Home Office

Counter-Terrorism and Border Security Act 2019

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

This consultation begins on Monday 25 February 2019

This consultation ends on Friday 05 April 2019

About this consultation

To:	Representations are welcome from operational organisations who will use the powers, as well as interest groups and the wider public.
Duration:	From 25/02/2019 to 05/04/2019 (6 weeks).
How to respond:	Please send your response by 23.59 on 05/04/2019 to: Email: Schedule3and7codes@homeoffice.gov.uk **Please indicate in your response whether you are content for it to be published, with or without attributing it to you/your organisation.**
Response paper:	Following the consultation period, responses will be analysed and the draft code revised as necessary. They will then be laid before Parliament for approval.
Topic of this consultation:	This consultation concerns the draft Code of Practice for officers who will exercise the new ports powers under Schedule 3 to the Counter-Terrorism and Border Security Act 2019 and modifications as a result of this legislation to existing powers under Schedule 7 to the Terrorism Act 2000.
Scope of consultation:	This consultation seeks representations on whether the Schedule 3 and Schedule 7 Codes are sufficiently clear to ensure the effective, fair and proportionate use of these powers.
Geographical scope:	UK wide.

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Executive summary

On 14 March 2018, in response to the poisoning in Salisbury of Sergei and Yulia Skripal and Detective Sergeant Nick Bailey, the Prime Minister announced a package of measures to harden our defences against hostile state activity.

As a first step, Schedule 3 to the Counter-Terrorism and Border Security Act 2019 ('Schedule 3') provides for new powers to stop, question, search and detain a person at a UK port or the Northern Ireland border area for the purpose of determining whether they are, or have been, engaged in hostile activity. These provisions will serve to address a current gap in our ability to tackle the threat posed by hostile state actors and mirror in many respects the existing powers to stop and question persons at UK ports for counter-terrorism purposes.

The Counter-Terrorism and Border Security Act 2019 also amends Schedule 7 to the Terrorism Act 2000 ('Schedule 7') to give effect to two recommendations of the former Independent Reviewer of Terrorism Legislation, Lord Anderson: providing for the suspension of the examination clock whilst someone receives medical treatment; and including a bar on the use of oral answers given in examination in subsequent criminal proceedings.

The 2019 Act also amends Schedule 7 restrictions concerning the right of a detainee to consult a solicitor (by replacing the power for a qualified officer to sit within the sight and hearing of a lawyer-client consultation in certain limited circumstances with a power allowing a senior officer, in those limited circumstances, to direct that the person consults a different lawyer); and limits the power of the state to expand an information sharing gateway in the Schedule by means of regulations, constraining the expansion of this gateway to allow information to be shared only with persons that exercise public functions.

A Code of Practice is to be issued to officers empowered to exercise the powers in Schedule 3; and a revised Code of Practice is to be issued to officers who are empowered to exercise the powers in Schedule 7, as amended by the 2019 Act. The Codes also inform the training and accreditation process, which officers must pass before being able to use the powers without supervision.

Both the Terrorism Act 2000 and the 2019 Act require the Codes of Practice to be put out for consultation. The Government welcomes comments on these documents and will consider any representations before a final version of the draft Codes is laid before Parliament for approval.

Background Information

What is the Schedule 3 Code of Practice?

The Schedule 3 Code of Practice sets out the processes and safeguards governing the exercise of counter-hostile activity ports powers by ports and border officers. It gives detail on how these powers should be used, including examples where relevant, and is intended to provide additional clarity and ensure the highest standards of professionalism and compliance with these important powers.

The Code is primarily intended to guide those public authorities able to exercise powers under Schedule 3. Once issued, the Code will have statutory force, and individuals exercising Schedule 3 functions must perform them in accordance with the Code. The Code is admissible as evidence in criminal and civil proceedings, and may be taken into account by any court, tribunal or supervisory authority when determining a question arising in connection with those functions.

The Schedule 3 Code has been closely modelled on the existing Code for the counter-terrorism powers under Schedule 7 to the 2000 Act. The key differences are:

- the scope of the Schedule 3 powers, which focus on determining whether a person appears to be someone who is or has been engaged in hostile activity; and,
- the retention powers that would allow an examining officer, subject to the authorisation of the Investigatory Powers Commissioner, to retain, use and potentially destroy an article where there are reasonable grounds for believing that it could be used in connection with a hostile act, or to prevent death or significant injury.

What changes are being proposed to the Schedule 7 Code of Practice?

The existing Code of Practice is to be revised in order to reflect the amendments made to Schedule 7 by the 2019 Act. These include:

- clarifying that the examination clock can be paused at any point where a person detained under the powers cannot respond to questioning due to being transported to/from hospital or due to receiving hospital treatment;
- reflecting that there is a bar on the use of oral answers given in examination from being used in subsequent criminal proceedings; and,
- detailing the new power that would allow a senior officer, in certain limited circumstances, to direct that a person choose a different lawyer to the lawyer that

the person has chosen. This replaces the power that would allow a qualified officer to sit within the sight and hearing of a lawyer-client consultation in those limited circumstances.

We have reviewed the provisions concerning the scope of Schedule 7 search and retention powers and powers to take fingerprints and samples to ensure they accurately reflect the primary legislation. We have also sought to provide further clarity on the distinction between questions that can be asked by police officers in the ordinary course of their duties and those that can only be asked during the course of an examination.

Finally, there are a number of structural changes to the Code to ensure that it is a clearer and more accessible document.

Why are we consulting on the Schedule 3 and 7 Codes of Practice?

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

Next Steps

Following the consultation, the Secretary of State will carefully consider any representations made about the draft Codes, and what, if any, changes may be required. The draft Codes will then be laid in Parliament for approval by both Houses before they can come into effect.

Consultation

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

In particular, please tell us how well, in your view, the:

- Codes clarify the types of engagement that officers are able to undertake with the general public during the ordinary course of their duties and the questioning that is only permitted during an examination;
- Codes explain the rights and obligations of the examinee, including any restrictions to those rights and associated safeguards;
- Schedule 3 Code explains the new powers of retention, including the safeguards, timescales and information provided to the examinee;
- Structural changes made to the Schedule 7 Code of Practice makes the document clearer and more accessible for those following the code in the exercise of their powers.

The Government will consider any representations, including more general suggestions on the Schedule 3 and 7 powers. It must be noted, however, that the primary legislation is settled and so the overarching legal framework cannot be altered through amendments in the Codes.

This consultation is being directed at the following organisations or groups of people:

- UK Police Forces and UK Border Force
- Community and Human Rights groups
- Journalist and Media associations
- Legal professions associations
- The general public

Your feedback will be essential in shaping the future operation of Schedule 3 and 7 powers. All those who have an interest in how Schedule 3 and 7 will operate can help ensure that the powers are used effectively, fairly and proportionately by responding to this consultation.

We will publish a formal government response and summary of any representations received after the consultation.

Contact details and how to respond

Please send your response by 23.59 on Friday 05 April 2019 to:

Email: Schedule3and7codes@homeoffice.gov.uk

Complaints or comments

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 and the GDPR.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Home Office.

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