.

55. A number of operational considerations were raised where additional clarity would be helpful. One suggestion was to provide further guidance to officers on the appropriateness of using certain powers, such as detention, data download and the taking of biometrics, and where an examination may cause disruption to a person's travel plans, particularly when selected for examination prior to embarkation. Another suggestion was that where an officer's performance does not meet the desired standard, local forces should take remedial steps to address this. A final suggestion was to remove paragraphs 67-69 in the draft Schedule 7 Code that deal with the treatment of legally privileged, excluded and special procedure material and revert to the language of the 2015 Code of Practice. This is because while the proposed process might be straightforward for physical documents and files, it is less so for electronic equipment where technology is more limited.
56. Three further points were raised to ensure that counter-terrorism officers are not unnecessarily constrained when using certain examination powers. First, by being explicit that the power to search must include the power to require a person to provide the means of doing so, including by applying a thumb or finger to unlock an electronic device, or to look at the device to enable facial-unlock. Second, to ensure that examination of a retained article can be undertaken by a technical expert, rather than being limited to an examining officer. A final suggestion was to be clear that if an officer wishes to record the questioning of a person during an examination, then recording must take place even when a person has requested that the questioning is not recorded. Such recordings can be helpful, for example, where a complaint about an officer's conduct has been made.
57. A few minor and typographical changes were also suggested.

Government response

58. The Government agrees with the two suggestions to align the draft Code with the language of the law. We have made the suggested change to ensure that the distinction between engagement with members of the public and the commencement of an examination is clear at paragraph 22 of the revised draft Code. We have also used the suggested wording at paragraph 30 of the revised draft, to more closely reflect the views of the Supreme Court in the case of *Beghal* regarding the extent to which protected characteristics can be used to inform the selection of a person for examination.
59. Regarding the suggestions for further clarity, we have made the following changes. Firstly, at paragraphs 64, 66, 77 and 127 of the revised draft Code, we have provided that officers must exercise the powers to retain property, make copies, detain and take non-intimate samples and fingerprints proportionately. Secondly, at paragraph 24 of the revised draft we have explicitly referenced the potential disruption that can be caused to a person's travel, for example when selected for examination prior to embarkation. Thirdly, paragraph 19 and 33 of Annex B has been revised to make clear that where an officer's performance does not meet the desired standards, local forces

are responsible for ensuring that the performance of their officers continues to meet the standards set by the training and accreditation process.

60. Finally, we have amended paragraphs 67-69 in the draft Schedule 7 Code (now paragraphs 67-72 in the revised draft) to set out the practical steps that officers may take to access examinable material, while safeguarding material which is subject to greater legal protections. These steps have been modelled on Serious Fraud Office data handling processes considered by the High Court in *McKenzie, R (On the Application Of) v Director of the Serious Fraud Office [2016] EWHC 102* and will be particularly important in supporting examining officers in a scenario where protected and examinable material are difficult to separate (e.g. on an electronic device). We hope the role of independent counsel in reviewing such material will provide assurance to any examinee who has a legitimate interest in protecting their material, while thwarting potential terrorists or hostile state actors who seek to avoid security checks under the false pretence of safeguarding protected material.
61. The Government agrees with all three of the suggestions to ensure that counter-terrorism officers are not unnecessarily constrained when using certain examination powers. The draft Code would already require an examinee to provide PINs and passcodes to electronic equipment where an examining officer needs to access the equipment to conduct a search. The increasing use of technology, including finger, face and voice recognition, as a means of accessing an electronic device necessitates explicit mention in the revised draft Code, which we have included at paragraph 58. We have also amended footnote 16 to ensure that a technical expert is able to carry out the examination of a retained article if necessary. Finally, we have made the suggested change at paragraph 131 of the revised draft to provide the examining officer with the discretion to record questioning under Schedule 7 if they wish to do so.
62. We have made all of the suggested minor and typographical changes, with the exception of changing references to 'interviews' to 'questioning'. This is because the reference to 'interviews' aligns to the primary legislation and is understood by examining and review officers to be different to an interview under caution.
63. All of the changes described above have been made to the equivalent paragraphs in the revised draft Schedule 3 Code of Practice.

Next steps

The draft Codes of Practice will be laid before Parliament for approval. They will only come into operation once they have been debated in both Houses of Parliament and each House has expressly approved them.

978-1-5286-1813-7
CCS0320304068