

# Ethnic Profiling

The Use of 'Race' in UK Law  
Enforcement

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# Foreword

The debate about ethnic, racial and religious profiling is one that is unlikely to go away in the near future. The debate is a multi-faceted one, compromising issues of morality and law, pragmatism and idealism. The issue of profiling is not just relevant to stop and search, but also to the introduction and use of body scanners. The Equality and Human Rights Commission, of which I am Group Director Legal, has recently expressed its concerns to the Government about the apparent absence of safeguards to ensure that the body scanning system is operated in a lawful, fair and non-discriminatory manner, specifically focusing on our concerns around potential ethnic, racial and religious profiling.

This timely and informative volume examines the issues as they face the UK today, and is to be commended for the breadth and clarity of its coverage, and also for presenting the voices of some of those on the 'receiving end' of such treatment. It is crucial that we also listen to rank-and-file police officers, to hear firsthand the difficulties they face and learn from their experiences.

Policing in the United Kingdom must be for all the people of the United Kingdom. While this is an axiomatic statement, it is clear that for a significant number of people this has not been, and is not now, the case. Thinking back to recent history, the Sus laws and their abuse are a clear demonstration of how policing can contribute to a breakdown of trust in the community. Similarly, if one considers the situation in Northern Ireland in the 1970s, and the length of time it has taken there to rebuild trust in the police, a process which is still ongoing, with, happily, much improved prospects for the future. Recent events in the City of London and at Kingsnorth power station have reminded us that 'bad' policing alienates those that it is meant to serve. Despite the notable advances made by the police in the eleven years since the Macpherson report it is clear that there is still some way to go. The definition of the police as institutionally racist that was made by Macpherson served to force the police to mend its ways. Whilst its usefulness as a definition of the current situation has been questioned the statistics show that ethnic minority youth are still disproportionately stopped and searched.

We must be wary of simplistic analyses and explanations as to the cause of this. There are a number of factors involved, some of which are easier to control, and ideally resolve, than others. Deeper issues of structural disadvantage and the links between poverty and criminality, and the links between ethnicity and poverty, need to be thoroughly addressed. The solutions to these problems need to address wider issues of engagement in UK society as a whole.

This is not to absolve the police of their responsibility. They are given powers by Parliament. Parliament is elected by the citizens. It is incumbent upon the police to use their powers in the most effective way possible to tackle crime, and this entails ensuring that they have strong community support. It is unacceptable that significant sections of the UK feel alienated from the police.

The solution to the immediate problem of 'race' and ethnicity in law enforcement requires dialogue: dialogue between the people who feel alienated and the police; dialogue within the police as to how they can best do their job; dialogue with the wider society as to the type of policing we want. It will require determination, courage and wisdom to get these things right.

Ethnic profiling is part of the problem. Resolving the problem will need to involve all sections of society.

**John Wadham**

*Group Director Legal, Equality and Human Rights Commission  
February 2010*

# SECTION I: INTRODUCTIONS

## 1. ‘Race’ and Ethnicity in UK Law Enforcement<sup>1</sup>

Kjartan Páll Sveinsson

The Runnymede Trust

### Introduction

Ethnic profiling grabbed the global headlines last summer when President Obama made what proved to be a controversial statement about the police treatment of respected Harvard professor Henry Louis Gates Jr, who was arrested in his home in July 2009. Asked about his views on the incident, Obama said that “there is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact”.<sup>2</sup>

This factual and seemingly uncontroversial remark sparked a heated debate in the mainstream media on both sides of the Atlantic.<sup>3</sup> Obama was accused of making off-hand remarks without knowing the facts, and of reducing all contact between the police and black people to racism. The bullets fired in this war of words – involving high profile figures on the world stage – ricocheted for months afterwards, culminating in Rupert Murdoch’s assessment that Obama made “a very racist comment about blacks and whites, which he said in his campaign he would be completely above”<sup>4</sup> – a statement that he was later forced to publicly retract.<sup>5</sup>

The rage with which commentators on either side of the Atlantic reacted was excessive by any standard; Obama’s response was nuanced and measured – if somewhat cautious – in nature:

*...even when there are honest misunderstandings, the fact that blacks and Hispanics are picked up more frequently, and oftentimes for no cause, casts suspicion even when there is good cause. And that’s why I think the more that we’re working with local law enforcement to improve policing techniques so that we’re eliminating potential bias, the safer everybody’s going to be.*<sup>6</sup>

<sup>1</sup> ‘Law enforcement’ is used here in order to include non-police law enforcement organisations such as the UK Border Agency.

<sup>2</sup> Boston Globe (2009)

<sup>3</sup> Conservative Home (2009); Fox News (2009); My Fox Boston (2009); Phillips (2009); Rhial World View (2009); Seelye (2009); Telegraph (2009)

<sup>4</sup> Quoted in Tryhorn (2009)

<sup>5</sup> Ibid.

<sup>6</sup> Boston Globe (2009)

This proposition – which does not entail a rejection of stop and search, but holds that disproportionality and racial profiling undermines the effectiveness of it – is not particularly radical. Yet it is one that law enforcement agencies – in Britain as well as the United States – have struggled to address. Indeed, following the 10th anniversary of the Stephen Lawrence Inquiry, interest in and anger over the issue of law enforcement agencies disproportionately targeting BME people featured prominently on the public agenda throughout 2009. More than a decade of debate, however, has not yielded a consensus, and we do not seem to be any closer to bridging the gap between human rights and race equality groups – who hold that the costs of a racial bias in stop and search outweigh the benefits – and law enforcement agencies – who generally avoid talking about ethnic profiling altogether, preferring the more neutral term ‘disproportionality’. It is clear is that the contentious issue of ethnic profiling in British law enforcement – the extent to which British law enforcement agencies engage in such practices, the effect it has on communities, and what alternative law enforcement techniques could be used to fight, for instance, knife crime and terrorism – has not been resolved.

### Ethnic Profiling in UK Law Enforcement

‘Ethnic profiling’ is a complex concept which can manifest in various shapes and strengths. It is not an ‘either-or’ state of affairs, something which law enforcement agencies either do or they don’t. Nor is the concept necessarily an indictment on the behaviour of individual law enforcement officers. Rebekah Delsol offers a concise and nuanced description of the complexities of ethnic profiling:

*...many profiling practices are not explicit, and they may or may not result from racist intent on the part of individual officers. Indeed, many officers are unaware of the degree to which ethnic stereotypes drive their subjective decision-making. Any single decision to stop, check ID, question and search a person, or select a traveler for extra scrutiny may appear*



*reasonable. It is when law enforcement strategies are monitored for patterns that a disproportionate focus on minorities can appear.*<sup>7</sup>

This is an important point, which the articles in this volume show clearly. The extent to which law enforcement agencies engage in ethnic profiling, the consequences of their techniques, and the measures they have taken to prevent profiling vary greatly between agencies and policy areas. For example, the disproportionality in police stop and search tactics have been thoroughly scrutinised since the Stephen Lawrence inquiry and the introduction of the Race Relations (Amendment) Act 2000. As a result, various measures have been put in place to gauge and reduce the over-representation of BME people in the criminal justice system.<sup>8</sup> However, while Code A of the Police and Criminal Evidence Act (PACE)<sup>9</sup> states that it is unlawful for police officers to discriminate on the grounds of race or ethnicity, paragraph 2.25 does allow officers to take account of ethnicity when selecting persons to be searched under section 44.<sup>10</sup>

In contrast to police stop and search practices, the UK Border Agency (UKBA) is exempt from the Race Relations (Amendment) Act 2000 in important ways, allowing the immigration service to discriminate on the grounds of nationality and ethnic origin under certain circumstances.<sup>11</sup> No measures are therefore in place to gauge and reduce the impact of profiling at the borders, leading to extensive stereotyping amongst immigration officers and human rights violations on the part of UKBA.<sup>12</sup>

In spite of the variety of practices and responses throughout various British law enforcement agencies, there are certain common threads. First, it is clear that many BME people who are subjected to 'hard' policing tactics feel that they are targeted by law enforcement agencies because of their ethnicity or 'race'.<sup>13</sup> Second, most people recognise stop and search as an important crime prevention tool, even those who bear the brunt of these techniques. The main objection is how this is carried out, including a perceived racial bias in the decision making process of law enforcement

officers.<sup>14</sup> Third, the issue of accountability is paramount.

If law enforcement agencies maintain that procedures such as stop and search are important tools in the prevention and detection of crime, this still leaves open the question of disproportionality. Disproportionality, of course, has been the single most contentious part of law enforcement tactics such as stop and search. Indeed, it is the main reason why some critics have called for an end to stop and search as a crime reduction strategy.<sup>15</sup> The costs, they argue, far outstrip the benefits. Arguments made to justify disproportionality – firstly, that BME people are more likely to frequent public spaces and are therefore more 'available' to be stopped and searched than white people, and secondly, that BME people commit a disproportionate amount of crime and therefore should be stopped more – have been demonstrated to lack sufficient rigour to account for the vast differences in stop and search rates.<sup>16</sup> On the other hand, it is exactly the ethnic profiling aspect of a range of law enforcement techniques that have been most controversial and caused the greatest resentment amongst BME groups; many people feel that they are repeatedly stopped and searched precisely because of their 'race' or ethnicity. It is therefore reasonable to ask how and to what extent 'race' is used as an information carrier in law enforcement.

Ethnic profiling is considered problematic for a whole host of reasons. But if British law enforcement agencies feel that these measures are necessary to keep us safe, they must face up to the fact that many of their crime reduction practices do involve a certain degree of ethnic profiling. Therefore, in order to justify law enforcement practices that involve ethnic profiling, they also have to make the case that profiling is a necessary part of these. This will be difficult, and they will need to think about a number of factors.<sup>17</sup>

First, it must be true that the groups that are disproportionately targeted are equally disproportionately involved in criminal behaviour. Second, law enforcement procedures must promote the aims of government relating to crime, that is to say, they must lead to more perpetrators of crime being caught, more crime prevented from happening, and ultimately reducing the overall

7 Delsol (2008: 2)

8 Denison (this volume)

9 Police and Criminal Evidence Act 1984, Code of Practice A (Amended 1st January 2009)

10 Welch (this volume)

11 Cousey (this volume)

12 Latif (this volume)

13 See interview with young people from Second Wave (this volume)

14 Derfoufi (this volume); Glynn (this volume)

15 Bowling and Phillips (2007); Rollock (2009)

16 Bowling and Phillips (2007); Bennetto (2009)

17 See Risse and Zeckhauser (2004) for an extended analysis.

crime rates in society. Third, law enforcement agencies would need to demonstrate that no alternative crime reduction strategies are available or suitable. Fourth, operations involving ethnic profiling have to be appropriately deployed: they should only be applied in situations where their use will lead to better crime related results. Finally – and this will largely depend on whether the previous four criteria are met – law enforcement agencies must have the support of the communities they serve.

The debate following the 10th anniversary of the Stephen Lawrence Inquiry demonstrates that these criteria are currently not being met. The charge of a racial bias in various law enforcement tactics remains vociferous. As already mentioned, law enforcement agencies generally do not want to talk about ethnic profiling, let alone concede that ethnic profiling forms part of their practice. Nonetheless, this is exactly what many people who are at the receiving end of these practices feel. Unfortunately, however, the debate on the disproportional exposure of BME groups to ‘hard’ law enforcement tactics seems to be moving backwards. ‘Institutional racism’ – the dominant terminology since the Stephen Lawrence Inquiry – has received a backlash of opinion. In January 2009, the chair of the Equality and Human Rights Commission, Trevor Phillips, argued that the police service had made strides in addressing institutional racism, so much so that the term is no longer valid and has become a ‘blunt instrument’.<sup>18</sup> Phillips’s comments were echoed by Scotland Yard’s Commissioner, Sir Paul Stephenson, who claimed at a conference marking the 10th anniversary of the publication of the Stephen Lawrence Inquiry that he did not consider ‘institutional racism’ to be to be an appropriate or useful concept, as well as Justice Secretary Jack Straw, who stated that the Metropolitan Police Service was no longer institutionally racist.

There is little doubt that the police have made significant progress in some areas, mainly in recruitment of BME staff and investigating race crimes. However, the over-representation of BME people as targets of ‘hard’ law enforcement techniques has grown in the last 10 years,<sup>19</sup> a growth that cannot be accounted for by reference to differing crime rates or ‘street availability’. This is particularly true of stops and searches under powers with the greatest police discretion, namely section 60 of the Criminal Justice and Public Order

Act<sup>20</sup> and section 44 of the Terrorism Act 2000.<sup>21</sup> The extraordinary surge in the use of these powers as well as their increasing concentration on BME groups was the topic of intense debate throughout 2009. This debate reached a crescendo in January 2010, when the European Court of Human Rights (ECHR) ruled that section 44 violates the right to respect for private life, as guaranteed by Article 8 of the Convention on Human Rights.<sup>22</sup> Although racial discrimination did not form the basis of the case of *Gillan and Quinton v. the United Kingdom*, it is telling that the ECHR saw reason to discuss in depth in their ruling the disproportionate targeting of BME people under section 44. The ECHR ruling therefore further fuels suspicion that ethnic profiling forms part of the toolbox of British law enforcement agencies.

## The Importance of Accountability and Transparency

In their defence of tactics such as stop and search, law enforcement agencies argue that these are important tools in the fight against crime. The Metropolitan Police Service point to the reduction in teen-on-teen murder rate in London – in 2009 down to a third of what it was in 2007 and 2008 – which they attribute to an increase in section 60 stop and search within the Operation Blunt 2 strategy. In the words of London Deputy Mayor for Policing, Kit Malthouse, “[k]nife arches, search wands, and an increase in geographically targeted stop and search – often the most controversial kind – have resulted in 7,960 arrests and the recovery of 4,439 knives”.<sup>23</sup>

Whether the vast increase in stop and search is justifiable, and whether the benefits exceed the costs, is open to debate. It is true that the recent reduction in knife crime has coincided with an increase in stop and search. It is therefore valid to ask what role stop and search has played in this. But correlation does not imply causation. An analysis of stop and search figures broken down by London boroughs show a mixed picture; in some areas, like Newham, an increased use of section 60 stop and searches has coincided with reduced levels of knife crimes, while in others, like Southwark, an increase in stop and search has gone hand in hand with an increase in knife related violence. Conversely, some areas, such as Islington, have used section 60 stops very

<sup>18</sup> Quoted in Siddique (2009)

<sup>19</sup> Ministry of Justice (2009)

<sup>20</sup> Delsol (this volume)

<sup>21</sup> Welch (this volume)

<sup>22</sup> *Gillan and Quinton v the UK* application no.4158/05

<sup>23</sup> Malthouse (2009)



sparingly, yet seen a striking reduction in knife violence.<sup>24</sup> It is clear that the relationship between 'hard' law enforcement techniques and actual crime reduction is far from straightforward.

What is often lost in this discussion, however, are the long term effects of 'hard' policing tactics. The massive increase in stop and search recently has – unsurprisingly – affected minority ethnic young people to a far greater extent than their white peers. Recent figures have revealed that stop and search of minority ethnic 10-year-olds in London doubled in a single year, from 2008 to 2009.<sup>25</sup> The full impact of this may not be immediately discernable, but resentments about negative interactions with police can fester over time. The interview with young people from the 2nd Wave youth project shows that for many young people, the police is still very much a force rather than a service; they strive to feel safe in spite of the police rather than because of them. Law enforcement agencies must recognise that there is always the possibility that the costs of stop and search will start to outweigh the benefits, and that some of their tactics may no longer be promoting the aim of creating a safer society for all.

As the defiant response from Home Secretary Alan Johnson to the ECHR ruling suggests,<sup>26</sup> this recognition is not always there; law enforcement agencies are often not adequately prepared to adjust their approach when it becomes clear that their tactics are alienating the very people they are sworn to protect. The ECHR ruling drives home the case for reviewing the effectiveness of stop and search procedures as a crime reduction strategy. Yet when Runnymede made this recommendation in The Stephen Lawrence Inquiry 10 Years On, the Home Office rejected it on the grounds that "[s]top and search powers are required to make communities safer".<sup>27</sup> This kind of evasion of even discussing the strengths and weaknesses of 'hard' policing tactics implies that law enforcement agencies are not receptive to the darker sides of stop and search.

Stop and search may be a crucial tool to fight crime, but it is not a race neutral tool operating in a race neutral context. Uncontrolled and unmonitored stop and search can lead to stereotyping and discrimination, and we know the damage this kind of criminalisation has done to BME communities in the past. This is exactly why accountability and transparency lay at the heart of the Stephen

Lawrence Inquiry. Indeed, the statistical monitoring of police stop and search practice allows us to have an informed discussion on disproportionality in the first place. Yet the calls to cut red tape in policing are growing louder with each passing month, and for some reason these calls have focused nearly exclusively on the stop and search form. Recently, Alan Johnson joined the fray by making a public announcement that he intends to explore ways in which the requirements of the stop and search form can be reduced. The Conservatives have made similar pledges, while simultaneously wanting to strengthen stop and search powers.

Runnymede is very concerned about the continued lack of clarity or rational thinking in policy developments in this field. We take seriously police claims that stop and search tactics are an important tool in the fight against crime. But history has shown us that without accountability, these tools are abused. The results in the past have been disastrous, which is why – following the Stephen Lawrence Inquiry – structures have been put in place to make stop and search more accountable. Much of the criticism of measures such as section 60 is not so much that they are used, but where and when they are used; the police often fall back on section 60, even when it may not necessarily be needed, and often do not give communities enough choice on crime reduction strategies. Aspects of stop and search forms such as the time and place allow stop and search patterns to be measured against crime patterns, allowing for a measure of whether the stops are taking place at the right time and place for the right reasons.<sup>28</sup>

In this context, we would do well to remember not only the logical rationale for Macpherson's recommendations on police stop and search practices and the statistical evidence justifying them – which are as relevant today as they were in 1999 – but also the history of the relations between the police and black people in Britain. The lasting legacy of mistrust left by uncontrolled and unmonitored stop and search based purely on suspicion, most famously exemplified by the Sus Law, is still felt by the black British population. As the contributions to this volume demonstrate, there is an urgent need for the stalemate of the stop and search debate to be broken. Part of this will be to explore the role of 'race' and ethnicity as information carriers in British law enforcement techniques. If the president of the United States can call for this discussion, then so can we.

<sup>28</sup> Rebekah Delsol (personal communication)

<sup>24</sup> Fitzgerald (2010)

<sup>25</sup> Dodd (2009b)

<sup>26</sup> Travis (2010b)

<sup>27</sup> Home Office (2009c)

## 2. Policing and Ethnic Profiling

Alpa Parmar

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### Introduction

Whether ethnic minority people who are involved in the Criminal Justice System are there because of *whom* they are rather than *what* they may have done has occupied the research agendas of social scientists, criminal justice practitioners and policy makers for many decades. The traditional imagery of justice is depicted in the form of *Justitia* (the Roman goddess of Justice) who often appears blindfolded, and with a set of scales suspended from her left hand and a double-edged sword in her right. The blindfold is to suggest that justice should be meted out objectively, without fear or favour and without regard to identity, status or power. Thus, the principle of impartiality is embedded within the aim of the law to balance reason and justice. Evidence to suggest that ethnic profiling is in operation in the procedural aspects of ensuring the rights and safety of citizens is thus contrary to this principle. Figures on stop and search and empirical studies have indicated that stop and search measures are not applied evenly by the police and the figures vary according to the ethnic background of those stopped. Citizen contact with the police is perhaps imperative to understanding ethnic profiling as it is the entry point into the criminal justice system, hence the decisions that police officers make in deciding who to stop and as a consequence who to arrest have both far-reaching and compelling consequences, as this volume reveals.

### Stop and Search Legislation and Practice

Citizens can be stopped and searched under a number of forms of legislation; some are used more often by the police than others. The power to stop and search is primarily an investigative power for the purposes of crime detection or prevention in relation to a specific crime.<sup>1</sup> However, a number of scholars have argued that stop and search is often used by police officers in a discretionary manner, for 'gathering intelligence' or for general 'social control'.<sup>2</sup> In 2007/8 the police recorded 1,035,438 stop and searches of people under section 1 of the Police and Criminal Evidence Act 1984 and

other legislation. Overall this showed an increase of 8 per cent on the figures from 2006/7. Of the searches carried out in 2007/8, 13 per cent were of black people, 3 per cent of people of mixed ethnicity, 8 per cent of Asian people and 1 per cent of people of Chinese or other ethnic origin. There were nearly eight times more stops and searches of black people per head of population than of white people and twice as many stops and searches of Asian people per head of population than of white people.<sup>3</sup> The number of stop and searches made under the Terrorism Act 2000 increased by 215 per cent between 2006/7 and 2007/8 and most of these were carried out by the London Metropolitan police.

Section 44 of the Terrorism Act 2000 allows an officer to stop and search persons and vehicles to look for articles that could be used in connection with terrorism whether or not there are reasonable grounds to suspect the presence of such articles. It can perhaps therefore be argued that this legitimates discretion on the police officers' part. After nine years of its implementation, the European Court of Human Rights – at the time of writing this introduction – decided that the lack of a need for suspicion was unlawful as it was counter to the right to privacy as enshrined in the Human Rights Act 1998.<sup>4</sup>

The European Court also criticized the lack of checks made on the authorizations by parliament and the court and overall regarded the arbitrariness of the power to be problematic. In light of the fact that black and Asian people are four times more likely to be stopped under Section 44, and that the use of these powers has grown fourfold between 2004 and 2008, concerns have been raised to suggest that ethnic profiling was occurring and becoming entrenched in policing practice.<sup>5</sup> However, whether the negative impact on minority ethnic communities and their perceptions of the police can be revoked in the way the legislation might be is questionable.

1 Lustgarten (2002)

2 Waddington et al. (2002)

3 Ministry of Justice (2009)

4 Travis (2010b)

5 Parmar (forthcoming)

## Explaining Disproportionality

The history of ethnic minority relations with the police in Britain has been contentious and most notably was brought into question by both the Scarman and Macpherson inquiries in 1981 and 1999 respectively. Both inquiries highlighted the persistence of conceptual racism in the police force as well as in the procedural aspects of policing, and led to the implementation of major reform in the police service.

Empirical studies which have examined the interaction of stop and search encounters have revealed a number of factors pertinent to ethnic profiling. Waddington et al.<sup>6</sup> argue that rather than comparing the number of people stopped and searched to the resident population, it may be more accurate to consider the population who are actually available to be stopped. Taking account of the available population, there is recognition of the fact that some demographic groups – distinguished on the basis of age, ethnic origin, gender and so on – are more likely than others to spend time at their home, or at work or in private space and are therefore unavailable to be stopped by the police, whereas other groups – because of their lifestyle – are likely to be more available to be stopped. Nevertheless, Bowling and Phillips<sup>7</sup> suggest that the concept of 'availability' is biased because the extent to which people are available to be stopped and searched is also related to structural factors including unemployment and school exclusion which are disproportionately associated with ethnic minority groups.

One of the suggestions often made to explain or justify the over-representation of black people that are stopped and searched is that the police act on intelligence when deciding whom they should stop and search and that this is usually based on specific offences and information about specific descriptions of individuals.<sup>8</sup> However, this perhaps results in a perpetuation of ethnic profiling based on victim reports, which have been shown to be fairly unreliable.<sup>9</sup> Additionally, the ambiguity of the concept of 'reasonable suspicion' which is central to the justification of stopping someone is thought to invite discretion in the police's interpretation of legal rules.<sup>10</sup>

6 Waddington et al. (2004)

7 Bowling and Phillips (2007)

8 Reiner (2000); Bowling and Phillips (2007)

9 Bowling and Phillips (2007)

10 Quinton et al. (2000)

## Evidence of Discrimination

A range of research studies and policy documents have indicated that police stereotypes and prejudices may also be responsible for the disproportionality we see in stop and search figures and indeed the suggestion that ethnic profiling by police officers is in operation. Studies on individual police officers and police culture have revealed that that negative views of black and Asian people are commonplace and explicit and have persisted over the decades. Different stereotypes were found to exist for different ethnic minorities. Asians were regarded as devious, liars and potential illegal immigrants.<sup>11</sup> Black people were shown in studies to be regarded by police officers as prone to violent crime and drug abuse, to be incomprehensible, suspicious, aggressive and troublesome.<sup>12</sup> In a review of studies in this area, Bowling and Phillips<sup>13</sup> found that black areas are targeted by the police through intensive surveillance and that the questioning style used by officers is rude, hostile and accompanied by racial abuse.

The Macpherson report represented a landmark in the nature of the relationship between the police and ethnic minorities by highlighting the persistence of institutional racism, which was first identified by Scarman in 1981. However, although the police organisation was thought to be 'institutionally racist', police officers were described as being unwittingly racist which further complicates the exact nature of the racism and indeed how to recognise it. Specifically in regard to stop and search, the Macpherson report<sup>14</sup> suggested that there was an inherent lack of trust amongst the black community towards the police and that the use of the power was frequently unlawful and unjustified. Macpherson also recommended that there should be a regulation of stop and search powers alongside improvements in police training as part of the overall reform.

## The Changing Nature of Discrimination

Since the Lawrence inquiry, a recent Home Office study found that although racist language had pretty much disappeared, the possibility was that the attitudes had simply become more subtle and

11 Cain (1973); Jefferson (1993)

12 Graef (1989); Reiner (1991)

13 Bowling and Phillips (2002)

14 Macpherson (1999)

gone underground.<sup>15</sup> This was evidenced by BBC documentary *The Secret Policeman* which exposed some of the virulent forms of cultural racism expressed by police recruits towards Asian and black people.<sup>16</sup> This further undermined the notion that the Macpherson reforms had managed to achieve change at all levels of the police service.

The changing nature of stereotypes has also been discussed in sociological and criminological literature and is perhaps reflected in the stop and search statistics of Asian people as discussed above. Some have pointed to the pliability of stereotypes of Asian and particularly Muslim people. Indeed, stereotypes which assumed that Asian people were conformist, are now thought to be less applicable and rather, the very stereotypes assumed to explain law-abiding behaviour (e.g. family pressures, tight knit communities and high levels of social control) are now thought to promote criminal and deviant activity amongst Asian youth.<sup>17</sup> More recently Asian people, particularly from Muslim backgrounds, have been associated with terrorist threats and involvement in gangs and violent activity.<sup>18</sup>

The stop and search figures discussed above suggest there has been an increase in the numbers of black and Asian people stopped under the Terrorism Act 2000. Despite the fact that the legality of powers have been called into question at the time of writing this introduction, the dubious nature of ethnic profiling as a tool to counter terrorism has been questioned from academics as well as within specialist policing strategies.<sup>19</sup> In August 2008, *The Guardian* reported that an MI5 document stated that it was not possible to draw up a typical profile of British-based terrorists as most are “demographically unremarkable” and “simply reflect the communities in which they live”. Assumptions could therefore not be made about suspects based on their skin colour, ethnic

heritage or nationality.<sup>20</sup> Clearly, therefore the targeting or profiling of specific groups is not only resulting in the alienation of communities but also is ineffective in terms of crime prevention.

## Coda: Security or Suspicion?

Stop and search figures indicate that even when contextual and demographic factors are taken account of, black and more recently Asian males are disproportionately subjected to these powers. The extent and consistency of the disproportionality has led scholars to suggest that ‘ethnic profiling is in fact occurring’.<sup>21</sup> This is not necessarily a new finding with regard to young black males’ experiences of policing, but rather affirmation of a consistent pattern that has persisted for decades. The disproportionality is important to continue to recognise. This conclusion is problematic because despite the withdrawal of stop and searches under the Terrorism Act 2000, young people, particularly British Asians, have become mistrustful of the police and further disenfranchised from symbols of the state and authority. This is paradoxical, given that as part of the UK government’s ‘Prevent’ approach to stop terrorist activity, concomitantly the police aim to foster a relationship of trust and confidence with local communities to enable the exchange of vital intelligence.<sup>22</sup> Instead, the over-policing of ethnic minority groups has created ‘suspect communities’, thereby thwarting any meaningful flow of information.<sup>23</sup> One central role for the police and one which legitimises their power is the aim to both protect safety and engender security. Perhaps the conceptualisation of trust as a process of mutual exchange between the police and citizens would allow for security and suspicion to become less entangled.

<sup>15</sup> Foster et al. (2005)

<sup>16</sup> Screened in 2003, *The Secret Policeman* was based on covert recordings made by Mark Daly, a BBC journalist who had joined the police service. The film documented extreme racism among recruits at the National Police Training Centre in Warrington, including officers’ expressions of admiration for the murderers of Stephen Lawrence, the use of extreme racist language to describe black and Asian people, and declaring an intention to stop and search people from ethnic minorities out of spite. Daly also recorded a serving police officer boasting about the abuse of discretion in the use of stop and search powers against people from minority ethnic communities.

<sup>17</sup> Hudson and Bramhall (2005); Hudson (2007); Parmar (2007)

<sup>18</sup> Webster (1997); Alexander (2000); Goodey (2001); Bowling, Parmar and Phillips (2008)

<sup>19</sup> Moeckli (2008); Lord Carlile of Berriew (2009)

<sup>20</sup> Travis (2008)

<sup>21</sup> Bowling and Phillips (2007)

<sup>22</sup> Home Office (2009b)

<sup>23</sup> Pantazis and Pemberton (2009)



# Government Work to Address Race Disproportionality in the Criminal Justice System - PSA 24 Indicator 4<sup>1</sup>

Simon Denison

Office for Criminal Justice Reform

## Introduction

BME representation in the Criminal Justice System (CJS) has been an issue for decades, and continues to be. For example, Black and Asian people are still more likely to be stopped and searched than white people, and more likely to be arrested. There are, however, two key pieces of legislation which underpin work to address issues around race and the CJS: the Race Relations Act 1976 and the Race Relations (Amendment) Act 2000.

The Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, gives public authorities a statutory duty to eliminate unlawful discrimination as well as promote race equality and good race relations. The Act also requires authorities to take account of and monitor the impact of services and policies on ethnic minorities. All CJS agencies are covered by the Act.

CJS agencies are therefore obliged to give consideration to the service they offer to BME people. However, it is recognised that many of the drivers that lead people to become involved with the CJS, whether as victims or suspects, defendants or offenders, fall outside the responsibility of CJS agencies.

In addition to the work by CJS agencies in ensuring that they offer the best possible service to BME people, issues such as health, education and housing are also significant. The work of Local Authorities and Crime and Disorder Reduction Partnerships in England, and Community Safety Partnerships in Wales, is therefore of key importance in addressing BME peoples' representation in the CJS.

## Background to PSA 24 Indicator 4

In 2007 the Government published 30 new Public Service Agreement (PSA) targets for the period 2008-11. These targets set out commitments

across the full range of Government business. For the Criminal Justice System (CJS) the PSA commits Government to: 'Deliver a more effective, transparent and responsive Criminal Justice System for victims and the public'.<sup>2</sup> There are five priority aims ('Indicators') within PSA 24, of which one is focused on reducing racial disparities within the CJS (Indicator 4):

... to better identify and explain race disproportionality at key points within the CJS and to have strategies in place to address racial disparities which cannot be explained or objectively justified.

Indicator 4 focuses on the experiences of BME people within the CJS, as suspects, defendants and offenders, victims and witnesses, and as staff of CJS agencies. The Indicator moves away from the previous perceptions-based measure (PSA 2(e)) and turns its focus on experiences; perceptions of fair treatment continue to be monitored through the Communities and Local Government Citizenship Survey, however. The indicator focuses on race due to the persistent nature of the issue; the dedicated Equalities PSA (PSA 15)<sup>3</sup> addresses other diversity strands, although not within the context of the CJS.

Indicator 4 contains within it three main objectives:

- To improve the collection of ethnicity data by CJS agencies, with all agencies adopting the 2001 Census 16+1 classification system if they have not already done so;
- Improving the use of ethnicity data to identify, examine and understand disproportionality; and
- To ensure that each criminal justice area has in place an action plan that is jointly owned, implemented, monitored and reviewed by all CJS agencies to address any race disproportionality which cannot be objectively justified.

In addition, there are three thematic areas to which the above objectives apply:

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<sup>2</sup> HM Treasury (2009b)

<sup>3</sup> HM Treasury (2009a)

- Suspects, defendants and offenders;
- Recruitment, retention and progression of BME staff in CJS agencies; and
- Victims and witnesses.

The Indicator is being delivered by criminal justice agencies, co-ordinated by Local Criminal Justice Boards (LCJBs),<sup>4</sup> with support provided by the Office for Criminal Justice Reform (OCJR). This support takes the form of a revised dataset on service delivery and diagnostic tools to assist LCJBs in delivering each of the areas of work, plus a robust performance management framework that will ensure the effective delivery of the Indicator. Delivery of Indicator 4 is overseen by the Race Disproportionality Board, chaired by Chief Constable Peter Neyroud, chief executive of the National Policing Improvement Agency. Board members are senior representatives from all CJS agencies, plus LCJB representatives and judicial observers.

Strategic oversight of Indicator 4 (and the PSA as a whole) is provided by the CJS Operational Board and the National Criminal Justice Board. Performance against all 30 PSA targets is monitored by the Prime Minister's Delivery Unit in HM Treasury.

## Work Currently Underway

The three main objectives of the indicator are being delivered through a range of work programmes, such as:

- Data collection: the Race Disproportionality Delivery Board monitors data quality on key data items on a quarterly basis. Feedback on this monitoring is then provided to members of the Board and possible actions to address issues of concern are discussed.
- Use of data: a series of toolkits have been developed by OCJR that will assist LCJBs in delivering each of the three main areas of work. These will be discussed in more detail below.
- Action plans: support is provided by OCJR to assist LCJBs in formulating and

delivering action plans to address issues of concern. The delivery of these plans is assessed through a comprehensive performance management framework with feedback and further assistance provided as required.

In order to give an indication of the work on-going in both LCJBs and OCJR under the umbrella of Indicator 4 each of the three thematic areas will be addressed in turn.

## Suspects, Defendants and Offenders

The data that has historically been available on ethnicity and the CJS is the 'Statistics on Race and the Criminal Justice System' report, commonly termed the Section 95 report as its publication is a legislative requirement under Section 95 of the Criminal Justice Act (CJA) 1991. The publication of the Section 95 report was a significant step forward in terms of monitoring the experience of BME people with the CJS, and now includes data relating to both service delivery and staffing of CJS agencies. There are, however, a number of widely recognised problems with the Section 95 report.

Section 95 of the CJA 1991<sup>5</sup> is loosely-worded and does not specify the data items to be published:

*The Secretary of State shall in each year publish such information as he considers expedient for the purpose of ... facilitating the performance of such persons of their duty to avoid discriminating against any persons on the ground of race...*

As a result the report has grown incrementally, starting from a police-focused report and expanding as more data has become available.<sup>6</sup> In addition, there is a significant lag between data collection and publication – the most recent report, published in April 2009, contains 2007-8 data.

In 2004 a Root and Branch Review of the Section 95 report was commissioned, and carried out by the University of Portsmouth. The Review was published in 2005<sup>7</sup> and included a wide range of recommendations relating to data collection, use and governance. The key themes to emerge from the Review were that a useful, timely and locally-owned dataset should be produced and used at a local level.

<sup>4</sup> Local Criminal Justice Boards (LCJBs) are non-statutory, semi-autonomous bodies made up of the chief officers from all the main CJS agencies, plus support staff. LCJB areas are co-terminous with police force areas; however, London has one LCJB covering both the Metropolitan Police Service and City of London Police.

<sup>5</sup> Criminal Justice Act 1991 (Chapter 53)

<sup>6</sup> Ministry of Justice (not dated)

<sup>7</sup> CJS Online (2006)



OCJR therefore developed a dataset for use by LCJBs that satisfied these three criteria:

- *Useful*: the dataset contains information on a number of key stages of the CJS and is outcome-focused. The dataset is configured with inputs to each stage and associated outcomes/disposals – this enables an assessment to be made of whether different ethnic groups are over- or under-represented in different outcomes/disposals. The dataset contains information on police, CPS, magistrates' courts, the Crown court, youth offending, probation and prisons. In addition, the dataset makes use of data already collected – there are no new processes that need to be put in place.
- *Timely*: this is arguably the most important consideration. Data are received by LCJBs 10 weeks after the end of a quarter, ie. data for April-June 2009 were available mid-September 2009. However, in order to ensure that timely data are available management information is used: this means that the data cannot be released into the public domain. Despite this restriction, a number of items in the dataset are included in the Section 95 report so will, in time, be published (for example stop/search data).
- *Local*: the dataset is provided to LCJBs and contains information at that geographical level. It enables LCJBs to have a strategic oversight of how the CJS is performing in terms of ethnicity and service delivery in their area.

In keeping with the terminology suggested in the Root and Branch Review the dataset is called the Minimum Dataset (MDS). The dataset is disseminated to LCJBs by OCJR via an online portal, which has some analysis functionality built into it to make the job of assessing disproportionality easier for LCJBs. This works by making a quantitative assessment of the difference in the outcome/disposal distribution seen in the total (input) at each stage of the CJS with that seen for each ethnic group; the MDS uses confidence intervals to make this assessment.

The MDS is being rolled out to LCJBs in a number of stages, with the roll-out programme building a range of capabilities. The programme covers data interpretation and presentation, in order to ensure that data are presented in a meaningful way with maximum impact to LCJBs, but also how to act upon the data. This is the most crucial point of the

process as the MDS is designed to provide robust evidence to drive forward changed experiences for BME people who are suspects, defendants and offenders. The data are the means to this end.

The roll-out programme for the MDS is proceeding well – 38 LCJBs either have, or are currently rolling out, the MDS. The MDS has therefore been taken up with enthusiasm, and actions are currently being taken forward by a number of LCJBs to address areas of disproportionality in their areas. These actions are jointly owned by the LCJB and the agency concerned, with support being provided by OCJR as required.

### **Recruitment, Retention and Progression of BME Staff**

There has been an issue with the representation of BME people as staff of CJS agencies in terms of retention and progression, as well their recruitment, for some time. Staffing data are included in the Section 95 report and continue to indicate that BME people are under-represented as staff in CJS agencies, and where data are available that they leave sooner and are more often employed at lower grades than white people. As a result of this continuing problem Indicator 4 specifically addresses these staffing issues.

OCJR has developed a diagnostic tool to assist LCJBs in identifying and addressing issues around BME staffing. This issue is covered by legislation<sup>8</sup> under which public authorities, including CJS agencies, are obliged to monitor staffing in terms of BME representation and collect a specific set of data items to assist them in doing this. It is these data items which form the backbone of the evidence base for the tool.

The tool takes the form of a workbook with a set of clearly explained stages:

- Data collection: both quantitative (see above) and qualitative data. Qualitative data are derived from interaction with staff networks and focus groups;
- Data analysis: an automated template has been developed to assist LCJBs and agencies in analysing quantitative data. Key themes to emerge from the qualitative information are also noted;
- Understand drivers: using the analysis results

<sup>8</sup> Race Relations Act 1976 (Statutory Duties) Order 2001

senior managers and human resources staff are interviewed to discuss the findings and actions to address issues of concern; and

- Identify, implement and monitor actions: actions are clarified and action plans drafted to ensure that actions are implemented and monitored in an effective way.

There is no specific mandate for the findings of this tool to be implemented in agencies, but by making senior agency representatives who sit on LCJBs aware of and committed to the work actions will be taken forward effectively. In addition, the results of this work are not for the public domain due to the sensitivity around personal data.

The tool has been piloted by Durham and Sussex LCJBs and prior to publication in November 2009 was peer reviewed by the University of Northumbria. Roll-out began in December 2009.

## **Victims and Witnesses**

One of the headline aims of PSA 24 is to 'deliver a more effective, transparent and responsive Criminal Justice System for victims....' A strand of work relating to BME victims and witnesses was therefore included in Indicator 4, in addition to Indicator 3 which specifically addresses victims issues.

A tool similar to that for staffing issues outlined above will be developed to assist LCJBs in identifying and addressing poor satisfaction rates for BME victims and witnesses. The evidence base for this tool will be the Witness And Victim Experience Survey (WAVES) and data held locally by police forces (police user satisfaction surveys).

Progress in taking this work forward has been delayed due to a prioritisation of the MDS and staffing work. However, the tool will be available in early 2010.

## **Other Work**

In addition to work being taken forward as part of Indicator 4, within OCJR there are also a number of other pieces of work being undertaken that address BME peoples' experiences of the CJS, such as:

- Race for Justice: this work was initiated by the Attorney General in 2005 and aims to improve the CJS response to victims of hate

crime.<sup>9</sup> The work covers all diversity strands and not just race, but will certainly improve BME hate victims' experiences of the CJS. A number of audits of police forces' responses to hate crime have been undertaken and a diagnostic tool similar to the one relating to staffing has been developed. The tool has been peer reviewed by the University of Portsmouth and will be available to LCJBs and agencies shortly.

- Challenge Fund: this aims to increase community engagement, improve the effectiveness of staff engagement and improve the understanding of and address race disproportionality by making funds available to LCJBs for specific projects. Recent examples include a project aimed at improving the mentoring services available to BME staff members in all agencies in the West Midlands, and the development of an accredited programme in Gwent to improve the rehabilitation of people convicted of racially-aggravated offences.
- Bail diagnostic tool: this will be similar to the tool already developed around staffing issues and will enable LCJBs and court areas/regions to better understand disproportionality in bail decisions.

## **Conclusions**

There is a broad range of work underway under the umbrella of PSA 24 Indicator 4 to improve BME peoples' experiences of the CJS, as well as work that does not fall strictly within the purview of the PSA.

Indicator 4 relies on evidence-based decision-making and is outcome-focused: robust and objective evidence is the way to effect improved outcomes for BME people, rather than action by anecdote. The tools developed by OCJR will enable local areas to tailor solutions that will work for them.

<sup>9</sup> Race for Justice Taskforce (2006)

# SECTION II: YOUNG PEOPLE AND SECTION 60

## Section 60 Stop and Search Powers

Rebekah Delsol

In matters of policing and equality, stop and search practices have become the crucial litmus test. Although this was first tackled back in 1984 with new standards for stop and search under the Police and Criminal Evidence Act (PACE),<sup>1</sup> recent headlines such as “Some PCs are looking to put me in my place as a black man”,<sup>2</sup> and “Stop and search disproportionately targets black and Asian people”<sup>3</sup> highlight enduring concerns about the ‘over policing’ of black people in Britain. The focus of these concerns has usually been on stops and searches conducted under section 1 of PACE, which requires officers to have reasonable suspicion to conduct a stop. Where individualised grounds of suspicion are required, racial stereotypes should have less sway, and the fact that serious disproportionality persists in PACE stops and searches has rightly been the subject of much debate. However, civil rights advocates are concerned that the police are increasingly turning to other stop and search powers that carry no requirement of reasonable suspicion, and that under these, disproportionate stops and searches of black and Asian people are even higher than under PACE. One such power is section 60 of the Criminal Justice and Public Order Act.<sup>4</sup> Since its introduction in 1994, official data shows that the numbers of section 60 stop and searches have increased dramatically and the powers are being used in response to a far wider range of incidents than originally intended under the law.

Section 60 was originally introduced to tackle football hooliganism and the threat of serious violence. It could only be authorised by officers at Superintendent level and above. Stop and searches under section 60 are of particular concern because they do not require ‘reasonable suspicion’ that an individual is about to commit a crime or is carrying a weapon. Just being in an area covered by a section

60 authorisation is enough for officers to conduct a stop and search.

In 1997 and then again in 1998, section 60 powers were extended to cover situations where senior officers believe that persons are carrying “dangerous instruments or offensive weapons” and to allow officers to remove or seize items hiding a persons’ identity, whether or not weapons are found.<sup>5</sup> The changes to the law also permitted the initial 24 hour period to be extended for a further 24 hours, and reduced the rank level to Inspector rank and above who could authorise the application of section 60 in those areas where they anticipated incidents of serious violence.

Since that time, the numbers of section 60 stop and searches have increased steadily. In 1997/98, there were 7,970 section 60 stop and searches; increasing to 11,330 in 2000/01; to 45,600 in 2004/05; and to 53,250 in 2007/08 – a 19 per cent increase on the previous year.<sup>6</sup>

There is little research into the quality of local intelligence that is used to justify section 60 authorisations. There is also little regulation to ensure that the intelligence basis given for invoking section 60 meet legal standards (i.e. that there is a credible threat of serious violence in a defined area), or to see that the power is used consistently within and between forces. Civil rights advocates have raised increasing concern that in practice section 60 has become a useful police resource for responding to low-level disorder.<sup>7</sup>

An investigation conducted by the Independent Police Complaints Commission (IPCC) into the use of section 60 stop and search powers in the West Midlands in 2007 confirmed activists’ concerns. The IPCC found that section 60 was being used inappropriately to deal with routine crime problems

1 Police and Criminal Evidence Act 1984, Code of Practice A (amended 1 January 2009)

2 David (2009)

3 Travis (2009b)

4 Criminal Justice and Public Order Act 1994, Section 60

5 Knives Act 1997, Section 6; Crime and Disorder Act 1998, Section 25.

6 Hand and Dodd (2009: 35)

7 Sanders and Young (2007)

with no justifiable reason why normal police powers based on a reasonable suspicion were not being used. The IPCC Commissioner overseeing the investigation reported that:

*We found no evidence - for example weapons actually seized or intelligence anticipating serious violence in this particular neighbourhood - justifying such an order... The police must not misuse powers such as section 60 in this way... Section 60 is an exceptional and highly intrusive power and it is not justifiable to use it for tackling a routine crime problem.<sup>8</sup>*

Although section 60 stop and searches represent only a small fraction of the overall numbers of stop and searches conducted under various police powers, they have already increased significantly and this trend appears to be accelerating due to knife crime initiatives across the country. The prime example is the London Metropolitan Police's Operation Blunt 2, which was launched in May 2008 as part of a high-profile initiative to tackle knife crime. Blunt 2 has relied on the application of section 60 powers in high-risk areas and the use airport style metal detectors ('knife arches'), amongst others tactics. Figures for the first eight months of Operation Blunt 2 in London show that officers made 209,269 stop and searches predominantly aimed at teenagers and young men.<sup>9</sup>

Ministry of Justice data for 2007/08 shows that across the country, when police use their section 60 powers, they are 10.7 times more likely to stop and search black people than white people, while Asian people were 2.2 times more likely to be stopped and searched than their white counterparts.<sup>10</sup> It is not hard to determine why stop and searches conducted under the section 60 authority result in higher rates of disproportionality than PACE section 1 stop and searches. As Professor Ben Bowling states:

*Wherever officers have the broadest discretion is where you find the greatest disproportionality and discrimination. Under section 60, police have the widest discretion, using their own beliefs about who is involved in crime, using their own stereotypes about who's worth stopping, that's where the problems in police culture affect the decisions that are taken... A power that was intended for narrow purposes is being used much more extensively against black and Asian communities.<sup>11</sup>*

This dynamic appears likely to increase further under the pressures to address knife crime and youth violence. Media portrayals and public debates on these troubling issues are interwoven with subtle racialised images, which set the context for stop and search by stigmatizing minority youth, and identifying only poor and minority neighbourhoods as 'high risk' or 'high crime' areas. In this light, it is important to examine the impact and effectiveness of section 60 powers. In 2007/08, only 4 per cent of stops and searches conducted under section 60 led to an arrest - significantly lower than the 11 per cent arrest rate for stop and searches conducted under PACE section 1.<sup>12</sup> In the absence of well-defined grounds for suspicion, these searches are less effective. Furthermore, in focusing on an area rather than focusing on individuals where there are grounds for suspicion, they run the risk of simply displacing problems to other areas.

While the police have been quick to acknowledge that the tactic is 'intrusive' they argue that it has had an important impact in deterring knife crime and youth violence. Since Operation Blunt 2 began, the MPS have made 14,700 arrests and recovered 7,500 knives.<sup>13</sup> Yet, an analysis of recent figures shows little connection between numbers of section 60 stop and searches and levels of knife crimes in different London boroughs. Between April and October last year, police in Southwark conducted 9,437 section 60 stop and searches yet saw knife crime rise by 8.6 percent. In contrast, there was a 25 percent reduction in knife crime in Islington where police conducted only 840 section 60 stop and searches.<sup>14</sup>

Few would disagree with section 60 powers being used in situations with a genuine risk of violence in a clearly delineated area for a short period of time. Beyond these circumstances, the powers given to the police under PACE section 1 provide an adequate tool that includes the safeguard of reasonable suspicion and local monitoring mechanisms. If police develop an over-reliance on section 60, it will have a long-term impact on the predominantly young black people who find themselves repeatedly stopped and searched. Without a well-defined standard of suspicion, searches are likely to take place for reasons that are unclear to the individuals being searched

8 Independent Police Complaints Commission (2007)

9 Laville (2009)

10 Ministry of Justice (2009: 29, 49, 205)

11 Dodd (2003)

12 Povey and Smith (2009: 35)

13 There are large discrepancies in the figures quoted on arrests and knives seized during Operation Blunt 2. These figures are taken from Metropolitan Police Service (2009)

14 Travis (2010a)



or the wider community. This could lead to the undermining of public confidence, just as happened under the old stop and search, or 'sus' laws, that were replaced by PACE. Sus laws were used for what is now described as 'saturation policing'. In 1981, anger over 'Swamp 81' – a massive stop and search operation in Brixton – erupted in urban unrest in Brixton. Similar tactics used in other cities led to further outbreaks of public anger in Manchester, Liverpool and other areas of the West Midlands. PACE was introduced in the wake of this period. There is a real risk of similar alienation in response to section 60 and other stop and search powers being used today. If section 60 is used in a fashion that reintroduces saturation policing, it risks repeating this traumatic episode in the history of police-community relations in the UK and seriously setting back the important efforts that have been made to monitor and address disproportionality.

As increasing numbers of stop and search powers fall outside the safeguard of reasonable suspicion, including section 44 and schedule 7 terrorism stops and road traffic stops<sup>15</sup> we must learn lessons from the past. Powers should be used for the purposes they were intended for, and where police are given extraordinary powers, safeguards and local mechanisms for external accountability should go beyond what is required for section 1 PACE stops to ensure that communities can have confidence that powers are being used fairly and legitimately.

<sup>15</sup> Including: Section 163 Road Traffic Act 1988, Sections 44-47 Terrorism Act 2000, Schedule 7 Terrorism Act 2000, Section 4 PACE (road checks) and sections 14 and 65 of the Criminal Justice and Public Order Act 1994 (races and trespassory assemblies)

## Young People's Experiences of Stop and Search Second Wave

Youth work focusing on the interaction between young people and the police is fraught with challenges. Second Wave is a community arts organisation based in Deptford, south-east London, working with young people aged 13-24. Over the past five years, Second Wave has developed an innovative programme to establish positive dialogue and reduce confrontation between local youth and police officers. The aim of its outreach programme is to increase confidence and challenge stereotypes on both sides. This programme is unique in that it provides a neutral and safe environment in which young people and the police can talk, listen, share ideas and experiences, and to explore different perceptions of each other.

Workshops are led by young people at Second Wave. Police officers attend on a voluntary basis (from Lewisham and the local Territorial Support Group, TSG4) in casual, plain clothes (not in uniform). This youth-centred approach establishes an atmosphere of equality, where the experiences of young people are taken seriously. Second Wave's sessions are always vibrant, honest, open and creative.

In the ongoing debate about Stop and Search and its impact on communities, young people's voices are seldom heard. Yet it is young people who bear the brunt of Stop and Search practice. Here, six young people [Ami Bah (16), Shanai Levy (17), Macey McMullen (18), Kloe Dean (20), Martins Imhangbe (18) and Creston Hamilton (19)] discuss the experience of Stop and Search from a youth perspective, and how positive relations between the police and young people can be encouraged.<sup>1</sup> The issue of trust is paramount and the continual effort to build a long-term sustainable approach is consistently emphasised by Second Wave.

### *As young people, do the police help you to feel safe?*

*I just feel that, them knowing that they have authority over us, they intimidate us. It's not a case of me feeling safer, it's me cautioning myself. Cause they know they have the authority, they can say 'You're doing this', section this and that.*

<sup>1</sup> The discussion was dynamic and the young people spoke with passion and confidence. Some sensitive topics were discussed; in order to protect the anonymity of the interviewees, opinions are not attributed to individuals. A new paragraph indicates a new speaker.

*They know they have that power, they use that to intimidate you.*

*It shouldn't be like that, it should be like, you see a policeman and you think 'Oh, I'm safe walking down this road.' You shouldn't feel like you're watching out for them.*

*You can't really feel safe around anyone, cause everyone's just a human being. But because we're all human beings, the way we express ourselves, obviously it's going to be different from the way the system wants it. But because they're in the system, and they think that they run everything, they feel that they can undermine people. But they need to understand that everyone's the same. So I don't feel safe around nobody, really, cause you don't know who's going to turn around and say, 'Yeah, you've done this, bam!'*

*I don't think I've ever felt safe around any police officer. They're meant to make you feel safe. But when they come into your space and they come into your house and they kick down your door, and there's like ten of them running around your house, they're not making you feel safe.*

*I think that if you interviewed a lot of young people, they will say that they are the biggest bullies...*

*They are a gang.*

*They are a gang, they like to stereotype us, but then again they're the biggest gang.*

## **Do you think you can rely on the police for protection?**

*I don't think I can rely on the police. You can rely on them to a certain extent. But for example, people have been stabbed outside a police station, things like that. There was an instance, for example, me and my friend needed to get out of an area and we asked the police to take us out of that area. But they said no, take a bus. And as a result of that, someone ended up dying. If the police had taken us out of that area, that could have been avoided. It's like they wait for something to happen before they take action. Sometimes when they take action, it's too late. The police need to start listening, and acting quicker, one step ahead.*

*I feel like you can't rely on them, and really and truly, the only place you do feel protected is within your own community, and your friends and your family.*

## **If you cannot rely on the police, where does your sense of protection come from?**

*My sense of protection is with myself. Knowing the person I am, being hard headed, I make sure I don't allow anyone in, I keep to myself. You have to keep to yourself but be aware, you know. If I'm about to go out, I make sure I call so many different types of people, and find out, what you hearing on the streets, what's going on, who's got trouble with who, what's gonna happen, who's going where. You need to know everything, cause you know you need to protect your own back. Cause police are only gonna come ten, fifteen minute after someone get stabbed, you know what I mean? So you need to make sure you're not that person stabbed.*

*It's nuts, you can say 'I don't like police, I don't like police,' but when you're explaining it to people, they're thinking 'No but, but, but...' But nothing, you're not in a situation to really understand. So when it comes to young people expressing their views on police officers, not everyone gets it. So it just gets to a point where everyone just shut you down. And then when you really wanna express yourself, it just make you sound like a donut. It's like, 'Oh, you don't know sugar'.*

## **How do you identify the people you can trust? (Does this include police officers?)**

*You can say that you trust someone, but you can only say that out of experience. And you can only trust them in certain situations. You can't say you fully trust them, you can only say you trust them to a certain extent.*

*You can't really say 'Ah, I've got full trust in anyone'. Cause at the end of the day, yeah, what is trust? You can trust them to a certain extent, for the information you give them, but at the end of the day, you're the only one who knows what's going on in your mind.*

## **Can the level of confrontation between young people and the police be reduced? How can this be done?**

*It can be reduced, if both sides grow up. Cause some of the gang members, they need to stop*



acting like they're the police. And the police need to stop acting like they're gang members. So both of them need to grow up.

In regards to the police, I think it's about having a relationship with them, before you can even determine who to trust anyway. But working with the TSG [Territorial Support Group] for so long, a lot of them see me, in Catford and stuff, and they always say 'Oh I see you', so it's nice that they acknowledge you. So I think if I was in a situation, and they were one of the officers, I would respect them. So with those police officers I know, I wouldn't say I trust them, I would have a positive outlook. So if I was in a situation and they were involved, I would feel a bit safer. A lot of young people don't know the officers in the area, like when I was in primary school and stuff, the PC used to come in and do little workshops and stuff, and you would know him as the local policeman. I feel like that kind of thing is a bit lost, so maybe if that was incorporated more. Not that everyone needs to be on the police's side, but just to have that awareness, and to know that some situations might be treated differently, as well as young people knowing why they do certain things. Like a lot of things got explained to me in the sense of why they were holding that man against the wall, that he killed however many people. Little things like why they do certain things that they do. Not saying that everything they do is right, but it gives more of an understanding, 'We stopped that man because he could have had a gun', all this stuff. A little more insight for young people, would help with the whole trust thing. It's all about knowledge, I think, because for me to trust you, I've got to know you. I think it's the same thing in regards to the police and the community.

Trust is mutual. If you don't trust me, why should I trust you? It has to be built up on both sides.

I think the level of confrontation could be reduced. I don't know how, I don't have that answer to the world. But if you've previously been through certain things, you might forgive, but you'll never forget. Like, even though I haven't got physical scars, but some of my family has. Trust takes years to build, but could be lost in a couple of seconds.

## Do you think the police deliberately target particular groups for Stop and Search?

I think they do. You hear about it more, as well. You hear about it, and you see it. You would hear about a group of young black persons stopped

and searched. So you hear more about, you know, a young black boy was stopped and searched, a young black boy got stabbed, a young black boy done this, a young black boy done that. So you hear about it a lot in the media.

But that's pumped a lot by the media as well though. Cause I think it depends on the area, cause like in east London, there's a lot of Indian boys that get stopped.

Yeah, but also I think because the police has that in mind, they hear so much about it in the media, because they hear about it so much, they think 'We need to stop them'. So a lot of people end up getting stopped and searched for the wrong reasons. Because they feel they need to stop that group of black boys, or stop that black boy.

I'm trying to see it from both sides, yeah, and I'm trying to see that if you're a policeman, or policewoman, and you get this description, and you know of people who have done these crimes before – not that you have to pick him up, arrest him, you don't need to do them things – but if you've got that type of evidence, I can understand how they think that person might reoffend. But again, I think it's more about how they handle that situation. Because if you've been given that as evidence, that's your job to look for that.

Do they deliberately target people? Yes. Why? They're told to. When they stop you, they're like, 'We're looking for a black guy, wearing black bottoms, and a black tracksuit'. And you're walking around in a grey tracksuit, a white hat, you get me? But we get stopped.

## How does it feel, as a young person, to be stopped and searched?

If I just pull one of my experiences out of a hat, in Plumstead, this was on the main road, and my friend came across the road riding a bike. And as soon as he came across the road and he saw me, a police car came, a riot van. I don't know why a riot van for two people. And all I see is a white guy going 'You! Stay there!' Like, we were both jamming on the corner, innit, it's not like we were gonna go anywhere. Next thing you know, he comes over. He's like, 'There's been a lot of young guys on bikes, distributing weed.' And he's like, 'Oh, you smell of weed.' But the thing about it is, my auntie gave me this aftershave for my birthday. And I always told myself I would never use it! But the first time I used it I got stopped and

searched and told I smelled like I have weed on me. And they were like 'Oh, we need to search you.' And I was like some goldfish, I didn't know nothing about stop and search. So I said 'Alright'. So they patted me down, and then they were like, 'Oh, can you come into the van?' I went into the van. They were like, 'Can you lower your trousers please?' And I was like [pulls a face of disbelief]. And I had a tracksuit bottom on under my jeans, but I'm thinking, 'Lower my trousers? That don't really sound right coming from a police officer, in a main road, in a riot van'. So I lowered it to about there. And he's like, 'Have you got anything in your shoes? Take them off.' So I took them off, you know, I was cooperating with everything. And then I was fixing myself, another one comes out of nowhere, the same bald one who said 'You! Stay there!', comes in from the side door and says 'Is he giving trouble?' and I was like, 'No. Can you leave me alone?' And if the woman hadn't come in, I think I would have gone to prison. Cause she comes in, like, 'Oh, leave him alone, he's got nothing on him'. And then they just let me out. They didn't even give me a slip or nothing. So I was thinking, OK, that's it. You just normally get stopped, kicked out and you go about your business. And I told my mum, she didn't believe me. I said I ain't using that spray again [laughter]. I gave it to my brother [laughter].

I've been stopped and searched twice. Once I just got stopped, the other time it was two females. But it does actually make you feel like a criminal. When I get stopped and searched I'm thinking, 'You're feeling my trousers, man! You're feeling my pockets, you don't need to do that!' So I actually feel like a criminal. And I actually didn't know this, but every time a police officer stop and search someone, they have to give a slip. But they always lie and say it takes half an hour, [all agree] 'It's gonna take half an hour for me to fill out this slip, do you still want it?' And most kids are like, 'I don't want it.' But every time they fill out a slip it goes on their record to how many people they've stopped and searched, how many black people they've stopped and searched. But I never knew that. So maybe that's why they don't want to give out the slips. Maybe a police officer could be racist, and you could find how many black people, how many Asians, and you could find that out.

It's interesting to hear everyone's different experiences, cause I've been stopped four times in my life, and I've only been searched once. But I thought about why they stopped me, and I think we need to realise that our culture is a lot to do with it. Our stereotype is our culture, if that makes sense? That whole thing about hoodies, and the way we dress, and the way we act, the way we talk. I think that's what gets misinterpreted. But this one time,

I was walking down my road, and they pulled up, drove up on the pavement to stop me. And they were like 'We're just looking for a girl who's just beat up her mum, round the corner, and it fits your description, tell me your name, have you got ID?' And I thought, the only way I would have wanted to argue was if I knew I had done something wrong. But I thought there's no point in me arguing with them. And I think that's where a lot of people go wrong, cause automatically they don't like the police, and even if they haven't done nothing wrong they'll respond in an anti-police way. But some of them are very hard work.

The thing about stop and search, is that a lot of it is in public. And say your auntie, or someone close to you, sees that, you haven't done nothing, and they go and tell your mum. It just makes you look bad. And you don't want your mum to be worrying about it, she's gonna think you're hanging around with the wrong crowd, and you haven't done nothing. It's embarrassing, as well, everybody's gonna think 'Oh, he's done something bad'.

## In your experience, do officers adequately explain to young people why a Stop and Search is necessary?

There's only been one time out of all the times I've been stopped and searched that they actually explain themselves right. And one thing I realised about when they stop and search you, even though they're the ones who issue the Go Wisely<sup>2</sup> information packs, yeah, they don't want to issue it! The government told them to issue it! So I got stopped, and these were people from north London, that got sent all the way down to south east London to do a stop and search, to see if anyone was carrying knives. I saw them, I walked past them, and they clocked that I was watching. So I went to the shop, and because I saw this boy getting stopped I decided to walk past and see if I can hear what they were stopping him for, innit? And he was like, 'Excuse me!' And I was like, 'Damn' [laughter]. And he was like, 'We're stopping and searching all youths, to see if they've got knives and this and that on them'. So basically, he didn't really say what he was stopping me for, he was like 'Come, I need to search you'. So I knew what the Go Wisely stood for, and I asked

<sup>2</sup> Go Wisely is a mnemonic for correct police procedure (Grounds, Object, Warrant, Identity, Station, Entitlement, Legal power, You are detained...).

him the questions, he was like, 'What? What do you mean Go Wisely?' I was like, 'That's how you lot run your stop and searches, right? Grounds, all of that. And can I have your badge number'. He was like, 'What?' And I was like, 'What section are you stopping me on?' And he was like, 'Ehm ... [pretending to talk to his colleague] Excuse me!?' And I was like, 'You wanted to search me, right? Have you got that form? Did you give one to him?' And he was like 'No.' And I was like 'OK, well I want mine.' And that's the only time it actually went well, cause I had to be the one who like 'Yeah, you need to tell me this, and you have to give me that'.

## How can the quality of communication between the police and young people be improved?

Some people bear grudges, but some people just forget them. Like when I got stopped last year – this was when I was on bail for my case – and I was jamming inside of Morley's, in a food shop, and a bunch of Catford girls came into the Morley's. There was only like five or six of them. Five minutes later, two riot vans and two squad cars basically blocked off the road, came up in there and said 'Oh, we heard that one of you has got a gun'. A gun, in a food shop, what are we gonna do, rob their chicken or something? And they're supposed to have a one-to-one with you, you know 'Oh we're stopping you because of this'. [in a loud voice] 'Uhm, I think this one's got it! Uhm, can you check him for the gun please?! Look, he's got a foot tag!' That's when the pastor's wife walked past! That week when I went to church ... no way! [laughter] But the thing about it, they make it so hard for you. Imagine if they did arrest me, it would have gone on my case as well. And the thing is, no one in that chicken shop had a gun on them. And within ten, fifteen minutes they were gone. I didn't get no slip, no nothing. They said 'You can pick it up from the police station'.

That gets on my nerves!

If I got £20 for every time for every time a police officer told me that, I could pay for my college fee! [laughter]

They think that they feel like they're doing their role, but they're missing a lot of bits. I think they're surprised most of the time when we know the law. And I think it should be a thing where, if you can tell that we know it, you might as well tell the answers. Cause we know it, so there's no point in lying. We will go back to your police station, and we will question you.

## What is the role of a youth project like Second Wave?

Like how Second Wave do all that outreach and that, talking to the police. Young people like us with bad experience of the police, it's good for them to hear it. And I'm sure we speak for the majority, it's like the link. There needs to be a time where young people sit down with the police. And I think if Second Wave was bigger, it would be much better. Or if what we do here, the outreach, was taken to other places, I think that would really work. I think that would help communication.

I think I'd be a criminal if it wasn't for outreach. I ain't gonna lie. Because my thoughts about police before, it only changed once I started coming to outreach.

Yeah, when you get a chance to speak to them. More insight.

Exactly.

Second Wave has given young people their power as well. Police have already got that empowerment, young people wouldn't have that. So Second Wave is kind of helping to give us that power as well. Especially having a workshop where we're leading, and they have to follow us.

I still despise the police, but being at Second Wave has taught me how to bite my tongue and control my anger, control my fuse. So it is really good. And I think Second Wave don't get as much credit, or as much press ... if someone does get injured, they report on the negative, they don't focus on the positive, and they don't give Second Wave enough credit. Everyone always says 'Young people and police should work alongside and help each other'. But when someone is doing that, they wanna forget about it.

Yeah, they should give the credit. Cause it's young people like us that are getting stopped and searched and this and that, but then again come to a good place like Second Wave, and we can take the lead of our own workshop. And it's a chance for them to see that even though we get stopped and searched, there is good in us. And I think that is a good thing, cause most of the time they just think, 'Oh, cause you get stopped and searched, you don't do anything with your life, you have no motivation'. And I think Second Wave also gives us a voice.

I started Second Wave when I was 13, and I ain't gonna lie, I was reckless, I did roll with a couple of wrong people and nearly got involved in different situations, but Second Wave just makes you think and makes you realise that there's so much more

you can do with yourself. There's more people who respect you for you. On the street, yeah, you got to do something to get up there. And if you wanna stay up there, you got to carry on, carry on, carry on. But Second Wave, you don't have to do anything. Just be yourself. You don't get judged.

## Is an increased use of Stop and Search the best way to tackle knife crime?

Hell no. The more you stop people, the more they're going to get aggravated. You know, energy flows where attention goes. So increasing stop and search, that won't stop it, that will just make it happen. If it ain't happening already, if they ain't carrying a knife already, you stopping and searching them a multiple of times, one day you might say 'Excuse me, can you...' boom! And that's you gone. Why? Cause you stopped that person five times already within the last three days, asking them the same question, they're gonna get sick of your voice. And they're gonna be sick of your van rolling up to them, especially if they're going home to their mum, or they're going to pick up their little brother, or if they're just trying to live a normal life. So you know, 'This guy is getting on my nerves, if he wants to find something I will show him something'. That's the mentality of some of the youth are nowadays. It's like your parents when they're annoying you, even if you've got respect for them, sometimes your anger takes over and you do things or say some things that you don't mean to. That's what can happen on the streets. The more they stop you, the more you're gonna think to yourself, 'Oh, they're getting on my nerves, I need to do something about it'. And why would you have done it? Because they were pushing you. But they wouldn't see it in that way.

I think it's the other way, cause sometimes I've thought, 'Imagine if I did carry a knife'. You know, when I got stopped and searched, I thought 'Imagine if I did have a knife'. I would have been in jail. So it does make you think, so I thought, 'There's no way I'll carry a knife, there's no point, it's not worth it'. So stop and search can be a good thing. It makes you think about the repercussions about it. If your friend got stopped and searched with a knife, that might stop you carrying a knife. I think that helps.

## Could any other methods be more effective in tackling knife crime?

Last year, yeah, and the year before, obviously there was bare knife crime, innit?

And gun crime.

Yeah. Both. But now, they don't show it as much. Even though you know in yourself, bare people are getting stabbed, but...

Isn't it a lot to do with media? Cause the person who triggered it off was so young, like twelve or something, thirteen, when he died. Then journalists and stuff started clocking on how much people were actually getting stabbed. A lot of the time the media does escalate a lot of this stuff. Yeah, the rate is up, but it's been high for a long time. A lot of the time it's the media that's pumping it out there. And it's probably increasing knife crime even more, cause it's all these young people thinking 'I might get stabbed!' And it's probably making them carry a knife. So I think it's gone past what precautions police can do, and it's gone into how these young people are being raised, what their culture is, and what's being pumped into their head all the time.

I think, if we were informed more, from the police and from the British Crime Survey, it wouldn't shock us so much. Cause everyone watches TV, you know? But they keep it in their little group, and not telling us everything. So when it comes on TV, we're like 'Oh, it must have been bad, for it to be on TV!'

Yeah, and with police as well, when something happens in your area, obviously you wanna know cause it's your area, and they're not allowed to tell you nothing. But it could be even my road blocked off and I can't get to my house, 'So what's happened?' 'Oh, I can't tell you'. But I live on the road, I wanna know if there's a mass murderer or whatever. It's about being able to communicate knowledge.

## Should young people be encouraged to play a more active role in creating safer neighbourhoods?

Even though I've been here at Second Wave, all the little boys, the people I knew growing up in Pepys [Pepys Estate, Deptford, London SE8] when they do stuff I actually stop them, like 'Why did you do that?' It makes me think, 'What's the point?' So coming from Second Wave, it's made me change my views on police. It's made me more mature, it's made me realise, 'You are within the community, even though you might commit crime. I've committed crimes, but then I had forgotten about how it would affect my community. And at Second Wave they do make you see the other side.



## Police Stops and Stop/Search – It's Quality not Quantity that Counts

Nick Glynn

Leicestershire Constabulary<sup>1</sup>

Being stopped by the Police is a significant event in anyone's life. The quality of the encounter, however brief, is key in terms of its effect on the confidence individuals and the wider public have in the Police. The ability of the Police to stop people is an essential element of the UK's 'Policing by Consent' model and therefore the manner in which stops and stop searches are conducted is critical to the maintenance of that consent.

There is often a focus on the legislative types of police stops (Sec 1 PACE, Sec 60 CJPOA, Sec 44 Terrorism Act). Putting the legislation to one side, the Police carry out three main types of 'stops' i.e. whilst the subject is on foot, in a vehicle and the third which can occur in either of these two stops when the subject is subsequently searched.

What impact does being stopped have on an individual? How does it affect their attitude towards the police in the future? How do police officers view their power to stop people? These considerations are balanced against the assertion that the power to stop people and subsequently search some of them is an essential tool in the prevention and detection of crime.

Stops and stop and search are police tactics which are generally perceived to have widespread public support. Targeting known, active criminals is a proven policing tactic and when it is used intelligently, directed at specific individuals and limited to the aims for which it is intended it can be highly effective. I have seen the benefits of targeting active criminals, stopping them and subsequently searching them (when there are grounds to do so). The result is often fewer crimes, fewer victims and a potential increase in public confidence in the Police and the Criminal Justice System. Acquisitive crime has fallen sharply over the last 10 years largely as a result of a more effective National Intelligence Model<sup>2</sup> approach to intelligence, the targeting of police resources and effective partnership with Local Authorities and other key partners. However, the efficiency of stop

and search as a tactic receives less focus, and the way in which active criminals and indeed other members of the public are treated during a police stop receives even less attention.

There were over a million recorded stop and searches in 2007.<sup>3</sup> This is the tip of a very large iceberg when compared to the actual number of stop encounters for which there are no official figures. Whilst there has been strong criticism of the stop and account forms – most notably in Sir Ronnie Flanagan's recent review of policing,<sup>4</sup> which were introduced to bring more accountability to encounters where no search took place – withdrawal of these forms alone will reduce the amount of scrutiny that these encounters come under but may still miss the point. The most recent police complaints figures<sup>5</sup> highlight that during 2008/09 complaints rose 8 per cent from the previous year to 31,259 with 21 per cent relating to incivility (rudeness). It is fair to assume that a significant number of these 6,564 incivility complaints arose from stop encounters and that the ripple effect of a poor encounter goes far wider than the individuals who had the confidence and fortitude to put themselves through the police complaints process.

It is easy to view UK police officers speaking to members of the public in a rude manner via police fly on the wall shows on satellite TV. It is apparent that some police officers are not aware of how they sound, possibly because stopping people is, for them, such a common occurrence. Police officers are rarely stopped or stopped and searched themselves.

Interestingly, training for police officers in how to deal with people in a positive manner has received criticism in the press.<sup>6</sup> Comments attributed to police officers who had received such training provides an insight into how some officers view the people they deal with, where cooperative, law abiding people are spoken to politely and others 'don't deserve such treatment'. Such comments are

<sup>1</sup> The views expressed in this chapter are those of the author and not necessarily the views of the Leicestershire Constabulary

<sup>2</sup> Home Office (2007b)

<sup>3</sup> Travis (2009a)

<sup>4</sup> Home Office (2008)

<sup>5</sup> Independent Police Complaints Commission (2009)

<sup>6</sup> *Daily Mail* (2009b)

telling. They highlight the difficulties some officers have in that they differentiate between different types of 'customer'. The first promise in the national Policing Pledge<sup>7</sup> makes no distinctions regarding who should be 'treated fairly with dignity and respect'. This expectation of fair treatment quite rightly applies to everyone.

Stop and search targets are still a feature of individual police officer targets and a failure to achieve such targets can affect career progression. The outcome of these stops and searches is rarely considered as a factor and it is of equal concern that the negative impact that ineffective, poorly conducted stops and stop and searches have on the public is not factored in either.

Stopping people with no grounds to search them requires the person's consent, a critical part of 'policing by consent'. When officers *treat people fairly with dignity and respect*<sup>8</sup> this consent is not questioned but recent cases where groups of people have been stopped<sup>9</sup> or 'kettled'<sup>10</sup> have highlighted that this consent may have been stretched too far.

Stopping people is routine for the police. Initiatives that assist police officers understanding of what it is like to be stopped, like Second Wave<sup>11</sup> in Lewisham, London, are to be applauded. The RT Hon Iain Duncan Smith rightly points out that, 'There is a good practice in Lewisham but not everywhere, and their good practice needs to be taken to other places'.<sup>12</sup> Including this approach as a standard part of initial police training, where

the feelings of people who have been stopped are examined in detail, is critical to improving the way stops and stops and searches are carried out. Such training is equally important for refresher and management training and consideration could also be given to including this approach within conflict management training.

A number of forces carry out victim surveys and this has expanded from burglary and robbery to victims of other types of crime as well as anti-social behaviour. Obtaining a wider understanding of the effects of being stopped by the police by means of supervisor follow-up calls, interviews and surveys will not only highlight the detrimental effect this can have on public confidence but will also raise the profile of how a person can be stopped 'well' by the police, treated correctly and leave the encounter with confidence in the police that is either equally as good as it was before the encounter or indeed higher than it was. People surveyed may also provide a supply of volunteers willing to assist with realistic police training.

I don't advocate an increase in the bureaucracy around stops and stops and searches but instead an uplift in the awareness and understanding of police officers regarding the effect they have on individuals and the wider community every time they stop someone. It is my belief that this will lead to stop encounters of a higher quality and efficiency, fewer complaints against the police, statistically fewer stops overall and, crucially, an improvement in the public's acceptance of the consent essential to the unique approach to policing that we enjoy in the United Kingdom.

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7 Directgov (not dated)

8 Ibid.

9 *The Sentinel* (2009)

10 UK Parliament (2009)

11 [www.secondwave.org.uk](http://www.secondwave.org.uk)

12 [www.secondwave.org.uk/about\\_us.html](http://www.secondwave.org.uk/about_us.html)

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# SECTION III: COUNTER-TERRORISM MEASURES

## Overview of Section 44

James Welch

Liberty

Section 44 of the Terrorism Act 2000 creates a search power which, like that under section 60 Criminal Justice and Public Order Act 1996, allows areas to be designated within which police officers in uniform are authorised to search people and vehicles without suspicion directed at the individuals concerned.<sup>1</sup>

The authorisation may only be given by very senior officers, officers of at least the rank of assistant chief constable outside London or commander within London, and on the grounds that the officer considers it 'expedient for the prevention of acts of terrorism'. The authorisation has to be confirmed by the Home Secretary within 48 hours and may last for up to 28 days. Such authorisations are routinely renewed on a rolling basis.

While the search power is not dependent on reasonable suspicion it may only be exercised "for the purpose of searching for articles of a kind which could be used in connection with terrorism".

Section 43 of the Terrorism Act provides a search power that may be exercised when an officer has reasonable grounds to suspect someone of being a terrorist.

The most recent statistics on race and the criminal justice system produced by the Ministry of Justice under section 95 of the Criminal Justice Act 1991 show that in the year 2007/8 there were 117,278 searches under section 44, an increase of 215 per cent over the previous year. 56 per cent of these searches were of vehicles, 44 per cent of pedestrians. The Metropolitan Police were responsible for 87 per cent of these searches; 19 per cent of police forces did not make any use of the power at all.

In the whole of England and Wales those identified by the police as Asian made up 17.7 per cent of the total number searched, as against a proportion

of the population of 4.7 per cent, those identified as black made up 13 per cent of those searched (2.8 per cent of the population), while those the police identified as white accounted for 63.1 per cent of searches (91.3 per cent of the population). This means that across England and Wales as a whole Asian people were 5½ times more likely to be searched than white people, while black people were almost 7 times more likely to be searched.

The disproportionality was less in London. Here those identified by the police as Asian made up 19 per cent of the total number searched, as against a proportion of the population of 12.9 per cent. An Asian person in London was 1¾ times more likely to be searched than a white person and a black person 1⅓ times more likely.

The 117,278 searches across England and Wales resulted in 72 people being arrested in connection with terrorism. 1,180 of those searched were arrested for other reasons.

PACE Code A seems to sanction an element of racial profiling in the selection of people to be searched under section 44. Paragraph 2.25, while stressing that officers should be careful not to discriminate on racial grounds in the exercise of the power, continues that "[t]here may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities)".

Whether racial profiling in the exercise of the power would be unlawful direct discrimination under the Race Relations Act 1976 was considered by the House of Lords in *R (on the application of Gillan and another) v the Commissioner of Police of the Metropolis*.<sup>2</sup> The Claimants challenged the compatibility of the power with several articles

<sup>1</sup> The power to search under Section 44 can also be exercised by a community support officer acting in the company and under the supervision of a police officer.

<sup>2</sup> [2006] UKHL 12

of the European Convention. While this was not directly relevant to the case – both claimants were white – three of the Law Lords picked up on the suggestion made by the claimants' barrister that the wide discretion conferred on officers could readily lead to the power being exercised in a racially discriminatory manner and addressed the issue in their judgments.

The Law Lords took the view that selecting people to be searched on a truly random basis would render the power ineffective; there had to be an element of selection. Race could be an element of that selection process provided that it was not the sole reason for choosing to search a particular individual. In the words of Lord Brown:

*It is one thing to accept that a person's ethnic origin is part (and sometimes a highly material part) of his profile; quite another (and plainly unacceptable) to profile someone solely by reference to his ethnicity. In deciding whether or not to exercise their stop and search powers police officers must obviously have regard to other factors too.<sup>3</sup>*

The Law Lords' approach (and that of PACE Code A) does at least have the benefit of honesty: if stopping and searching only some individuals is to be effective in apprehending those engaged in terrorist activities – or even in acting as a deterrent to those who might – officers will have to engage in some mental selection process and, whether consciously or not, race is likely to be a factor in this process.

This approach is open to three objections:

Firstly, on the assumption that racial profiling already plays a part in the selection of those searched (and the figures published under section 95 suggest that this is the case) section 44 is not effective as a means of apprehending terrorists. In 2007/8 only 0.06 per cent of searches under section 44 resulted in arrests for terrorism (117,278 searches leading to 72 arrests). It seems that the Ministry of Justice has not published any figures on how many of those searches resulted in charges, let alone convictions. Moreover, it may well be that some if not all of those searches could have been justified under section 43 (the "reasonable suspicion" search power).

Secondly, it undermines the principle that direct discrimination cannot be justified. Leaving aside the legal niceties, it is rightly considered deeply objectionable to disadvantage someone because of their race.

Thirdly, subjecting people to the inconvenience of a search because of their race, or even creating a situation where someone might justifiably believe that they have been selected for search because of their race, is bound to create resentment and undermine softer approaches to combating the terrorist threat.

We are already regularly subjected to searches without reasonable suspicion – at airports or entering courts or the Houses of Parliament. There clearly is a place for an exceptional power to search without reasonable suspicion, but only at particularly sensitive locations and events and when the power is exercised against everyone without selection.

The Metropolitan Police seems to be moving in this direction. While still apparently insisting that the whole of Greater London be designated for the purposes of section 44 they announced in July of last year that section 44 would only be deployed at particular sites or as part of specific operations.

## Afterword

The European Court of Human Rights gave its judgment on the *Gillan* case on 12th January 2010.<sup>4</sup> In contrast to the House of Lords the Strasbourg court held that searches under section 44 did amount to an interference with personal privacy and found a breach of Article 8 on the grounds that the powers of authorisation, confirmation and search were "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse".<sup>5</sup> Without directly criticising the position on racial profiling taken by Lord Brown and the two other Law Lords, the Court noted that black and Asian people are subjected to a disproportionate number of searches and expressed its concern at the "clear risk of arbitrariness in the grant of such a broad discretion to the police officer".<sup>6</sup>

While the Strasbourg court's judgment should lead to legislation which will considerably circumscribe the power of search under section 44 if not repeal it completely, the House of Lords' judgment in the *Gillan* case has given a tentative green light to racial profiling in other contexts. Sadly, some of the suggestions made in the light of the attempted bombing of the flight from Amsterdam to Detroit on Christmas day show that this is an issue that will recur.

<sup>4</sup> *Gillan and Quinton v the UK* application no. 4158/05. The judgment is not yet final – the Government may exercise its right to ask for the case to be reconsidered on a referral to the Court's Grand Chamber.

<sup>5</sup> Paragraph 87

<sup>6</sup> Paragraph 85

<sup>3</sup> Paragraph 91

## Counter-terrorism Policing and Section 44 Profiling – Ethnographies of Anger and Distrust

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Since their inception, section 44 stop and search powers within the Terrorism Act 2000 have generated considerable controversy, as evidenced by the wide range of criticisms that have come from diverse contexts, including from within policy, civil liberties, policing and community circles. A wide variety of arguments have been generated regarding the detrimental impacts that the over and inappropriate use of section 44 powers can create. Whilst these arguments are significant and deserve full recognition, the specific focus of this short piece is to present an ethnographic account of the impacts of section 44 profiling, where the term ethnography refers to an examination of the lived experiences of those individuals experiencing section 44 powers. This approach is part of a longer tradition pursued by critical scholars working from within a wide range of different subject disciplines, whereby there is a concern to examine, and draw attention to, the voices and experiences of those individuals experiencing the brunt of state powers, especially given the dominance of top-down, state-driven perspectives in relation to the sensitive and often secretive arena of counter-terrorism.

Individuals' accounts of their experiences of section 44 counter-terrorism powers illustrate the significant and multi-layered emotional, psychological and other impacts on those stopped and searched, suggesting that the impacts can be severe and long-lasting. These experiences might be considered to comprise a form of victimisation by the state, as it is state powers that are being enacted which are detrimentally affecting individual citizens. Anger is a common theme found within people's accounts of section 44. The following is a quotation from a young Asian Muslim male who is used to engaging with the police as he is a member of the Muslim Safety Forum:<sup>1</sup>

*Then they (police) started writing down on the form, why was I stopped. And he was going 'he was seen associating with a guy with Hezbollah materials'. I'll give you the slip, I've got it*

1 The Muslim Safety Forum is an umbrella organisation made up of a large number of Muslim organisations and acts as an advisory body to the Metropolitan Police and ACPO on issues concerning British Muslims.

*somewhere. I said 'look, that's not how it came. I came to you guys so you...and then I introduced myself, so everyone knows what the situation is, I came to you guys.' But the way the slip makes out is that, you know, us two were hanging around, not that we were doing anything wrong but the fact is that what they were saying is incorrect, saying that you know I was seen associating with Hezbollah literature and all that kind of stuff. Erm therefore stop and search section 44. And that was like, that was what really got me angry because it's a blatant lie. And then go and sign it. I'm not signing it because if I sign it then obviously that's saying it's true. It's no big deal but it's, you know, you're asking me to sign something that's not true, I can't do that. So he goes okay, it's fine, it doesn't matter, yeah. So he didn't ask me to sign it, because it's no big deal for them if I sign it or not. But...and that really got me angry, like okay so this is, this is me who kind of engages with this kind of stuff and I am angry. Then I started to think that the amount of people who get stopped and searched 44, they don't have any interaction with the police at all, they must be so angry because I was fuming. I was like what is this going on? Do you know what I mean, it's a blatant lie, there's nothing worse than lies, do you know what I mean?'<sup>2</sup>*

The following is a quotation taken from an interview with a young Muslim woman working with and supporting communities:

*And then the behaviour is very offensive, you know, police officer turn round and then people say why are you stopping me? They say because I have the right to, you know, to stop... Which they do, but you know they actually need to say something more than that to people; the behaviour is that I'm the boss, I'm, I can do it so I do it.<sup>3</sup>*

Featured in people's accounts of their experiences of section 44 counter-terrorism powers is the common theme of how these, and other counter-terrorism, powers have served to erode trust between the police and Muslim communities in particular, as there appears to be a commonly held perception that it is Muslims, in particular young Muslims, who are being targeted. The following is a

2 Taken from Spalek, El-Awa and McDonald (2009)

3 Ibid.

quotation from a young Asian Muslim man:

*My confidence in the police is at an all time low, I don't trust them and because of the powers they now have I trust them less.<sup>4</sup>*

The following quotation is from an interview with a young woman who has engaged with police through the Muslim Safety Forum:

*I mean stop and search is one of the key things. You know what I mean? I did some work like at the trust in terms of a survey that we conducted, I think around about eight or ten different London boroughs. So I focussed on the Tower Hamlets and Camden like working with the Bangladeshi community in particular. And there, you know, kids were saying that you know four or five times a month they are getting stopped and searched, some of them said a lot more than that as well. And they saw stop and search as a kind of a fishing tool where in particular they was stopped under like the terrorism legislation and everything where you know you don't have to prove anything then and you have absolutely no rights at all and you know taxi drivers were saying that working in the City and in like the West End and so on, when they're going through the City they're being stopped because it's under terrorism legislation they have to, they have no redress, you can't say anything and you know youths that are just wandering the estates, you know, they might be you know misbehaving, they might not be, but you know one thing they're not is terrorists.*

Whilst traditionally, young Black men have experienced, and indeed continue to experience, the brunt of 'hard' policing tactics, in a post 9/11 context young Muslim men in particular have been viewed as constituting a 'problem group' and a 'fifth column enemy within' by media, politicians, the security services and criminal justice agencies.<sup>5</sup> As such, Muslim minorities have been approached by the security services in order to act as informants, they have been detained without charge, some have had their homes raided and some have been stopped and searched and questioned without charge. These 'hard' policing strategies can, if inappropriately carried out, significantly undermine any attempts that police make to engage with Muslim communities, as experiencing anti-terror laws in this way may reduce individuals' motivations to engage with state authorities.<sup>6</sup> According to Gregory,<sup>7</sup> there

is tension between community-based 'soft' models of policing, which involve engaging with Muslim communities under the 'Prevent' agenda, and the 'hard' policing tactics traditionally used for intelligence gathering, investigations and arrests, under the 'Pursue' strand of the British government's CONTEST 2 strategy.

Where trust is undermined by poorly conducted section 44 policing powers, and their over-use, then this has consequences for community intelligence,<sup>8</sup> as trust and confidence towards the police are a precondition to community intelligence. A lack of community intelligence may then lead to further intrusive, 'hard' based, policing strategies to be employed because suspicion tends to be of the community as a whole rather than being limited to specific groups or individuals and so generating and/or reinforcing community anger, frustration and paranoia.<sup>9</sup> Therefore, the impacts of section 44 policing powers go beyond the impact on individuals to the erosion of trust between Muslim communities and police, a significant issue given the importance placed upon engagement, trust and partnership work between police and Muslim communities within a counter-terrorism context under the government's current Prevent agenda within CONTEST 2.

Finally, it is important to note that many individuals' reactions to section 44 counter-terrorism powers constitute powerful emotional responses. This is an important point, given that neutrality, objectivity and impartiality are often viewed as necessary antecedents in policing.<sup>10</sup> This would suggest that police officers need to increasingly accommodate and taken into account the emotional impacts of their work with communities, as innovative police officers have shown that it is through an acknowledgement and awareness of emotions that trusting relationships between police and communities can be built. Indeed, it might be argued that practitioners working in a counter-terrorism arena need to be emotionally intelligent and be able to empathise with communities deemed 'suspect' in order to allow for effective prevention and interventionist work to take place.<sup>11</sup> It is possible for police work to create spaces for engagement and partnership work within contexts characterized by fear, distrust and anger. Indeed,

4 Taken from Ahmed (2010)

5 Poynting and Mason (2006)

6 Spalek, El-Awa and McDonald (2009)

7 Gregory (2009)

8 Demos (2007); Hillyard (1993); Innes, Abbotts, Loew and Roberts (2007); Virta (2008)

9 Murphy (2005)

10 Drodge and Murphy (2002)

11 Spalek, El-Awa and McDonald (2009)



the work of Lambert<sup>12</sup> and Haqq Baker<sup>13</sup> illustrates the capacity for police officers and communities to work together. However, this work is demanding and requires the support of senior police officers and policy makers.

## Conclusion

Section 44 counter-terrorism powers are part of a wider growth in counter terrorism powers that not

<sup>12</sup> Lambert (2010)

<sup>13</sup> Haqq Baker (2010)

only serve to reduce civil liberties for everybody but which have served in particular to alienate members of Muslim minorities. The emotional and psychological impacts of section 44 are significant and long-lasting, creating barriers to engagement and partnership work between communities and the police. Nonetheless, in contexts of fear, anger and suspicion, it is possible to create spaces of empowerment and trust. However, this positive peace-building work is under constant pressure from the inappropriate and over-use of counter-terrorism powers.

## Schedule 7 – The Need for Greater Accountability and a More Proportionate Policing Policy

Zin Derfouli

Federation of Student Islamic Societies

### Main Powers

Amongst the little known yet wide ranging powers under the UK's Terrorism Act 2000 (TACT) is Schedule 7.<sup>1</sup> This special power's use is confined solely to policing the UK's ports and borders where 'examining officers' are able to stop, question and/or detain people, *without the need for any reasonable suspicion*, to ascertain whether they are likely to be engaged in acts of terrorism or not. Although persons stopped, or even subsequently detained under it, are not under arrest, that option remains open and the powers are wide enough to act as a de facto, albeit short term, arrest.

Examining officers are able to stop and conduct a thorough search of an individual, their possessions and any vehicle that they may be driving as well as of all associated passengers, their possessions and their associated vehicles. Officers can also conduct a thorough search of all the areas of the port they have entered and delay flights, trains or other transportation to conduct their search. Most significantly, it allows officers – again without needing reasonable suspicion – to *detain a person for up to 9 hours* for an extensive 'examination' consisting of an even more thorough search of the person, their possessions and to undergo intensive questioning. Schedule 8 extends their powers to obtain the examined individual's DNA and fingerprints and, should the individual request a lawyer for legal advice and representation, officers can delay that right.

<sup>1</sup> Terrorism Act 2000 (Chapter 11)

### Theory vs. Practice

No doubt these laws do play a key role in keeping us safe by ensuring Britain, particularly its airports, remain a hostile environment to any would-be terrorists, and that such people are dealt with swiftly. But it must be used against the right people. The failure of the government to ensure that innocent people merely detained under Schedule 7 for further questioning are treated differently from actual terrorist suspects has meant that policing in practice is quite different from its theory leading to huge concerns over whether the current powers can be justified, are being used proportionally and its disproportionate impact on ethnic minorities and British Muslims. For example, the fact that the police routinely gather the DNA and fingerprints of such innocent people detainees and lump it onto the same database as convicted terrorists lacks proportionality and infringes their right to the presumption of innocence. Controversially, the government proposes no change to this policy and will now retain their DNA and fingerprint profiles for (at least) 6 years,<sup>2</sup> similar to those arrested but not convicted. But this particular power is unnecessary; had there been suspicion or sufficient evidence suggesting that the person is a terrorist, the police, quite rightly, already have the power to arrest them and thereupon obtain their biological information.

According to the Home Office, 10,400 people have

<sup>2</sup> Home Office (2009a)



been examined under this legislation since 2004.<sup>3</sup> Of them 1,110 were subsequently detained with 43 subsequent convictions resulting in a mere 0.4 per cent conviction rate of the total recorded stops or 3.8 per cent of the total recorded detainments. However, due to the current grossly inadequate data gathering process of such incidents, the figures do not accurately reflect the reality on the ground.

Firstly, the actual number of people convicted is lower than 43 since this figure also includes multiple convictions brought against individuals. Also, only examinations taking longer than an hour are collated centrally meaning that the actual total number of stops under Schedule 7 is far higher, thus further reducing the overall conviction rate. This calls to question the overall effectiveness of airport policing and whether the indiscriminate use of such draconian measures as standard procedure are necessary or even justified.

## Current Data Gathered

Only very basic information of those stopped over an hour is recorded including their name; the total duration of their examination and whether the person was detained or not. It is only since July, in response to pressures over ethnic profiling, that the Metropolitan Police Authority (MPA) have started collecting the (officer defined) ethnicity of those examined at selected ports.<sup>4</sup> Though warmly welcomed, this practise is by no means universal and no data is gathered on the person's faith. Therefore, we are unable to understand the true extent of ethnic and religious profiling under Schedule 7 and so unable to hold our police and government to account.

## Accountability

But, assuming that this policy does become universal practice, we still face a barrier in accessing this information since the Association of Chief Police Officers (ACPO), for 'security reasons', still advises police forces to refrain from releasing this information thus hindering progress and police accountability.

<sup>3</sup> Figures represent examinations between 1 January 2004 and 30 September 2009 obtained from a Home Office headed letter dated 23 November 2009 from Lord West of Spitfield, Counter Terrorism Minister, as a written answer to questions tabled by Lord Ahmed of Rotherham. See <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-2992.pdf>

<sup>4</sup> Metropolitan Police Authority (2009)

Since Lord Carlile, the independent reviewer of the terrorism laws, expressed his general satisfaction over the operation of Schedule 7 last year, the authorities have become too complacent and seem to have ignored his warning that it is, however, still being used more often than is necessary for national security.<sup>5</sup>

We must remember that this power is radically different from the other TACT stop powers. Just falling short of an arrest, it affords the police the greatest powers to restrict a person's movement and liberties and so should not be used lightly. Yet the Home Office figures above show that the overwhelming majority of those detained were completely innocent and so, along with the experiences discussed in the next section, creates a powerful case in favour of replacing current practise for a more proportionate system.

The recent scaling back of section 44 to a more proportionate and defined use<sup>6</sup> is a perfect example of what can be achieved through civil rights groups, communities and the police working together. Access to the necessary information enabled the British public to hold their police to account and give them a clear mandate for change. Its success has already been shown in quarterly figures just published showing, a fall of 37 per cent in its overall use in April-July (compared to the same period last year)<sup>7</sup> without compromising national security.

## Impact on the Innocent

This legislation is, without doubt, having a detrimental impact on young people, particularly Muslims,<sup>8</sup> in the UK. These counterproductive methods not only create resentment towards the government and undermines support for the fight against terror but it leaves detainees with longer term psychological problems by often leaving them feeling paranoid, depressed, vulnerable and targeted.

Amongst the concerns expressed by those I have met brave enough to share their experiences, many of them students, are fears of being

<sup>5</sup> Lord Carlile (2009)

<sup>6</sup> Dodd (2009a)

<sup>7</sup> Travis (2009c)

<sup>8</sup> It is important to remember that other groups, particularly some members of the Sikh faith, feel targeted due to them feeling 'mistaken' for a Muslim in such circumstances, thus almost blaming Muslims for their experiences under the Terrorism Act which then has negative consequences for Muslim-Sikh community relations. See Moghul (2008).

'watched', blacklisted, having their homes later raided or their families endangered. Although emphasising that they have nothing to hide, they still deeply worry about another possible encounter with many feeling that it is merely 'a matter of time'. Foreign nationals, typically from countries with ghastly human rights records, feel particularly vulnerable with many now living in constant fear of being deported back home and suffering in the custody of their security services.

By leaving such innocent people too afraid to engage in legitimate and democratic activities, from fear of being placed 'on the radar' and being 'picked up again', it has created barriers to many individuals' aspirations and personal development. Feeling resentful and becoming more suspicious of society, some end up losing faith in 'the system' and withdraw from society making them vulnerable to extremist or terrorist groups seeking to exploit their grievances.

Interestingly, those I have interviewed were actually very understanding and generally sympathetic towards the police but their greatest resentment remains over *how they were treated* rather than *why they were stopped or detained*. One interviewee made it clear to me that, although he had completely missed his flight and felt embarrassed by being escorted around the airport, had he not been treated like "a terrorist by being forced to give up [his] DNA" or made to feel that he needed to prove his "Britishness and loyalty to the Country", he would have readily 'forgiven' the officers. This common theme ran throughout the interviews and provides key lessons for the government over policing in the 21st century.

Past studies, including a recent world-wide poll conducted by Gallup,<sup>9</sup> show that, contrary to some prevalent stereotypes, British Muslims not only welcome but have more faith in democracy and democratic institutions than the average Briton. But they still feel that there are key barriers, beyond their control, such as police activities,

<sup>9</sup> Gallup study found that – apart from the military, perhaps due to current military activities in 'Muslim countries' - British Muslims had more faith in key British democratic institutions than the general public, including the judicial system and courts, national government, the quality and integrity of the media and the honesty of elections. See Gallup (2009).

which prevent them from integrating more easily. The determination of Muslims in Britain to overcome these barriers and play a more active role in society provides the government with a key opportunity to *fully* engage their concerns over ethnic and religious profiling and, together, find solutions to these problems.

## Conclusion and Recommendations

In recognition of the need to police borders and ports effectively, rather than argue against the actual powers of Schedule 7, I have argued for a more proportionate policy including what I feel are some real and pragmatic ways forward to achieving this goal.

The government has thus far clearly failed to ensure that port policing distinguishes the innocent from actual terrorist suspects. Schedule 7 causes major inconveniences upon those examined by often causing them much stress, embarrassment, delays to their journeys and promotes a climate of fear amongst other passengers.

There is no better way for the government to prove it is serious about addressing this then, as I argue, to not only introduce a far more robust data gathering process by recording all stops and detentions under Schedule 7 – along with the race and faith of the individual – but to also release this information into the public domain; ensure the police respect innocent people's right to withhold samples of their DNA and fingerprints and destroy those already taken from innocent individuals under this power; and help them reschedule their journey.

Adopting this policy would go a long way to restoring trust and introducing greater sympathy towards the police and the government's counter terrorism measures whilst ensuring the minimal amount of harm and inconvenience is placed upon innocent people in the unfortunate circumstance of being stopped under Schedule 7.

# SECTION IV: THE NATIONAL DNA DATABASE

## The National DNA Database

Helen Wallace

GeneWatch UK

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ARCH

Since 2004, the police have taken DNA and fingerprints routinely from anyone arrested for any recordable offence – this includes nearly all offences except dropping litter and parking fines. Officially, all this information is now kept until age 100, even if the individual is not charged or convicted.

As a result, the Government has built a vast DNA database of about 5 million people's records: a new DNA profile is added roughly every minute. Nearly a million innocent people who have been arrested in England, Wales or Northern Ireland are thought to have their DNA, fingerprints and computer records retained. Many more people with records on these databases have been cautioned or convicted for minor offences. About a million people on the database were arrested as children – aged ten to 18. Many of these children are innocent or have been given reprimands or final warnings, rather than being convicted by a court.

The Crime and Disorder Act 1998 removed the presumption that a child aged 10-14 was 'doli incapax', which had required the prosecution to prove that the child knew the act to be seriously wrong, rather than merely naughty. Any child in England and Wales aged 10 or over can now be arrested on suspicion of a criminal offence. If the offence is 'recordable' (most offences are) a sample of their DNA can be taken, by force if necessary, and the profile derived from it retained on the National DNA Database (NDNAD).

Government figures show that the arrests of 10-17-year-olds are rising disproportionately: between 2002 and 2006 they rose by 16.4 per cent to 348,500, while adult arrests rose by 6.6 per cent during the same period. As the number of arrests has risen, so, too, have arrests that do not lead to any disposal. In 2003/04, 25,317 arrests of children

and young people received no further action. By 2005/06 this had risen by 84 per cent to 46,640.

One of the most shocking aspects of the DNA database is its racial bias. About 4 out of every 10 black men have a record on the database, compared to about 1 in 10 white men. For young black men, the bias is even worse: about 3 out of 4 young black men, aged between 15 and 34, have records on the DNA database. Vulnerable people, including people with mental illness, also often end up with records on the database as a result of being arrested by the police.

## The European Court of Human Rights

In December 2008, in the case of *S. and Marper v. the UK*, the Grand Chamber of European Court of Human Rights reached a unanimous judgment that the blanket retention of innocent people's DNA and fingerprints by the UK Government contravenes Article 8 of the European Convention on Human Rights (the right to privacy).

At the time of writing, the Government has yet to implement a response to the judgment. Its initial proposals to retain DNA records from innocent people for 6 or 12 years, depending on the offence for which they were arrested, were widely criticised. They have been replaced with an alternative 6 year retention time for innocent adults (3 years for under-16s), in the Crime and Security Bill 2009/10. However, both opposition parties regard these proposals as unacceptable. The Government has also made a welcome proposal to destroy the original DNA samples (biological samples), which are currently stored by the commercial laboratories which analyse them, and which contain unlimited genetic information which is not needed for identification purposes.

## ***Nothing to hide, nothing to fear?***

If you are arrested, part of your DNA is analysed by a laboratory to produce a string of numbers known as a DNA profile. This profile is stored on the National DNA database and can be used to trace you or your relatives. A sample of your DNA, containing your personal genetic information, including some private information about your health, will also be stored by one of the commercial laboratories that do work for the police. Your record on the National DNA Database is linked to your record of arrest on the Police National Computer, which is now also stored until age 100. This Police National Computer record can be used to refuse someone a visa or a job as a result of an enhanced criminal record check. Every night each individual's DNA profile is compared with all the crime scene DNA profiles stored on the computer database, in a process known as 'speculative searching'.

Because DNA profiles can be used to track individuals and their relatives, retention of these records is a form of 'biosurveillance' of the people on the database, who are treated as a 'risky' population who might commit a future crime. Concerns about the retention of records include:

- the potential threat to 'genetic privacy' and to family life if information is revealed about health, or previously secret details of family relationships are revealed;
- the creation of a permanent 'list of suspects', linked to fingerprints and DNA, that could be misused by governments or anyone who can infiltrate the system;

- the exacerbation of discrimination in the criminal justice system and potential loss of trust in policing;
- the use of the computer database and DNA samples for genetic research without consent – including controversial attempts to predict ethnic appearance using DNA;
- the potential for errors and miscarriages of justice - DNA evidence is not foolproof: false matches can occur with crime scene DNA profiles and DNA evidence can be planted.

In addition, concerns have been raised about the impacts on the wellbeing of children and the mentally ill of taking samples unnecessarily. DNA evidence is relevant to less than 1 per cent of recorded crimes, so most people's DNA is not used to investigate the offence for which they have been arrested.

## ***Helping to solve crime?***

Making the DNA database so large has not helped to solve more crimes – the database has more than doubled in size over the last 7 years but the number of crimes detected using DNA has not increased. In Scotland, most innocent people have their DNA and fingerprint records deleted as soon as they are acquitted or have charges dropped and only a small number of people accused of serious violent or sexual offences can have their records kept temporarily. Scotland's DNA database is at least as effective at solving crimes as the DNA database in England.

# The National DNA Database has Criminalised Every Black Family in Britain

Matilda MacAttram

Black Mental Health UK

The National DNA Database (NDNAD) currently poses one of the most serious threats to race relations in Britain.<sup>1</sup> It has effectively criminalised Britain's black communities on an unprecedented scale, creating a climate of distrust in both law enforcement and crime prevention agencies among minority ethnic communities.

The NDNAD was established in 1995 and introduced by the Home Office as a tool for the police to store the DNA of convicted criminals, through the Home Office DNA Expansion programme in 1999.<sup>2</sup>

Changes to the law in 2001 allowed DNA to be retained after acquittal or if charges are dropped. In 2003 changes were again introduced giving the police powers to take DNA on arrest rather than when a person is charged. Further amendments to the law gave the police powers to take a DNA sample from anyone without being charged or even cautioned. A decade of legislative changes has enabled the Home Office to amass over 5.1 million DNA profiles, making the UK's DNA database the largest database per capita in the world.<sup>3</sup> At least a million innocent people who have been arrested in England, Wales or Northern Ireland are thought to have their DNA, fingerprints and computer records retained on this system.<sup>4</sup>

The numbers of innocent people from Britain's black communities profiled on this database far outstrips that of any other group living in the UK, while information on the process for taking and storing DNA or the consequences of being profiled on the database available to this group is negligible.<sup>5</sup>

Reliable statistics on disproportionality in the NDNAD are in short supply, which is a cause for concern in its own right.

Evidence given by the Attorney General to parliament's the Select Committee show that 27

1 Myers (2009)

2 BMH UK (2009b)

3 Beatson (2009)

4 Liberal Democrats (2009b)

5 BMH UK (2009c)

per cent of the entire black population are currently on the database compared with 9 per cent of all Asians and 6 per cent of the white population. 57 per cent of innocent samples taken in London alone are from people from African Caribbean communities.<sup>6</sup> Disturbingly 42 per cent of the entire black male population living in the UK, and 77 per cent of all young black men, are profiled on the database<sup>7</sup> even though the Home Office's own research shows that people from this group are less likely to commit a crime than their white counterparts.<sup>8</sup>

DNA profiles can be used to track an individual or their relatives, and the samples contain unlimited genetic information, including some sensitive personal information about a person's health.<sup>9</sup> With at least one member of every family from this community currently profiled on this system, there is no doubt that the DNA database has effectively criminalised Black Britain as the purpose of retaining an individual's DNA profile in a database is to treat them as a suspect for any future crime.<sup>10</sup> Children from this group have also felt the brunt of current policing practices when combined with this technology. Close to one out of four black children (23 per cent) compared to one out of ten white children (10 per cent) are profiled on this system.

The absence of any information from law enforcement agencies on how and why DNA is taken, where it is stored, the implications of being profiled on the Database or how to apply to have one's DNA removed<sup>11</sup> is in stark contrast to the zeal with which police officers have harvested this community's DNA over the past decade.

The Government consultation<sup>12</sup> on the law governing the retention of innocent DNA on the National DNA Database, presented the Home Office with the opportunity to inform all stakeholders about the database and address

6 They Work for You (2008)

7 Ibid.

8 Sharp and Budd (2005)

9 GeneWatch UK (2005)

10 OBV (2009)

11 BMH UK (2009c)

12 Home Office (2009a)



concerns about how it is currently managed. The decision to omit publicising this consultation or the issue of the NDNAD among minority groups resulted in an absence of BME voluntary sector organisations and key agencies within from African and Caribbean engaging with this process. This has reinforced the perception that the DNA database is an attempt to criminalise this group by stealth.<sup>13</sup>

A freedom of information request has revealed that Home Office ministers have approved 25 applications from private commercial companies to access the DNA database for illicit research over the past 10 years. This has included sinister explorations into ethnic profiling which confirm that the Government has not been open or honest about their true intentions for the DNA database.<sup>14</sup> Such action violated both data protection and privacy laws which makes it clear that neither the Home Office or the police are the right custodians of the database. Community leaders are also concerned that any state agency

now has a database which contains all of black Britain's genetic heritage.<sup>15</sup> Recommendations in the Human Genetics Commission report includes taking the DNA database out of the control of the police and Home Office altogether because of public mistrust.<sup>16</sup>

At an event to mark the 25th anniversary of the discovery of DNA fingerprinting, Sir Alec Jeffreys voiced his concern about and opposition to the policy of keeping DNA samples of innocent people on the NDNAD. His comment sums up the feeling of the community well. He said: "my genome is my property. It is not the state's. I will allow the state access to that genome under very strict circumstances. It is an issue of my personal genetic privacy. I have met some [innocent] people who are on the database and are really distressed by the fact. They feel branded as criminals and I would feel branded as a criminal".<sup>17</sup>

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<sup>13</sup> BMH UK (2009c)

<sup>14</sup> Liberal Democrats (2009a)

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<sup>15</sup> MacAttram (2009)

<sup>16</sup> Human Genetics Commission (2008)

<sup>17</sup> The Poor Mouth Blogspot (2009)

# A Question of National Identity

Matthew Ryder

Matrix Law

Seven and a half years after new legislation permitted the police to retain the DNA of all arrested citizens,<sup>1</sup> the European Court of Human Rights declared the policy unlawful.<sup>2</sup> In those few years, the UK amassed the world's largest database of samples,<sup>3</sup> containing the DNA of 7.39 per cent<sup>4</sup> of its citizens. As the British government now has to rethink its policy, it is clear that the European Court's decision is more than a legal debate. The case has raised three important public policy concerns about how British society sees itself.

First, the case reaffirmed the importance of the European Court of Human Rights in developing British law. The Court strongly criticised the British government's position, notwithstanding that it had been endorsed by the High Court,<sup>5</sup> the Court of Appeal<sup>6</sup> and the House of Lords.<sup>7</sup> There was, it seemed, a fundamental mismatch between a British view towards DNA retention and a European one. Yet the Court's decision was greeted with widespread approval by the British media.<sup>8</sup> In this important case, the notion that the European Court of Rights is an unwelcome outsider to our legal system, out of tune with British thinking, did not ring true. The reverse appeared to be the case. It was the Strasbourg Court, not Westminster, that

seemed to speak for the views of the British public. It is worth remembering this next time there is a populist attack on the European Court of Human Rights, or the Human Rights Act. In cases such as this, the European Court may be the best champion there is of the British public's interests.

Second, the European Court's decision added light and depth to the national debate on the DNA database that had become narrow and simplistic. In those very rare cases where a DNA match provides the only link between an otherwise unidentified suspect and a crime scene, DNA samples are invaluable. The British government and courts had been mesmerised by just such a case,<sup>9</sup> which was referred to frequently in argument. Strasbourg, in contrast, looked beyond the forensic benefit of retaining a sample from an arrested person in an exceptional case. With the benefit of seeing the exponential growth of the British database after the 2001 policy change, and comparing the UK to other jurisdictions, the European Court considered a broader question: what are the implications of such personal information, from so many citizens, being handed to a government? Confronting that question, head on, produced a very different analysis.

The British government, in trying to respond to the European Court's judgment, must now also grapple with the wider issues: Do we still want Britain to be the world leader in the gathering and retention of its citizens' DNA? What does this say about the relationship between British citizens and the state? If other nations do not need to collect DNA from so many of their citizens, why does Britain need to

1 Criminal Justice and Police Act 2001, section 82, amending section 64 of the Police and Criminal Evidence Act 1984

2 *Marper v UK* (2009) 48 EHRR 50

3 House of Lords (2009: §180). Austria has the second largest database containing 1 per cent of its population's DNA. The US database contains 0.5 per cent.

4 *Ibid.*, Q1049 to Vernon Coaker MP, Minister for Policing, Crime and security, p. 370

5 [2002] EWHC 478

6 [2002] 1 WLR 3223

7 [2004] 1 WLR 2196. It is also notable that the case divided even those jurists with reputations for a more progressive approach to human rights: Lord Justice Sedley (in the Court of Appeal) and Lord Steyn (in the House of Lords) found that there was no breach of Article 8 by the retention of DNA from innocent persons. Rabinder Singh QC, an advocate with a formidable reputation as one of Britain's leading human rights lawyers, argued the case *for* the government.

8 See, for example, Philip Johnston, Assistant Editor of the *Daily Telegraph*: "... if the country wants the DNA profiles of all citizens to be held in perpetuity, then legislation should be brought before parliament and a proper national debate held about it... [the government] cannot treat the whole population as potential crime suspects" (Johnston, 2007). *The Daily Mail* headline of 5 December 2008 read: "One million innocent people could have their profiles wiped from Britain's 'Orwellian' DNA database after court ruling" (Drury, 2008).

9 The case that led to the change in law, in 2001, and the retention of DNA from all arrested persons was a House of Lords decision: *Attorney General's Reference (No. 3 of 1999)* [2001] 2 AC 91. A 66 year-old woman was subject to an horrific rape by a burglar in her home. The rapist's DNA matched a sample on the database taken from a man arrested for a minor burglary. The man had been acquitted of the minor burglary and under the old rules his DNA should not have remained on the database. But because of administrative error it was still available for a match to be made. The lower court held the DNA match to be inadmissible, because the sample should have been destroyed. But the House of Lords reversed that decision and hinted at approval for the notion of keeping the DNA of acquitted persons. This famous example is not without some flaws. For example, the minor burglary occurred *after* the rape. Even under the old system, a match could have been made *before* the man's acquittal.

do so? If British culture would not be comfortable with a policy of DNA sampling from all citizens, what is the logical basis for retaining the DNA of all people who happen to have been arrested? Does this undermine the presumption of innocence? Is there a better criterion to trigger DNA retention than arrest? Conversely, is the British public comfortable with the possibility that taking fewer citizens' DNA may mean that some crimes that could be solved, will not be? If DNA is retained for the purposes of the prevention and detection of crime, do we trust our government to safeguard that information properly? Is the fear of error or misuse of DNA data by the government rational and legitimate?

These are not easy questions to answer. An effective DNA database may help solve crime. But it is now much clearer that this important but occasional benefit comes at a significant social and cultural price. The public consultation carried out by the Home Office in the wake of the European Court's decision, would have been welcome much earlier.

Third, and perhaps most importantly, the Strasbourg Court looked not only at the individual and collective implications of Britain's DNA retention policy, but also at the indirect consequences. The policy enacted in 2001 had permitted the taking and retention of DNA from any arrested person. As a result, those disproportionately represented in arrest figures were similarly overrepresented on the DNA database. And those more likely to be arrested due to improper factors – such as race discrimination – had that mistreatment now compounded by the retention of their DNA. Black men, who are

significantly more likely to be stopped and searched by police in the UK than white men, were particularly affected. By 2007, the government estimated that 75 per cent of all African-Caribbean men between the ages of 18 and 35 would soon be held on the database.<sup>10</sup>

This quantitative difference caused by a racially disproportionate arrest practice, created a qualitative difference in the relationship between black people and the database. Unlike the British courts, the European Court of Human Rights acknowledged this as a legitimate cause for concern.<sup>11</sup>

Deciding when to retain the DNA of a citizen is more than a decision for lawyers and police officers. It is a matter of complex public policy. On the margins the issues seem easy: few would advocate the routine retention of DNA from every citizen; and fewer still would object to the retention of DNA profiles from those convicted of very serious crimes. But in between those two positions it is more complex. By being seduced by the power of DNA matching in an isolated case, Britain found itself as the world leader in the retention of citizens' DNA. The European Court of Human Rights has given us a chance to think again. Our response will say much about the type of society Britain wants to be.

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<sup>10</sup> Home Affairs Committee (2007: §33); see also Home Affairs Committee (2009) §6, §7, §18 and minutes of oral evidence taken from Trevor Phillips, the Chair of the Equality and Human Rights Commission, on 28 April 2009, Q42 and 43.

<sup>11</sup> *Marper v UK* (2009: §124)

# SECTION V: PROFILING AND IMMIGRATION

## Racial Profiling and Immigration

Nazia Latif

Northern Ireland Human Rights Commission

The subject of this paper<sup>1</sup> is: what human rights, if any, are engaged in the practice of ethnic profiling; the extent to which ethnic profiling is used by immigration officers in enforcement work at ports and places of work and residence; and finally the reasons that ethnic profiling is problematic not only from the viewpoint of human rights obligations but also from the perspective of effectiveness and efficiency.

The Northern Ireland Human Rights Commission uses domestic and international human rights standards as benchmarks against which to evaluate the desirability of government legislation and policy. One might be excused for believing that immigration enforcement is exempt from many of the protections and norms around ethnic profiling specifically and racial discrimination more broadly. For example, the Race Relations Act and its Northern Ireland equivalent the Race Relations (Amendment) Regulations (Northern Ireland) Order 2003, permits immigration officers to discriminate on the grounds of nationality and ethnic origin if a Ministerial Authorisation has been given. Certain provisions of the Human Rights Act 1998 such as Article 6 (the right to a fair trial) of the European Convention on Human Rights (ECHR) have been ruled not to apply in the field of immigration and the right to be free from arbitrary detention under Article 5 ECHR is qualified by Article 5 (1) (f): “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”. However, while human rights standards are broadly sympathetic to the perceived needs of states to control irregular migration they do demand that people, once within the territory of a state, are offered certain minimum protection and treatment.

<sup>1</sup> The primary research referred to in this paper formed a NI Human Rights Commission investigation: *Our Hidden Borders: The UK Border Agency's Powers of Detention* can be found at [www.nihrc.org](http://www.nihrc.org)

## Human Rights and Ethnic Profiling

The practice of ethnic profiling is not in keeping with international human rights standards. Article 2 (1)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination states: “Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with his obligation”.

More recently the United Nations Human Rights Committee has ruled in *Lecraft v Spain*,<sup>2</sup> a case involving a black American who had acquired Spanish citizenship in 1969. Rosalind Williams Lecraft was stopped for an identity check by the police on the basis that her racial features implied she was not Spanish. The police officer claimed his actions were necessary in order to control illegal immigration. The Human Rights Committee ruled that there had been a violation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR) taken with Article 2 (1) of ICCPR. The Committee commented:

*... it is legitimate to make general identity checks to protect the safety of citizens and prevent crime or with a view to controlling illegal immigration. However, when the authorities perform such controls, the mere physical or ethnic features of the persons subject to them should not be taken as indicative of their possible illegal status in the country. Neither should such checks be made such that only persons with given physical or ethnic features are selected. Doing otherwise would not only adversely affect the dignity of the persons affected, but would also contribute to spreading xenophobic attitudes among the population at*

<sup>2</sup> *Lecraft v Spain*, August 2009, Reference: G/SO 215/51 ESP (99)

*large and would be inconsistent with an effective racial discrimination prevention policy.*

Moreover, the UK's differential treatment on grounds of racial origin has amounted to a breach of Article 3 ECHR (the right to be free from torture and inhuman or degrading treatment or punishment) in the past. Following the UK's refusal to allow British nationals to re-enter the UK having been expelled from their country of origin in East Africa, the European Commission observed:

*Special importance should be attached to discrimination based on race: publicly to single out a group of persons for differential treatment based on race might, in certain circumstances, constitute a special affront to human dignity, and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.<sup>3</sup>*

## It's Like Being Paid to Clean a Park

The dynamics of immigration enforcement in Northern Ireland are unique to the rest of the UK for a number of reasons. It is of course unique because of its physical separation from the rest of the UK and because it is the only part of the UK to share a land border with another state, the Republic of Ireland. This part of the paper draws on the findings from an investigation carried out by the Northern Ireland Human Rights Commission into the detention powers of the UK Border Agency (UKBA). That investigation involved interviews with people detained as a result of 'Operation Gull'<sup>4</sup> and enforcement visits to residences and places of work; interviews with immigration officers; and observation of their work at Belfast City airport and observation of internal briefings prior to and after enforcement visits. The investigation found that ethnicity was a determining factor in an immigration officer's decision to engage in further investigation with an individual. In one case an enforcement visit was carried out to a local take-away on the basis that people of Middle Eastern origin were seen to be working there but no work permits were

registered to that address. A presumption therefore appears to have been made that ethnic minorities are likely to be immigration offenders.

As part of the Commission's investigation, investigators shadowed immigration officers conducting 'Operation Gull' at Belfast City Airport. At the end of the first day of shadowing no-one had been detained by immigration officers. One immigration officer complained that the day had not been much fun and when asked further to explain what he meant by 'fun' he replied that immigration enforcement was like being paid to clean a park and if by the end of the day the park was not clean "questions would be asked". Such views were not uncharacteristic of those expressed by immigration officers – that certain profiles of people were not only undesirable but determined to deceive them and the immigration laws of the UK. Many expressed those profiles in terms of nationalities but the question must be asked how easily those conceptions held by immigration officers can be disentangled from ethnicity, particularly in the few seconds of initial contact between an immigration officer and disembarking passenger or on a reconnaissance visit.

While the UK Border Agency refutes any suggestion that it profiles on the basis of ethnicity, the Commission's primary research cannot support that claim unequivocally. Comments from immigration officers certainly indicated that certain presumptions were made about nationality. One immigration officer confirmed that every Nigerian passport was checked for forgery. Another stated that he knew he would be routinely lied to and although there was nothing he could do about it "...I can let them know that I'm not a mug".

## Effectiveness and Accountability

Along with the human rights violations involved in the practice of ethnic profiling it is important to point out that it is in fact an ineffective way of law enforcement – whether that be criminal law or immigration law. The case cited above of the take away employing people looking of Middle Eastern origin in fact led to no arrests. All working on the premises had the necessary authorization to do so, yet a team of immigration officers and seconded police officers, having sought a warrant from a Lay Magistrate invested time and resources into this operation on such precarious grounds. Immigration enforcement activity at ports has also been

<sup>3</sup> Cited in Blake and Hussain (2003:75)

<sup>4</sup> Operation Gull is carried out by the UK Border Agency's immigration officers at Northern Ireland ports. It involves immigration officers being stationed at ports and asking incoming passengers for identification. It is different from immigration enforcement conducted at other UK ports because it is domestic flights that are targeted, and as a result, not all passengers will be carrying passports and/or visa documentation.



shown to become a self-fulfilling prophecy when presumptions are made about certain ethnic or national groups. If only people of a certain ethnicity or nationality are targeted then they will inevitably become disproportionately represented in the statistics on immigration offenders.

Human rights standards and efficiency demand a proportionate and balanced approach to addressing irregular migration. Profiling on the basis of ethnicity is neither proportionate nor efficient. Currently, the UK Border Agency carries out its work without clear guidance on first, what constitutes

ethnic profiling and second how to conduct their business without using it. Instead, we hear blanket denials from senior policy makers and officials of its use. When taken with legislation that in effect permits it and a lack of meaningful accountability in Northern Ireland when it is alleged,<sup>5</sup> that denial raises serious cause for concern.

<sup>5</sup> There is no arrangement as yet for an independent mechanism to deal with individual complaints against immigration officers. While the Police Ombudsman of Northern Ireland is likely to take on this role, the necessary legislation has yet to be introduced to Parliament.

## Profiling and Immigration

### Mary Coussey

Former Independent Race Monitor for Immigration

### Basis

The basis of ethnic profiling in immigration was the Race Relations Act amended in 2000.

On the whole the 2000 Amendment Act was a good initiative by the government of the day as it extended the legislation to public functions not previously covered by the 76 Act, and introduced the general and specific duties to public organisations to promote equal opportunities and – for certain authorities with specific duties – analyse for any adverse impact of practices.

In my experience in some organisations, the specific duties on public bodies have made a significant difference to the approach to equality.

But the whole basis of immigration control is nationality and there were therefore exemptions for immigration functions. These were in respect of discrimination on grounds of nationality and ethnic origin.

The immigration service – then Immigration and Nationality Directorate (IND), now UK Border Agency (UKBA) – was able to discriminate on these grounds in specific ways, if authorised by a minister. And the Act created the Independent Race Monitor to monitor the effect and the operation of the Authorisations. (These functions have now been absorbed into the Inspectorate).

There was also a specific exemption to the public duty in that there was no duty to promote equality of opportunity in exercising immigration functions.

In considering the issues in ethnic profiling, it is important to focus on how these Authorisations were applied in practice, and how they were interpreted.

### The Authorisations

As far as I am aware the Authorisations were the only exemptions to the Act which allowed defined discrimination on grounds of ethnicity, although there have been others for nationality. And of course there have always been wide exceptions for acts done to safeguard national security.

The Authorisations covered a long list of 12 activities, but the most far-reaching were the ones covering the examination of passengers. These allowed immigration officers to prioritise arriving passengers for examination, and to subject them to more rigorous examination than other nationals not named in the Authorisation. The other Authorisations were mostly quite specific and usually were triggered by a short-term problem or trend. For example, there were several schemes to allow language analysis of people from areas adjacent to countries with significant numbers of asylum applicants. The Authorisations had to be

issued by a minister and be backed by statistical evidence to justify them. So for example, the Authorisation on prioritising arriving passengers relied on statistical data on the proportion of breaches of immigration law and adverse decisions against the nationals concerned in the previous three months. Increasingly the basis for determining categories of passengers for further questioning has also been risk profiling. This is an analysis of the characteristics of people who have been in breach of immigration rules, covering additional items as travel routes. The nationalities listed in the Authorisations were not published.

There is also provision for a minister to issue an Authorisation against certain ethnic groups. The argument was that these groups were people caught up in ethnic conflicts and the exemption was needed to ensure that people from the same geographical areas did not misrepresent themselves and make claims for asylum. At the time of my appointment as Race Monitor in 2002, these ethnic groups were Afghans, Albanians, Chinese, Kurds, Roma, Somalis, and Tamils. Pontic Greeks were also included but cancelled in September 2002. The use of ethnic origin was controversial from the start and the subject of challenge from the then Commission for Racial Equality, NGOs and later there were two judicial reviews.

It was clear that there was potential overlap between ethnicity, nationality, and in some instances, ethnic origin and colour or race.

## Applying the Exemptions

### *Ethnic origin*

At my appointment I was aware of the controversy governing the use of ethnic origin and during my initial induction I asked several immigration officials how they would distinguish between ethnicity and nationality in the exempted groups. It was clear to me from the answers given that this was difficult unless factors such as colour and physical appearance were used, but these grounds remained unlawful and were subjective and open to abuse. In fact most officials in practice used nationality as the trigger for deciding on further examination.

By the time I started monitoring decisions, the exemptions for ethnic groups had been dropped. In the light of reviewing how the exemptions were applied when responding to judicial reviews,

officials realised that it was difficult to define how these exemptions could be applied without going beyond the permitted discrimination.

Ironically, in one significant case (*Regina v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre and others, 2004. UKHL 55*) there was a pattern of higher refusals of Roma passengers but the Authorisation on ethnic origin was not being relied upon, and thus the officials could not justify the pattern.

### *Nationality*

There was a similar procedure for examining passengers subject to controls, that is all non-EEA nationalities. Passengers gave the Landing Card to the Immigration Officer who normally checked any missing information such as address in the UK, asked the passenger from where they have flown, why they are coming to the UK, and how long they will stay. The latter is verified from the return ticket or e-ticket. The passport was checked against the warnings index (ie record of names with previous immigration history). (In the last three or four years, all EU passports have also been scanned on the warnings index). The vast majority of passengers were not asked any further questions. If there were queries or doubts raised from the reply to these initial questions, further questions were asked, and this applied to visa holders too. These include questions about the reason for the visit, travel plans in the UK, hotel or other bookings, their employment at home, how the trip was being financed, any contacts in the UK ('sponsors'), any previous UK visits. If there were still doubts about the reason for the visit, a notice was issued to inform the person that they would be held for further questioning. At this point more detailed enquiries would be made, for example of any sponsor, or into immigration history if there was an entry on the warnings index. If the person was visiting for a longer period, as a student for instance, they were asked detailed questions about their financial circumstances, payment of fees and arrangements for accommodation. People making family visits would be examined on their nature of their employment in their home country, and other connections at home. Although many business visitors entered without delay, occasionally if there are queries they would be asked more details about the business, and about associates in the UK, and clients may be contacted for confirmation.

Thus in the great majority of cases nationality alone is the basis for entry.

Immigration officers paid most attention to passengers from the nationalities listed on the Authorisations, because these were more likely to be recently involved in abuse of immigration regulations. Staff at each terminal were also aware from their own experience and that of their colleagues of local patterns such as document forgeries by particular nationalities, or particular flights which have generated 'case work'.

Officials argued that immigration officers were trained to take decisions on the facts of individual circumstances and there were sufficient checks, as a Chief Immigration Officer had to be consulted before anyone was refused entry. There was also overall monitoring, to ensure that standards were applied consistently. Others acknowledged that some staff became 'jaded' and could develop a 'mind set', and assumptions could be made. It was considered that the use of the Authorisations had introduced greater transparency and in general there was more need to justify decisions externally. There was a move to greater openness and for more detailed refusal notices. Increased use of intelligence and risk profiling also meant better targeting of people suspected of breaches.

## Conclusions

### *Advantages*

In my experience, the use of the Authorisations and risk profiling resulted in increased transparency and objectivity of decision making. As the overall statistical results are reported to ministers, this offered the scope for improved accountability.

### *Disadvantages*

The disadvantages are that by labelling people from certain nationalities as 'greater risk' the process could become self-fulfilling. If certain nationalities are more closely examined, their circumstances are more likely to be doubted, and this may result in higher standards being applied. It could lead to unlawful stereotyping, and assumptions were made based on nationality and other characteristics.

Similar problems apply to decisions in asylum casework. Caseworkers would apply their own assumptions about what would be 'reasonable' to decide whether an applicant's story was credible. These decisions were affected by stereotyped views of certain nationals who were predominant in making asylum claims, and by a belief that similar stories were passed around.

## *Other race profiling*

How does immigration profiling differ from other kinds? This depends on several factors:

### 1. The purpose.

Ethnic origin data for equality monitoring is used to comparatively measure progression and flows, in order to identify disparate impact and to enhance equality of opportunity. Its basis is a positive one.

In contrast, profiling for immigration control is negative, to stop abuse of the system, and by definition to refuse entry to people. It leads to stereotyping and the application of assumptions. Similar processes occur in HMRC stop and search.

### 2. The form and basis.

Immigration profiling identifies categories of individuals, who are then further checked as individuals. The initial profiling is objective, based on nationality and other risk factors, although it leads to stereotyping because of the link with this negative data on abuse. The use of ethnic origin in 2002 and before was subjective and thus difficult to justify, and had to be abandoned, although the possibility of it being reintroduced remains.

Equality monitoring is a statistical measure and rarely is it necessary to identify individuals. Categorisation is assigned to the individual and is normally done openly. Immigration profiling was done without the knowledge of individuals.

## *Positive change*

There is a range of interventions which could improve the use of nationality and risk profiling data. Better monitoring of the pattern of decisions by categories and nationalities at different ports and airports would show disparities between ports of entry and could be the basis of analysis into whether different/higher standards are being applied. Data from monitoring decisions can also be a tool to support training of new officials, and in developing existing officials, to improve skills in assessing credibility. Managers should use such monitoring data within ports and airports to expose different patterns and stimulate improved quality assurance. Guidance tools to define assessment criteria using examples from recent scenarios would help to improve consistency in decision making.

# SECTION VI: SUMMARY JUSTICE

## Ethnic Profiling and Summary Justice – An Ominous Silence?

Richard Young

University of Bristol

### Introduction

This chapter focuses on ethnic profiling practices relating to the summary imposition of criminal penalties. In this context, the relationship between summary punishment and investigatory police powers such as stop-search, arrest, and the taking of DNA samples is intimate, dynamic and complex. This is well illustrated by the experiences of Ken Hinds, who in October 2009 secured an apology and £22,000 compensation (but no admission of liability) in settlement of his High Court claim for false imprisonment and malicious prosecution, following a wrongful arrest by British Transport Police (BTP) in 2004. The quotes in the British press are instructive:

*In the past 20 years, I have been stopped and searched more than 100 times... I don't want to appear as if I've got a chip on my shoulder but I'm afraid there is only one explanation for this enduring and horrendous harassment: I am a black man... [In 2004] I saw the police searching this young black guy who was clearly distressed. I stood to one side and decided to observe in case he might need a witness and next thing an officer came up to me and said: 'You know him? No? Then f\*\*\* off! It's nothing to do with you.' I calmly told him that I knew my rights and that I was going to stand there and not interfere and observe but he called his pal over and they arrested me [for threatening and abusive behaviour]... More recently in August I was arrested and humiliatingly frog-marched across the King's Cross concourse [by BTP] because my £35 train ticket only entitled me to travel on a train 24 minutes later and they refused to accept I'd made an honest mistake. We'll be going to the High Court to get the caution they gave me quashed and I'll be seeking an apology from them... What upset me is that the next day, I had to catch the train again and I saw a white person catch the wrong train and instead of arresting her, they bent over backwards to help. (Ken Hinds, quoted in the Evening Standard, 16 October 2009).<sup>1</sup>*

*A BTP spokesman said Mr Hinds was cautioned for refusing to give details to station staff and that "there was never any suggestion" that the incident was racially motivated. (Daily Mail account of the same story, 16 October 2009).<sup>2</sup>*

We can see here in microcosm some of the elements that make ethnic profiling such a complex and dynamic issue. Repeated experience of being stop-searched and arrested on flimsy grounds, especially when accompanied by disrespectful treatment or unnecessary use of force, can make ethnic minority people more sceptical about police behaviour, more likely to fear abuse and act accordingly (as by taking evasive action, or seeking to monitor police actions against others), more likely to attract police attention as a result, and, ultimately, more likely to be arrested and subjected to summary justice or prosecution. Comparisons with how ethnic majority people are treated in similar situations fuel the resulting sense of injustice. By contrast, the police can usually shrug off accusations of ethnic profiling by treating each encounter as an isolated 'incident' in which ethnicity played no part. And it is, in truth, not easy to prove what contribution ethnic profiling makes to any particular incident or set of incidents. But, as this chapter seeks to make clear, the overall patterns of differential policing and punishment raise serious questions for the police, for legislators and for Government.

### Some Definitions

Definitions of 'ethnic profiling'<sup>3</sup> and 'summary justice'<sup>4</sup> are open to debate, but constraints of space make it necessary here simply to stipulate how those terms are used within this chapter. The definitions have been chosen so as to ensure that the discussion remains concise and does not replicate those to be found in other contributions to this collection.

<sup>2</sup> Daily Mail (2009a)

<sup>3</sup> De Schutter and Ringelheim (2008: 360-363)

<sup>4</sup> See Young (2008: 149-152)

<sup>1</sup> Cohen (2009)



Table 1: Percentage of ethnic groups at arrest and cautioning stages of the criminal process (recorded crime only) compared to the ethnic breakdown of the general population, England and Wales 2007/08.

	Ethnicity						Total
	White	Mixed	Black	Asian	Chinese or other	Unknown	
General population @ 2001 census	91.3	1.3	2.2	4.4	0.9	0.0	100
Arrests	79.3	2.8	7.4	5.1	1.4	4.0	100
Cautions*	82.5	*	6.5	4.6	1.4	5.0	100

\* The data in this row is based on ethnic appearance, and so does not include the category 'Mixed ethnicity' (the data in the rest of the Table is based on self-identified ethnicity).

'Ethnic profiling' is used here to mean the use of (presumed or actual) ethnic or racial characteristics in determining (solely or in part) whether a person has committed, or is about to commit, a criminal offence, and/or in determining how to respond to such a situation.

Thus one could easily associate 'ethnic profiling' with direct racial discrimination (targeting based on racial prejudice), but not so easily with indirect racial discrimination (targeting based on non-ethnic criteria such as age which has a disproportionate effect on people from a particular ethnic background).<sup>5</sup> It follows that the fact that a disproportionate number of a particular ethnic group receives a particular criminal justice intervention or outcome does not in itself indicate that ethnic profiling is at work. But evidence of disproportionality can play a productive role in stimulating debate about the reasons for any disparities. Such debates may in turn lead to in-depth research into the dynamics of decision-making at policy, managerial and front-line levels and the identification of possible solutions to any unacceptable practices uncovered.

'Summary justice' will be used here to mean the imposition of criminal penalties without recourse to the courts. I will take 'penalties' to encompass any formal criminal justice measure that adversely affects the current or future legal situation of the person on the receiving end (whether or not this amounts to a 'criminal record'). I thus include:

- cannabis warnings;
- police cautions (including reprimands and final warnings);
- CPS conditional cautions;

- police imposed penalty notices for disorder (PNDs).

## The Statistical and Research Evidence: A Cautionary Note

The main Government publication relating to ethnic monitoring provides detailed statistics on only one of the forms of summary justice noted above – cautions. Table 1 draws from this data<sup>6</sup> and shows the percentage of ethnic groups at the arrest and cautioning stages of the criminal process compared to the ethnic breakdown of the resident population.

Table 1 shows that non-white people are disproportionately represented in both the arrested and cautioned population, although the latter phenomenon seems largely to be a reflection of the former. The cautioning rate (expressed as a percentage of arrests in 2007/08 for recorded crime) was 23.7 per cent for whites, 16.2 per cent for blacks, and 20.2 per cent for Asians.<sup>7</sup> At first sight, then, it seems that white people 'benefit' from cautioning rather more than non-white people do.

What these figures do not tell us, however, is what happened to those who were not cautioned. We need to know what proportions of different ethnic groups were prosecuted, given some other summary sanction (such as a PND), or simply released without any formal action. In other words, does the relatively low cautioning rate for arrested black people indicate that they are drawn more

5 Sanders, Young and Burton (forthcoming, 2010: Chapter 2)

6 Ministry of Justice (2009, Table A)

7 Ibid, Table 5.7



Table 2: Police Detections for Recorded Crime by method of detection, 2008/09<sup>a</sup>

	2008/09	%
Charge or summons	698,810	52.2
Cautions	319,295	23.8
Offences taken into consideration <sup>b</sup>	102,052	7.6
Penalty Notices for Disorder	108,363	8.1
Cannabis warnings	107,257	8.0
Non-sanction detections <sup>c</sup>	2,907	0.2
<i>All detentions</i>	<i>1,338,684</i>	<i>100.00</i>

Table notes:

- a) Source: Walker et al. (2009: 134). Figures as displayed do not add up to 100.00 due to rounding.
- b) Meaning that a court was told of other admitted offences at the time of sentencing the charged offence.
- c) A tightening of the rules relating to non-sanction detections has led to a sharp decline in their number over recent years. From April 2007 they can only be claimed for indictable-only (Crown Court) offences, where the CPS is satisfied there is enough evidence to provide a realistic prospect of conviction but decides not to proceed with the case (or cannot do so because the offender has died). See Walker et al. (2009: 132).

or less often than other arrestees into the deep end of the system? We also need to gain some sense of whether any patterns of differential decision-making can be partly explained by such factors as differences in admission rates (as cautions should only be given to those who admit guilt) and ethnic differences in patterns of offending (as cautions are generally reserved for less serious forms of crime). The Government figures are of little help here.

The best available evidence on such matters remains the study by Phillips and Brown based on a sample of arrested people brought to ten police stations in 1993-94. This found that following arrest, compared with white people, black and Asian people were more likely to be released without penalty. Black and white people were equally likely to be charged, whereas Asian people were less likely to face this outcome.<sup>8</sup> These patterns were in part the product of racialised factors. Thus ethnic minority people were, on average, arrested on weaker evidence than white people even when differences in the types of offence for which the arrest was made were taken into account.<sup>9</sup> White suspects were more likely to confess and less likely to seek legal advice or remain silent when interviewed.<sup>10</sup> The lower admission rate amongst black people "is what one would expect if they are more likely to be arrested when they are innocent, or if they have less faith than white people in the fairness of the police and the criminal justice system as a whole – but it entails that a lower

proportion of them will be cautioned".<sup>11</sup> This illustrates the intimate connection between how ethnic minority people experience the criminal process in general and the way in which summary justice operates in particular instances.

The Phillips and Brown study demonstrates the need for research that burrows beneath raw statistics, but it is now rather dated. The legal and policy framework surrounding summary justice has changed radically since the early 1990s and new issues have emerged for consideration.

## The Growth in Summary Justice

There has been an enormous growth in summary justice over the last decade, deliberately engineered by government through a combination of policy statements ('closing the justice gap'), target-setting (the offences brought to justice target), and the provision of new powers to the police (most notably PNDs, which constitute, in effect, an 'on the spot' fine of £80).<sup>12</sup>

The importance of summary justice can easily be seen in Table 2, showing police detections for recorded crime, a concept that excludes most motoring offences and less serious summary offences. Cautions, PNDs and cannabis warnings together account for two-fifths of all sanction detections for recorded crime.

<sup>8</sup> Phillips and Brown (1998: 92)

<sup>9</sup> Ibid: 44-45.

<sup>10</sup> Ibid: 73, 62 and 78 respectively.

<sup>11</sup> Smith (2009: 35)

<sup>12</sup> See Morgan (2008) and Young (2008) for detailed accounts.

Table 3: Fixed penalty notices 2004-2007

Offence	2004		2005		2006		2007	
	No.	% of all PNDs	No.	% of all PNDs	No.	% of all PNDs	No.	% of all PNDs
Wasting police time	1,171	1.8	2,525	1.7	6,161	3.1	3,966	1.9
'Causing harassment, alarm or distress' (s. 5)*	28,790	45.2	64,007	43.7	82,235	40.9	77,827	37.5
Drunk and disorderly	26,609	41.8	37,038	25.3	43,556	21.6	46,996	22.6
Criminal damage (less than £500)*	1,190	1.9	12,168	8.3	20,620	10.2	19,946	9.6
Shop-theft (less than £200)*	2,072	3.3	21,997	15.0	38,722	19.2	45,146	21.7
Drunk in highway	2,497	3.9	3,138	2.1	2,712	1.3	2,066	1.0
<i>Total of above offences</i>	<i>62,329</i>	<i>97.9</i>	<i>140,873</i>	<i>96.2</i>	<i>194,006</i>	<i>96.4</i>	<i>195,947</i>	<i>94.4</i>
Other offences <sup>a</sup>	1,310	2.1	5,608	3.8	7,191	3.6	11,597	5.8
<i>Total of all PNDs</i>	<i>63,639</i>	<i>100.0</i>	<i>146,481</i>	<i>100.0</i>	<i>201,197</i>	<i>100.0</i>	<i>207,544</i>	<i>100.0</i>

Table notes:

\* The three offences marked thus count towards the offences brought to justice target. It may be noted that the figures are consistently dominated by just four offences: 'causing harassment, alarm or distress' (section 5 Public Order Act 1986), 'drunk and disorderly', criminal damage, and shop-theft. Together these made up 91.5 per cent in 2007.

a) There were 16 other offences covered by the scheme in 2004 and 19 in 2005, 2006 and 2007.

Analysis of figures from earlier years<sup>13</sup> shows that the growth of the PND scheme since its introduction in the early 2000s had two notable effects. First, it reduced the number of non-sanction detections (thus indicating that more of those detected received a punishment) and second it increased the total number of detected offences (thus indicating 'new business'). To what extent this latter effect is attributable to the 'usual suspects' experiencing a faster rate of 'detections' than previously (rather than new populations being drawn into the 'detected' net) is not known.

There is a dearth of research examining the impact of these important shifts on different ethnic groups, and nothing at all on the contribution 'ethnic profiling' may have made to decision-making. I am particularly interested in PNDs as there are some obvious issues of principle about the police imposing court-like penalties without much meaningful judicial oversight.<sup>14</sup>

<sup>13</sup> See Young (2008: 174-175).

<sup>14</sup> See Morgan (2008)

## The Growth in Penalty Notices for Disorder

Table 3 presents the available Home Office and Ministry of Justice statistics on the use of penalty notices for disorder for 2004-2007 for those aged 16 and over.<sup>15</sup> The Table focuses on the six offences out of the 25 covered by the scheme in 2005 where at least 2,500 fixed penalty notices were issued in that year.

One might have expected at least as much attention to have been given to ethnic disproportionality in this field as we have witnessed around stop-search,<sup>16</sup> especially given the enormous growth in the use of the PND. After

<sup>15</sup> Figures for 2004 can be found in Home Office (2005a).

Subsequent years' figures can be found in the annual Criminal Statistics, available from <http://www.justice.gov.uk/publications/criminalannual.htm>.

<sup>16</sup> For critical analysis of the extensive policy pronouncements about, monitoring of, and research on, stop-searches, see Sanders et al. (forthcoming, 2010), Chapter 2.

all, unlike with stop-search, we are here dealing with formal punishment and the creation of a quasi criminal record.<sup>17</sup> Yet, eight years after the legislative introduction of the PND by the Criminal Justice and Police Act 2001, the research evidence on disproportionality is very thin, and this lack of evidence has stunted debate. The Government and the police bear considerable responsibility for this state of affairs.

## Ethnic Monitoring of PNDs: The Statistical Gap

Home Office Ministers were pressed in Parliament in 2001 to 'ethnically monitor' the new PND powers to ensure that they were not used in a discriminatory manner<sup>18</sup> and responded by saying that this issue would be dealt with in Home Office guidance.<sup>19</sup> The design of the prescribed PND notice prompts officers to record visual as well as self-defined ethnicity and the Home Office guidance stresses that this part of the form "*must* be completed in all cases".<sup>20</sup>

Despite all this, no data or discussion relating to ethnicity is to be found in Government research into the PND pilots<sup>21</sup> or in its subsequent 'Review of Practice',<sup>22</sup> or in the available Home Office PND statistics for 2004, 2005, 2006 and 2007 (which *are* broken down by age, gender and offence).

In November 2006, the Government issued a consultation paper entitled *Strengthening powers to tackle anti-social behaviour*. This included a proposal to give the police the power to issue a 'Deferred Penalty Notice for Disorder' in cases where the offender proved willing to enter into an Acceptable Behaviour Contract.<sup>23</sup> Breach of the Contract was to be punished with the issue of a PND for the original offence.<sup>24</sup> In its 'Partial Equality Impact Assessment' of this proposal the Government at last addressed the issue of ethnicity:

*There is some evidence that BME groups receive a disproportionate number of PNDs relative to their number in the overall population, but the ethnicity of recipients has not always been recorded. Four per cent of PNDs were for Asians (compared with 1.8 per cent in the general population) and 3 per cent for black people (compared with 1 per cent in the general population). The data may be relevant due to the proposal [on deferred PNDs] including a discretionary power.*<sup>25</sup>

Despite the acknowledgement (in effect) that discretion can be a breeding ground for racial discrimination, this evidence of disproportionality was brushed aside by an airy reference to various safeguards: "Mitigation in the form of active monitoring, supervision and accreditation are included in the proposal".<sup>26</sup>

The 'mitigation' the Partial Equality Impact Assessment offers is not persuasive. How is 'active monitoring' supposed to work when ethnicity is 'not always recorded'? Moreover, only nine months earlier the Home Office's Review of Practice had established that no effective supervision of PNDs was taking place.

To summarise its findings on this point - few front-line supervisory staff appeared to take an interest in any element of the PND scheme, PNDs were rarely 'quality checked' by a supervisory officer and the completeness and quality of information they contained varied considerably.<sup>27</sup> The Partial Equality Impact Assessment failed to cite any of this evidence.

In November 2008, the Ministry of Justice published research into the pilots for extending the PND scheme to 10 to 15 year olds. This noted that ethnic recording is still woeful: 'The ethnicity of the recipient was unknown or unrecorded for half of all PNDs'.<sup>28</sup> Separate archival research by Coates et al, which involved examining 150 PNDs for s.5 for drunk and disorderly, found that data on ethnicity was missing in over a third of the PNDs.<sup>29</sup>

## The Research Base: An Ominous Silence

One immediate impact of this wholly inadequate level of ethnic monitoring is that researchers

17 Young (2008: 183).

18 Hansard, 2 April 2001, col. 699 (Lord Dhokalia).

19 Hansard, 2 April 2001, col. 714 (Lord Bassam of Brighton).

20 Home Office (2005b: para 12.8). The guidance (which runs to 39 pages) says nothing else about ethnicity.

21 Halligan-Davis and Spicer (2004).

22 Kraina and Carroll (2006)

23 These supposedly voluntary contracts, aimed at curbing anti-social behaviour, are arguably forms of summary justice. For guidance on their use see Home Office (2007a), available at <http://www.crimereduction.homeoffice.gov.uk/antisocialbehaviour/antisocialbehaviour058a.pdf>.

24 Ibid, 46. This idea has not yet been pursued through legislation.

25 Home Office (2006: 48)

26 Ibid.

27 Kraina and Carroll (2006: 27-32)

28 Amadi (2008: 10)

29 Coates et al. (2009: text accompanying n. 9)

studying PNDs find themselves unable to say anything of value about ethnic disproportionality. Thus the Ministry of Justice report states that: 'Due to poor data quality no conclusion on the distribution of PNDs according to ethnic classification can be drawn'.<sup>30</sup> The issue of ethnicity in this 31 page report is buried in one short paragraph, and is totally ignored in the 'summary', 'implications' and 'improvements to the scheme' sections - no doubt aimed at busy policy-makers. The fact that an urgent improvement needed is ensuring compliance with the duty to record ethnicity of PND recipients seems to have been overlooked by the author.

The archival research by Coates et al involved creating a model designed to predict when officers would arrest rather than issue a PND on the street. They state:

*Unfortunately, data on offender ethnicity could not be included in these analyses because it was missing in over a third of the PNDs.... the problem of illegible, inaccurate and/or incomplete ethnicity data in the relatively small research sample rendered further exploration of this potential influence unfeasible.<sup>31</sup>*

The longer term impact on research of the lack of ethnic monitoring data is that there is nothing solid to prompt the kind of in-depth research that evidence of disproportionality tends to generate (as can be seen in the stop-search debate). And, no doubt, the lack of research then feeds into the lack of interest in policy-circles.

## Why Should we Care about 'Offenders'?

When examining the available Government research, and parliamentary debates,<sup>32</sup> on PNDs one sees evident interest in, and concern about, the use of this punishment. But these concerns cluster around crime control issues such as 'offenders getting off too lightly' or 'victims being denied compensation by the scheme'. The due process concern that the scheme may be problematic from a discrimination point of view is scarcely mentioned anywhere.<sup>33</sup> This may be

because, unlike with stop-search, where everyone accepts that the vast majority of those stopped are found to have done nothing wrong, the PND scheme is seen as applying to clear-cut offenders. And who wants to be seen showing concern for offenders?

But one problem with the PND scheme is that it encompasses offences which are far from clear-cut. In 2007 there were 124,823 penalty notices issued for either 'drunk and disorderly' or s.5 Public Order Act 1986 (disorderly behaviour *likely* to cause harassment, alarm or distress<sup>34</sup>), making up 3/5 of the total haul of PNDs in that year. It has long been recognised that these are offences where police officers exercise a huge amount of discretion when determining whether the criminal law has been broken, which criminal label to apply, and whether any formal action should be taken.<sup>35</sup> Moreover, it is typical for there to be no prosecution evidence other than the police account of what happened.<sup>36</sup> If we take seriously the argument that wherever the police have the most discretion is where we will find the highest rate of unfairly discriminatory decisions,<sup>37</sup> then the need to examine disproportionality in the context of PNDs for these two offences seems obvious.

In the absence of proper statistical monitoring or research, however, all one can do is highlight the issues by reference to wider research findings on how police discretion is exercised in practice.<sup>38</sup> In short, the discretion inherent in policing, in the PND scheme itself, and in the definition of offences covered by that scheme, can easily combine to result in a summary penalty against someone from an ethnic minority largely on the basis of racial stereotyping. Thus black and, increasingly, Asian,<sup>39</sup> people are constructed as inherently more suspicious than white people, attract more police attention in consequence, are more likely to be regarded as lying or evasive when questioned or searched, often respond resentfully to all this

34 Contrary to the way Home Office statistics are presented (see Table 3), it is not an essential element of the offence that anyone is *actually* harassed, alarmed or distressed.

35 See, for example, the analysis of s.5 Public Order Act 1986 by Ashworth (1987: 17), and the empirical study by Brown and Ellis (1994).

36 Brown and Ellis (1994: 36-37).

37 Professor Ben Bowling, quoted by Dodd (2003).

38 For a review of the enormous literature on stop-search, arrest, interrogation etc, see Sanders, Young and Burton (forthcoming, 2010). This evidence coheres with the depictions of public order arrests that daily fill our television screens in such fly-on-the-wall series as 'StreetCrime UK' and 'BritCops: Frontline Crime UK'.

39 See Pantazis and Pemberton (2009)

30 Amadi (2008: 10)

31 Coates et al. (2009: n.9)

32 See, for example, Hansard, 11 March 2009, cols 365-388.

33 Exactly the same pattern can be observed in the terms of reference set for a review by the Office for Criminal Justice Reform of 'out-of-court' disposals ordered by the Lord Chancellor, Jack Straw, on 9 November 2009. See Hansard, 14 December 2009 col. 60WS.



by swearing or being 'non-cooperative', thus inviting the label of 'disorderly' and a judgment that their behaviour is 'alarming' enough to merit the imposition of summary justice.<sup>40</sup> In their mid-1990s study, Brown and Ellis found that in 36 of the 75 cases involving ethnic minorities in which section 5 charges were laid, race appeared to have some bearing on the nature of the incident, most usually in allegations by black people that the police were acting in a discriminatory fashion.<sup>41</sup> As they noted:

*One worrying implication of these figures is that there is genuinely greater friction between black people and the police, which is readily manifested in hostile encounters in everyday policing situations... Given these tenuous relations, it may well be that black people are more likely to perceive s.5 warnings<sup>42</sup> about their behaviour as provocation, leading to an escalation of the situation. Another possibility is that the police are more ready to react adversely where they receive abuse from black people.<sup>43</sup>*

The only difference now is that the police can 'react adversely' by fining the suspect £80 on the spot, thus virtually ensuring that the problematic circumstances of these arrests is not subject to review by a prosecutor or magistrate.<sup>44</sup>

## Conclusion

There is no doubt that police-ethnic minority relations have been damaged by the practices discussed in this chapter and throughout this book, and that many young black men, in particular, have learnt to distrust and dislike the police. But that does not mean that they are hostile to the very idea of policing or that the problems are

<sup>40</sup> See also Phillips and Brown (1998: 45-6)

<sup>41</sup> Brown and Ellis (1994: 31)

<sup>42</sup> The then statutory requirement to warn prior to arrest was removed by Schedule 17 of the Serious Organised Crime and Police Act 2005, but it is likely that many officers still issue warnings before proceeding to arrest.

<sup>43</sup> Brown and Ellis (1994: 33)

<sup>44</sup> Although it is worth adding that *individualistic* review is in any event unlikely to uncover discriminatory *patterns*.

insoluble. Ken Hinds, whose experiences were quoted at the beginning of this chapter, provides a perfect example of a constructive response to such problems. He sits on the Metropolitan Police's Independent Advisory Committee for Haringey, which aims to build relations between the police and the black community, and continues to support efforts to attract more black recruits.

*My message to [the police] is: we understand you've got a difficult job and you won't get it right 100% of the time, and we want you there to help safeguard our communities, but we want you to do it in a fair and just way...<sup>45</sup>*

It is difficult to disagree with his central message that effective leadership will be needed if current practices are to change:

*I'm fighting to make the police more transparent and hold them to account. The only way we can change this is by engaging the police at the top level, getting them to admit the truth about racial profiling, and changing their psyche.<sup>46</sup>*

But, as this chapter has shown, the Government also needs to demonstrate effective leadership. More consistent and comprehensive ethnic monitoring of summary justice measures will provide the necessary foundation for informed debate and in-depth research. Only then are we likely to get closer to the truth about racial profiling in this sphere. Finally, Parliament should think long and hard about the acceptable scope of the criminal law. Perhaps instead of constantly dreaming up new offences and police powers it is time for it to consider abolishing some of the vast array of measures that now exist. Section 5 of the Public Order Act should be a prime candidate for review in such an exercise. Those in power should not keep turning a deaf ear to the harassment, alarm and distress its use is causing to ethnic minorities.

<sup>45</sup> Walker (2009)

<sup>46</sup> Cohen (2009)

## Biographical Information on Contributors

**Mary Coussey** CBE was until November 2008 the Chair of ABNI (Advisory Board on Naturalisation and Integration), an Advisory, Non-Departmental Public Body, established by the Government in November 2004 to monitor the implementation of the language and life in the UK arrangements for both settlement and citizenship, and to make recommendations on the assessment processes. She is currently a member of the Active Citizenship Design Group, advising ministers on the implementation of active citizenship proposals. She is also a member of the Border Agency's Earned Citizenship Strategic Advisory Group.

Mary was also the Independent Race Monitor to the Immigration Service until June 2008, and until December 2008 was a member of the HM Revenue and Customs Race Equality Panel. As an Equality and Diversity consultant, she has carried out extensive studies, consultancy, and training in relation to equal employment opportunity and the Race Equality Duty in the public sector. Her consultancy experience also includes work for the Council of Europe on the role of the employment services on the promotion of equal opportunities for immigrants and ethnic minorities. Formerly, she was a member of the Home Office 'Life in the UK' Advisory Group. In 2009 she carried out a study for Nottingham University Human Rights Law Centre of the UK's implementation of the EU Race Directive.

Her publications include *The Role of the Employment Services in the Promotion of Equal Opportunities for Immigrants and People from Disadvantaged Ethnic Minority Groups*, and *Framework of Integration Policies*, both for the Council of Europe; and *Equality: A New Framework*, with B Hepple, and T Choudhury (Hart Publishing).

**Rebekah Delsol** completed her doctoral studies in sociology at the University of Warwick with a thesis examining the utility of the concept of institutional racism in explaining racial disparities in stop and search practice in four police forces in the United Kingdom and the United States. She coordinates the Open Society Justice Initiative's project on "Ethnic Profiling in Europe". Since 2005, the project has sought to address the issue of ethnic profiling through increasing awareness and understanding of the issue, advocating for the adoption of clear European standards and national legislation and developing the capacity of civil society and police to work together to remedy discriminatory practices.

**Simon Denison** works at the Office for Criminal Justice Reform, an organisation responsible for cross-cutting issues within the CJS. He has policy responsibility for the annual Section 95 *Statistics on Race and the CJS* report, and is responsible for managing a project that supplies up-to-date ethnicity data on suspects', defendants' and offenders' experiences to Local Criminal Justice Boards (the Minimum Dataset). Simon was also involved in producing the Government's response to the Home Affairs Select Committee Inquiry into Young Black People and the CJS, and was recently a peer-reviewer of a European Union guide on addressing ethnic profiling.

**Zin Derfoufi** is a campaigner and commentator on issues relating to civil liberties, race relations and community cohesion. He is currently leading the newly established Civil Liberties Division at the Federation of Student Islamic Societies (FOSIS) which monitors the impact that the UK's anti-terror laws and strategy are having on young people, particularly British Muslims, and so regularly comes across people who have been on the receiving end of such counter-terrorism measures. He is the youngest member of the Muslim Safety Forum (MSF), a forum which engages directly with the heads of the various Metropolitan Police security strands, and is also a young adviser to the Equality and Human Rights Commission.

**Terri Dowty** is Director of Action on Rights for Children (ARCH), an organisation with particular expertise in the effects of new technologies on children's data protection, consent and human rights. Terri is also on the advisory councils of the Foundation for Information Policy Research and of Privacy International. She regularly lectures and undertakes media interviews and has written a variety of books, papers, briefings and articles on children's rights. Most recently, she was a co-author of the Rowntree Reform Trust report: *Database State*, and of an authoritative study on children's consent: *Protecting the Virtual Child - The Law and Children's Consent to Sharing Personal Data*.

**Nick Glynn**, LLB (Hons), Cert. Ed., is a serving Chief Inspector with Leicestershire Constabulary, currently working within the headquarters Operations Support Department. He joined the police in 1985 and has extensive policing and trainer experience.

He was the Local Policing Unit commander for Spinney Hill in Leicester, which has a highly diverse population, from April 2005. This included the particularly testing times for minority communities following the 7/7 attacks. He has worked very closely with many minority groups.

In September 2007 he was seconded to the NPIA Neighbourhood Policing programme as a field officer assisting eight police forces in the east of England to successfully implement neighbourhood policing.

He has spoken at a number of national and international events including the European Senior Police Officers Conference in Germany in 2005 and at a meeting hosted jointly by the Open Society Justice Initiative and the Ligue Internationale des Droits de l'Homme (International League on Human Rights) in Paris in December 2009, titled "Combating Disproportionate Stop and Search in Paris: Comparative Experiences and A Way Forward".

**Nazia Latif** is currently Investigations and Research Worker at the Northern Ireland Human Rights Commission where she leads the Commission's work on immigration, asylum and criminal justice issues. She has a Masters degree in Middle East Politics from the University of Durham and obtained her doctorate from the University of Newcastle-upon-Tyne. Her PhD thesis was on the subject of Women, Islam and Human Rights.

**Matilda MacAttram** is founder and director of Black Mental Health UK (BMH UK), a human rights campaigns group established to raise awareness and address the stigma associated with mental illness within African Caribbean communities.

She was the BME (Black and Minority Ethnic) lead of the Mental Health Alliance's Policy Group during the parliamentary passage of the 2007 Mental Health Act, and chaired the BME Special Interest Group for the Mental Health Alliance.

Matilda currently sits on the Community Channel's Advisory Board as well as the editorial board for the journal *Ethnicity and Inequalities in Health and Social Care*.

She is also on the editorial panel of the Racial Justice Manifesto and on the steering group of the National BME Mental Health Network and was an advisory member on the Healer's Project at the Tavistock Institute.

Matilda is a former board member of the Polka

Children's Theatre in Wimbledon and currently sits on the management committee of Liberty, an international Christian aid charity.

**Alpa Parmar** is British Academy Postdoctoral Fellow at King's College London, School of Law. She graduated with a BA in Social and Political Sciences and has a PhD in Criminology, both from Cambridge University. Her doctoral thesis was entitled 'Crime and "the Asian Community": Disentangling Perceptions and Reality' in which she conducted an in-depth case study of a British-Pakistani community in the UK. She was previously Research Fellow for a Home Office funded evaluation of domestic violence initiatives in the UK. Her current research focuses on understanding the policing of the Terrorism Act 2000 and the impacts of stop and search practices on British Asian youth in London. Both the theoretical and practical implications for the policing of multi-ethnic societies are explored within this project, as are the potential influences on British Asian identities.

**Matthew Ryder** is a barrister at Matrix chambers. His areas of expertise include serious crime, surveillance, investigation, terrorism and human rights. He has been involved in a number of leading cases on the scope of police powers and drafted Liberty's submissions to the Court of Appeal in the case of *R (Marper) v Chief Constable of South Yorkshire*. He co-authored *Human Rights and Criminal Justice* (2nd edn); and *Blackstone's Guide the Serious Organised Crime and Police Act 2005*.

In 2008 Matthew was appointed as one of 20 REACH national role models, a scheme supported by the Secretary of State for Communities and Local Government tasked with raising the achievements and aspirations of African and Caribbean boys and young men. Matthew also sits as a Recorder (part time judge) in the Crown Court.

**Basia Spalek** is a Reader in Communities and Justice within the Communities, Securities & Global Justice Grouping at the Institute of Applied Social Studies at the University of Birmingham. Basia has written extensively about criminal justice, victimisation and minority experiences. She has recently been the Principal Investigator on two high profile Arts & Humanities Research Council and Economic and Social Sciences Research Council projects funded under the auspices of the Religion & Society programme: 'A Study Exploring Questions Relating to Partnership between

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**Kjartan Páll Sveinsson** is a research and policy analyst at the Runnymede Trust. He has conducted extensive research into small, less visible minority ethnic communities, race equality in the criminal justice system, and migrants' rights. Kjartan has previously conducted research on youth offending in South London for the Probation Service, and strategies of adaptation of adolescent immigrants in Iceland for the Ministry of Education (Iceland). His latest publications are *A Tale of Two Englands: 'Race' and Violent Crime in the Press* (Runnymede Trust, 2008), *Who Cares about the White Working Class?* (Runnymede Trust, 2009) and *Making a Contribution: New Migrants and Belonging in Multi-Ethnic Britain* (Runnymede Trust, 2010).

**Helen Wallace** is Director of GeneWatch UK, a not-for-profit organisation which aims to ensure that genetics is used in the public interest. She has written numerous articles and briefings on the National DNA Database and provided written and/or oral evidence to the European Court of Human Rights, the Scottish Parliament's Justice Committee, the House of Commons Science and Technology and Home Affairs Committees, and the House of Lords Constitution Committee. She has published widely regarding the science and ethics of human genetic testing and the development and expansion of genetic databases for health, research and forensic purposes.

**James Welch** is a solicitor and has been the Legal Director of Liberty since February 2000. Liberty is a campaigning organisation which seeks to protect civil liberties and promote human rights. Its legal department gives advice on human rights issues and acts in what it believes will be test cases before the domestic courts and the European Court of Human Rights. It also intervenes in significant cases before the higher courts.

Before moving to Liberty James was a partner at a legal aid firm in Harlesden, North-west London.

**Richard Young** is Professor of Law and Policy Research in the School of Law at the University of Bristol. He was previously Fellow in Law at Pembroke College and Reader in Criminal Justice at the Centre for Criminology, University of Oxford.

His research focuses primarily on the field of criminal justice using socio-legal methods. His research projects have been funded by the Legal Aid Board, the Nuffield Foundation, the Joseph Rowntree Foundation, the Legal Services Commission, and the Northern Ireland Court Service.

He is co-author of *Criminal Justice* (fourth edition, OUP, 2010, forthcoming) and co-editor of three collections: *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone, 1996), *New Visions of Crime Victims* (Hart, 2002), and *Regulating Policing: The Police and Criminal Evidence Act 1984, Past, Present and Future* (Hart, 2008). Richard is on the editorial board of two journals, *International Review of Victimology* and *Law and Policy*, and also serves on the editorial board of The Policy Press.

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### *About the Editor*

The Editor of this collection, Kjartan Páll Sveinsson, is a research and policy analyst at the Runnymede Trust. He has been working on the Community Studies series which explores small, less visible minority ethnic communities. He also commissioned and edited the papers in *Who Cares about the White Working Class?* His research interests include migration and transnationalism, and crime, policing and criminal justice.

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