



# HUMAN RIGHTS

## ANNUAL REPORT 2015

Monitoring the compliance of the Police Service of Northern Ireland with the Human Rights Act 1998.

## Foreword

I am pleased to present the Northern Ireland Policing Board's (the Policing Board's) 11<sup>th</sup> Human Rights Annual Report.

The Policing Board is required by section 3(3)(b)(ii) of the Police (Northern Ireland) Act 2000 to monitor the performance of the Police Service of Northern Ireland (PSNI) in complying with the Human Rights Act 1998. In order to assist it with fulfilling this duty, the Policing Board appointed Human Rights Advisors in 2003 to devise a framework detailing the standards against which the performance of the police in complying with the Human Rights Act 1998 would be monitored. The Policing Board's Performance Committee, with the assistance of the Human Rights Advisor, is responsible for implementing the monitoring framework. This work has been reported upon by way of a Human Rights Annual Report every year since 2005.

The implementation of human rights standards and principles is central to good policing and should be pivotal to everything that PSNI do. It helps to preserve public confidence in the PSNI which is paramount in securing its legitimacy. Ultimately it is the public who provide the police with their legitimacy and it is their acceptance of the legitimacy of the police that gives them their authority. This fundamental tenet lies at the heart of the work which the Policing Board, assisted by the Human Rights Advisor, carries out in monitoring and reporting upon the PSNI's compliance with the Human Rights Act 1998.

The Policing Board's Human Rights Annual Report reports on performance of the PSNI in its compliance with the Human Rights Act 1998. In this respect it is a reflection of the work undertaken by the Policing Board, particularly through the Performance Committee, in holding PSNI to account and is an open and public commentary on police performance and of the Policing Board's monitoring work. The Policing Board's human rights monitoring work has been recognised as good practice in other parts of the United Kingdom and Ireland, with police services and government officials from other countries frequently visiting Northern Ireland to learn

how PSNI has adopted a human rights culture and how the Policing Board carries out its oversight role in this regard.

PSNI has now implemented over 200 recommendations made in 10 previous Annual Reports across a range of issues such as domestic abuse, hate crime, children and young people, public order, use of force, stop and search, covert policing, complaints and discipline and many more. The importance of having Annual Reports is reflected in the sheer breadth of work undertaken by the Policing Board and by the Human Rights Advisor in identifying emerging issues which pose new and evolving challenges for PSNI. The 2015 Annual Report contains 14 recommendations for PSNI relating to human rights training, policy and guidance in relation to Domestic Violence Protection Notices, the operation of the Youth Diversion Scheme, the deployment of Small Unmanned Aircraft, the service of non-molestation orders and police detention.

As well as Annual Reports, the Policing Board and Human Rights Advisor monitor and report on PSNI's human rights compliance through thematic reviews. These reviews provide a means of undertaking detailed examinations of specific areas of police policy and practice from a human rights perspective, using the community's experience of policing to inform the evidence base against which compliance with human rights principles can be evaluated. The thematic reviews and associated follow-up reviews have made a combined total of 73 recommendations and have examined the police response to domestic abuse; children and young people; policing with and for lesbian, gay and bisexual individuals and transgender individuals; and police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007. The Board's Human Rights Advisor is currently finalising a thematic review of the PSNI response to race hate crime, the findings of which will be published during 2016.

The commitment of the Chief Constable and PSNI to ensuring a human rights based approach to policing is demonstrated by their acceptance and implementation of the recommendations made in previous Human Rights Annual Reports and thematic reviews. The 2015 Annual Report notes that nine recommendations from previous years were implemented during 2015. In implementing these recommendations,

PSNI reported to the Performance Committee throughout 2015 on a range of issues including child sexual exploitation; the service of ex-parte non-molestation orders and occupation orders; training, policy and practices for responding to disability hate crime; terrorism detainees; healthcare within custody; and Youth Engagement Clinics. The Policing Board, through the work of its Human Rights Advisor and Performance Committee, will continue to monitor and report upon PSNI's performance in ensuring a human rights compliant service.

This is the 7<sup>th</sup> Human Rights Annual Report produced on behalf of the Committee by the Policing Board's Human Rights Advisor, Alyson Kilpatrick BL. On behalf of the Policing Board, I would like to thank Alyson for her continued support and contribution.

**Anne Connolly**

**Chair**

**Northern Ireland Policing Board**

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## 1. PSNI HUMAN RIGHTS PROGRAMME OF ACTION

The Policing Board knows that a commitment to safeguarding human rights, the substantive and visible protection of those rights and the exposure of violations of rights if they do occur are the best means of building public confidence in policing and ensuring an effective and efficient police service which can police with the consent of the community. It is trite to say that a police service that cannot secure public confidence and maintain its legitimacy cannot function effectively. It is the public who provide the police with their legitimacy – it is their acceptance of the legitimacy of the police that gives the police their authority. That is the fundamental premise upon which the Performance Committee of the Policing Board (the Committee) monitors and reports upon the compliance of the Police Service of Northern Ireland (PSNI) with the Human Rights Act 1998. That was true when the PSNI was established and remains true today.

In 1999, a central proposition of the Report of the Independent Commission on Policing for Northern Ireland (the Patten report) was that the fundamental purpose of policing should be, in the words of the Belfast Agreement 1998, “the protection and vindication of the human rights of all... There should be no conflict between human rights and policing: policing means protecting human rights”.<sup>1</sup> In 2001, that central proposition was accepted by the newly established PSNI whose new oath of office incorporated an unambiguous commitment to the protection of human rights as contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>2</sup> and supplemented by other relevant human rights instruments.<sup>3</sup> There followed, in 2003, a Code of Ethics which became the new discipline code for police officers laying down the standards of practice and conduct expected of police

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<sup>1</sup> A New Beginning: Policing in Northern Ireland, Report of the Independent Commission on Policing for Northern Ireland, September 1999, paragraph 4.1.

<sup>2</sup> The ECHR was enshrined in domestic law by the Human Rights Act 1998 which amongst other things makes it unlawful for a public authority to act incompatibly with the rights contained in the ECHR.

<sup>3</sup> Such as the United Nations Code of Conduct for Law Enforcement Officials; the United Nations Basic Principles on the Use of Force and firearms by Law Enforcement Officials; and the European Police Code of Ethics.

officers. Importantly, the Code of Ethics also made officers aware of their obligations and rights under the Human Rights Act 1998. The Code of Ethics was revised and reissued in 2008<sup>4</sup> and has become “one of the success stories in advancing the human rights agenda in the PSNI”.<sup>5</sup>

In response to Recommendation 1 of the Patten report, which required a “comprehensive programme of action to focus policing in Northern Ireland on a human rights-based approach” the PSNI published a Human Rights Programme of Action. In the Programme of Action, which has been published each year since 2004, the PSNI demonstrates its commitment at an organisational level to embrace human rights as a core value in all police processes and as a guide to the behaviour of police officers and police staff. The Programme of Action also provides an opportunity for the PSNI to respond with specificity to the recommendations contained within each Human Rights Annual Report published by the Policing Board.

The PSNI Programme of Action 2014/2015 was published on 2 June 2015 and is available to view online through the PSNI website.<sup>6</sup> It was circulated by email to all police officers and staff and has been uploaded to the PSNI intranet (Policenet). In the Programme of Action the PSNI indicates its acceptance of 8 of the 9 recommendations made in the Human Rights Annual Report 2014 and outlines how it will implement them. In his introductory comments, Temporary Assistant Chief Constable Chris Noble welcomes the scrutiny and challenge of the Board and states that the PSNI regards human rights oversight, “as an opportunity to make policing policy and practice even better, more efficient and more effective”.<sup>7</sup> He continues, “Operationalising human rights requires constant effort; it requires us to be accountable, transparent and open to learning. In a world that is constantly changing, the implementation of human rights is a constant process; it is a job that is never truly complete. Human rights is not only in the DNA of policing, as a result of the ‘Patten’ reforms, it is also part of our psyche; it is how we think, weigh up

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<sup>4</sup> Police Service of Northern Ireland Code of Ethics 2008.

<sup>5</sup> Revised Foreword by Anne Connolly OBE, Chair of the Policing Board, June 2015.

<sup>6</sup> [http://www.psni.police.uk/index/about-us/human\\_rights.htm](http://www.psni.police.uk/index/about-us/human_rights.htm)

<sup>7</sup> PSNI Human Rights Programme of Action 2014/2015, 2 June 2015

options and ultimately make decisions and take action. As a Police Service we are intensely reflective and self-critical. We challenge ourselves about how we can work better together in achieving a safe, confident and peaceful society built on the dignity and rights of every human being in our community. As police officers we are charged with the protection of the public. To accomplish this duty police officers are given powers to stop; to search; to arrest. Human rights provide a practical framework through which we can use these powers with the consent and confidence of our community. This approach ensures our actions have a legal basis, are necessary and proportionate to what we are trying to achieve”.

The Committee, with the assistance of the Board’s Human Rights Advisor, is responsible for monitoring the PSNI’s compliance with the Human Rights Act 1998<sup>8</sup> and oversees the implementation of recommendations made in Human Rights Annual Reports. The Committee received various reports from PSNI during 2015 on its implementation of recommendations in the Human Rights Annual Report 2014, an overview of which is provided within the relevant chapters of this Report. The Committee welcomes Temporary Assistant Chief Constable Noble’s endorsement of the monitoring process in his introduction to the PSNI’s 2015 Human Rights Programme of Action and looks forward to receiving PSNI’s 2016 Human Rights Programme of Action in due course.

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<sup>8</sup> By section 3(3)(b) of the Police (Northern Ireland) Act 2000.



## 2. TRAINING

Effective training in human rights principles and practice is fundamental to any organisation committed to compliance with the Human Rights Act 1998. That was recognised in the Patten Report where it was observed, “training will be one of the keys to instilling a human rights-based approach into both new recruits and experienced police personnel”.<sup>9</sup> For that reason, it was recommended that, as a matter of priority, all members of the PSNI should be instructed in the implications for policing of the Human Rights Act 1998, and the wider context of the ECHR. It was also recommended that, “all police officers, and police civilians, should be trained (and updated as required) in the fundamental principles and standards of human rights and the practical implications for policing”. To reflect the ever changing environment in which police officers and staff operate, the emerging jurisprudence of the courts and the development of new international treaties and instruments, for example the United Nations Convention on the Rights of Persons with Disabilities,<sup>10</sup> training must be continually reviewed and up-dated.

The PSNI has striven to give full effect to the Patten recommendation and subsequent recommendations made by consecutive Human Rights Annual Reports. The PSNI recognises that training is essential to ensuring that police officers and staff are aware of the technicalities of protecting, respecting and fulfilling human rights law and that effective training is critical to providing a better and more instinctive understanding of the complex rights engaged and how those rights must be balanced. Human rights are no longer taught solely in a stand-alone lesson (although there is a dedicated introduction to human rights which is important and effective) but are integrated into all training in a meaningful and practical way. In particular, the PSNI accepted that the most effective training is interactive and delivered in operational scenarios.

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<sup>9</sup> At paragraph 4.9

<sup>10</sup> A copy of the Convention can be accessed at:  
[www.un.org/disabilities/convention/conventionfull.html](http://www.un.org/disabilities/convention/conventionfull.html)

Understandably, the PSNI has attempted to target its limited resources in a cost-effective way and that includes in respect of training. Increasingly, training is delivered by way of e-learning packages. While a move towards a stream-lined and cost-effective training programme should be encouraged, the Committee needs assurance that e-learning is used only where it is appropriate and is sufficient to deliver the training outcomes required. There is certainly a role for e-learning, for example in providing technical knowledge prior to entering the classroom, but it is unlikely to be a substitute for interactive training in which the practical application of human rights law can be explained, demonstrated and tested. Interactive training also permits the challenge to attitudes, stereotypes and misconceptions about human rights.

In past years the Committee, with the assistance of the Board's Human Rights Advisor, has paid particular attention to operational training and whether it encourages police officers to embrace the values that underpin human rights and to translate those values into practice. The Human Rights Advisor has advised the Committee that she continues to be afforded access to training materials, lessons delivered in the classroom and scenario based training. The Human Rights Advisor also meets with officers and staff involved in training to discuss training needs and priorities. In the coming year the Human Rights Advisor on behalf of the Committee will review all e-learning training with a particular focus on its effectiveness.

For a number of years, the PSNI employed a dedicated Human Rights Training Advisor with specialist human rights knowledge and experience in delivering training. She was responsible for reviewing all training delivered at the Police College and within police districts and assisted in the production of training materials. The Human Rights Training Advisor's contribution in the view of the Committee undoubtedly improved the training of police officers and civilian staff and ensured that human rights were contextualised into operational policing scenarios. In particular, she worked closely with police trainers responsible for delivering training to, and thus influencing, the wider organisation. More recently, she focused on reviewing and developing the training delivered to police civilian staff because, as reported in previous

Human Rights Annual Reports, police support staff do not receive the same level of human rights training as police officers. It has been emphasised many times that as civilian staff take on more public facing roles, for example as call handlers and station enquiry assistants, they must receive as much attention as police officers. The PSNI Human Rights Training Advisor carried out a review of and made recommendations relating to the training of civilian staff. The Performance Committee will consider in the next 12 months whether the training needs of civilian staff are being met.

The Human Rights Training Advisor also had an important role in engaging with stakeholders to ensure that concerns, which could be addressed by training, were addressed. The Human Rights Training Advisor resigned from her post in June 2015 when she moved abroad. The Committee would like to recognise her efforts and thank her for her dedication and expertise throughout the past years.

Since June 2015, the PSNI has been without a dedicated Human Rights Training Advisor. While there are others who have assumed responsibility for human rights training in the interim there is no person dedicated to human rights training. The Committee regrets that a new Human Rights Training Advisor has not been recruited. To ensure that the integration of human rights principles into all aspects of training remains a priority within the PSNI the Committee believes a new Human Rights Training Advisor should be recruited as a matter of urgency.

#### **Recommendation 1**

**The PSNI should, without delay, recruit a Human Rights Training Advisor with sufficient expertise and experience to ensure that the highest level of human rights training is delivered within the PSNI. Progress in relation to that recruitment should be reported to the Performance Committee within 1 month of the publication of this Human Rights Annual Report.**

Prior to leaving her post, the Human Rights Training Advisor provided the Police College and the Policing Board's Human Rights Advisor with a final briefing on the areas of work she had developed, the key training successes she had identified and the areas of training which in her view required further attention. While recognising some advantages afforded by improving access to internet-based materials and e-learning, she stressed the importance of face-to-face training. In her view, face-to-face training is the best means of making human rights memorable and practical and of inspiring officers and staff to embrace the principles and values which are core to the delivery of an effective and human rights compliant service.<sup>11</sup> She emphasised the importance of extending training beyond the avoidance of violations to embracing an approach which upholds and defends rights. The Committee respectfully agrees.

The PSNI Human Rights Training Advisor also reported, in a meeting with the Policing Board's Human Rights Advisor in June 2015, her view that the PSNI should consider how it might better incorporate the expertise and experience of community based organisations into training. The Committee has previously suggested that the PSNI might make better use of such expertise and experience, for example by developing a process for relevant organisations to have an input into training materials and by providing case studies or online video presentations.<sup>12</sup> The PSNI should also consider whether trainers are given sufficient opportunity to develop their own expertise by attending conferences and building relationships with local experts.

While a formal recommendation is not made at this stage, the Committee will keep training under review in 2016 and consider whether a formal recommendation is required.

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<sup>11</sup> This is also reflected in academic research such as Castillo-Merino D and Lopez ES (2014), Computers in Human Behaviour.

<sup>12</sup> Consultation and engagement are crucial to understanding the issues but also to fulfilling obligations contained within international treaties and instruments. See for example article 4(3) of the UNCRPD and article 12 of the UNCRC.

## District training<sup>13</sup>

Training lessons delivered, or to be delivered, within the various Districts during 2015/2016 include youth engagement, missing persons, terrorism powers, child protection, Applied Suicide Intervention Skills Training (ASIST), family liaison, human trafficking, hate crime, digital interviews and Automatic Number Plate Recognition. However, those lessons have not been and will not be delivered in all Districts as training schedules vary from District to District. Previously, District training was determined by District Commanders according to an assessment of District priorities. Since 1 April 2015, responsibility for determining the delivery of training within District has been assumed by Local Policing Area Commanders. If training is considered to be essential for all Districts it is directed by PSNI Headquarters. During 2015/2016, it was intended that those courses to be directed centrally would include review of public administration information and awareness and criminal justice 'case files'.

The Committee noted the recent report of Northern Ireland's Chief Inspector of Criminal Justice which called for greater collaboration between the PSNI and the Public Prosecution Service for Northern Ireland (PPS), to address significant failings in the preparation of case files and the standards applied around disclosure.<sup>14</sup> It was recommended that the PSNI and PPS should immediately establish a Joint Prosecution Team to address poor practice and deliver change. The report stated "This inspection found one third of case files were either of an unsatisfactory or poor standard. We recommend a Prosecution Team, made up of representatives from both organisations, should deal with issues such as investigative standards, bail management and forensic strategy, case management and disclosure".

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<sup>13</sup> District training is now referred to as Area Training but remained District Training for much of the reporting period.

<sup>14</sup> The Criminal Justice Inspection Northern Ireland (CJINI) recently completed an inspection of police case file preparation: *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland*, CJINI, 26 November 2015.

In response to the report of the CJINI, the case files lesson referred to above has been suspended pending the completion of the special joint project. That joint project is a root and branch review of case file preparation, the purpose of which is to identify failings and ensure excellence in the future preparation of case files. In particular, the project will develop PSNI/PPS agreed standards of file quality which will include measures to address timeliness. The Policing Board's Human Rights Advisor has received a comprehensive briefing from those leading the special project and was impressed at the careful and honest assessment of case file preparation. She was reassured that the project can, if permitted to develop fully, address all of the issues.

It is important that the project continues and has resources dedicated to it. To build upon the recommendation of the CJINI the Committee suggests that while training should be addressed as part of the joint project, an assessment of PSNI training cannot be neglected in the interim.

## **Recommendation 2**

**The PSNI should complete its Working Together project on case file preparation and implement the recommendations and findings contained within the Criminal Justice Inspection Northern Ireland Report<sup>15</sup> within 9 months of the publication of this Human Rights Annual Report. Thereafter, the PSNI should provide to the Performance Committee a written briefing on the outcomes of the project and on the steps taken or to be taken. That written briefing should be provided within 12 months of the publication of this Human Rights Annual Report.**

The majority of District training is developed and delivered by PSNI trainers. The Board's Human Rights Advisor has attended numerous training sessions and has been impressed at the experience and skill of the trainers and their ability to incorporate key human rights principles into their lessons. The trainers are in regular contact with each other to discuss their work and share lessons and ideas. In order to formally encourage the sharing of 'best

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<sup>15</sup> *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland, CJINI, 26 November 2015*

practice' and recognise training achievements, district trainers attend a presentation day every year which is organised by PSNI Police College with input from the Police Learning Advisory Council (PLAC) District Training Sub Group. As part of the presentation, trainers from each District provide a presentation on specific training initiatives delivered which had a positive impact on operational policing. Each presentation is then followed by questions from members of an external oversight panel. In 2014/2015, the panel was comprised of representatives from PLAC and the Policing Board's Human Rights Advisor.

Last year's Human Rights Annual Report recorded the success of the day and some excellent examples of training. The Committee appreciated that the presentation day was an important opportunity for PSNI trainers to share information and thereby improve training across the PSNI. The presentation day also identified gaps in training within some districts and helped to inform training priorities for the PSNI. The Committee therefore recommended that the PSNI should continue to participate in an annual District Training Presentation Day and that it should be attended by senior police personnel with responsibility for setting strategic priorities and for ensuring the delivery of effective training across the PSNI<sup>16</sup>

The PSNI accepted that recommendation. The presentation was held on 10 March 2016. Various senior police personnel attended as did officers and staff with lead roles in relevant training areas. The Policing Board's Human Rights Assistant attended on behalf of the Human Rights Advisor. Recommendation 1 of the Human Rights Annual Report 2014 has therefore been implemented. The PSNI is undertaking a review of the PLAC and when complete should report to the Performance Committee.

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<sup>16</sup> Recommendation 1 of the Human Rights Annual Report 2014, Northern Ireland Policing Board, February 2015.

### **3. POLICY**

PSNI policy governs the conduct of police officers and police staff and sets out the framework within which decisions may be made. It contains guidance on legislation and police powers and duties. It provides the measure by which police practice can be monitored and assessed. Policies must inform how, and dictate that, decision-making and practice comply with the Human Rights Act 1998, interpretation of which is informed by other relevant international treaties and instruments. If policy is itself human rights compliant it is much more likely that police training, decision-making and practice will be human rights compliant. In other words, good policy is the first (and most basic) step to ensure that human rights standards are applied in practice.

#### **Publication of police policies**

PSNI policy is primarily contained within Policy Directives and Service Procedures. Policy Directives contain overarching policies. Service Procedures are subsidiary documents that expand upon the principles and standards laid out in Policy Directives and provide clear instructions and guidance on particular aspects of the implementation of the policy. These documents are available to all police officers and staff through Policenet (the police intranet). When a new Policy Directive or Service Procedure is issued or an existing Directive or Procedure is revised, a message appears on the log-in screen to advise users of the latest addition to, or revision of, the policy library. The Policing Board's Human Rights Advisor has remote access to Policenet and can view directly all PSNI policy and guidance. That continued access is important and welcomed by the Committee. It is not, however, a substitute for providing access, where suitable, to the public who might be subject to the PSNI's use of its powers.



All police services across the United Kingdom are expected to publish their written policies, protocols and procedures.<sup>17</sup> It is accepted that some documents should not be published, if publication is likely to impact adversely upon operational activity or if the information is classified. However even if a policy document contains classified information, which cannot be published, a summary of the policy with the restricted information redacted from it can, and should, be published. These documents should be published in formats that enable persons with disabilities equal access to the information.<sup>18</sup>

In the Policing Board's Human Rights Annual Report 2012, it was recorded that the PSNI had removed all Policy Directives and Service Procedures from its public website thereby depriving the public of access to those documents. The PSNI explained that removal of the policies was intended to be a temporary measure pending the conclusion of its review and streamlining of policy. The Committee did not accept that such review merited the complete removal of all policy. It certainly did not justify the absence of new policies from the public domain for which the review was complete. It was therefore recommended that PSNI should publish forthwith, on its publicly accessible website, those policies that had been finalised.<sup>19</sup> That recommendation was recorded as not having been discharged in the Human Rights Annual Report 2013.

In 2014, PSNI reinstated that section of its website through which Policy Directives and Service Procedures can be viewed by the public.<sup>20</sup> Since then, a policy manager has been overseeing and coordinating the publication of police policy. In the Human Rights Annual Report 2014 it was recorded that all finalised Policy Directives and Service Procedures that could be published,

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<sup>17</sup> The Information Commissioner's Office has produced guidance for police services on the types of information that they should publish: [http://www.ico.org.uk/for\\_organisations/guide\\_freedom\\_of\\_information/publication\\_scHEME/definition\\_documents/](http://www.ico.org.uk/for_organisations/guide_freedom_of_information/publication_scHEME/definition_documents/)

<sup>18</sup> As required by for example the UNCRPD, articles 2, 9 and 21 and PSNI Equality, Diversity and Good relations Strategy 2012-2017.

<sup>19</sup> Recommendation 3 of the Human Rights Annual Report 2012, Northern Ireland Policing Board, February 2013.

<sup>20</sup> This can be found through the PSNI website [www.psni.police.uk](http://www.psni.police.uk) under About Us - Freedom of Information – Publications by Category – Policies and Service Procedures.

had been published therefore Recommendation 3 of the 2012 Annual Report was discharged. However, it was also recorded that there was a backlog of Policy Directives and Service Procedures that were pending review and which had not been made available to the public. At that stage there were 21 ‘active’ (in force) Policy Directives available to officers and staff through Policenet but only 2 had been made available to the public on the PSNI website.<sup>21</sup> There were 89 ‘active’ Service Procedures available to officers and staff through Policenet but only 13 had been published on the PSNI website.<sup>22</sup>

The Committee expressed its dissatisfaction with progress and recommended that the PSNI should publish all Policy Directives and Service Procedures that were ‘active’ (i.e. in force) on its website subject to redaction of classified information. Furthermore, it recommended that if any Policy Directive or Service Procedure was undergoing a review, that should be noted, but the document should not be removed from the website until such time as it had been cancelled or an updated version issued. The PSNI was required to provide the Performance Committee with a progress report in relation to the implementation of that recommendation within three months of the publication of the Human Rights Annual Report 2014.<sup>23</sup>

The PSNI accepted that recommendation and reported to the Performance Committee, in September 2015, that it was reviewing and realigning all of its policies with the Authorised Professional Practice (APP) issued by the College of Policing.<sup>24</sup> APP is authorised by the College of Policing as “an official source of professional police practice which sets out standards and a policy framework across a range of disciplines”.<sup>25</sup> The PSNI reported that “Police officers and staff are expected to have regard to APP in discharging their duties”. The PSNI also reported to the Committee that it was undertaking a review of its policy with one of its objectives being to align APP with PSNI Policy Directives and Service Procedures.

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<sup>21</sup> As at 5 November 2014.

<sup>22</sup> As at 5 November 2014.

<sup>23</sup> Recommendation 2 of the Human Rights Annual Report 2014.

<sup>24</sup> The College of Policing is a professional membership body for police services in England and Wales.

<sup>25</sup> As per College of Policing Website.

While some progress has been made, with 5 Policy Directives and 24 Service Procedures published on the PSNI website, the majority of Policy Directives and Service Procedures have still not been published.<sup>26</sup> It seems to the Committee that this new reason for delay in the publication of Policy Directives and Service Procedures also fails to address the substance of the Committee's previous criticism and the logic of its recommendation. Even if a policy is under review, for so long as it remains in force it represents the policy of the PSNI and should be published. The Committee is increasingly frustrated at the PSNI's failure to make progress and does not accept the review of policy as a proper reason to withhold publication of current policy. Recommendation 2 of the Human Rights Annual Report 2014 therefore has not been implemented. That recommendation should now be implemented immediately. As reported in various sections of this Human Rights Annual Report, for police action to be human rights compliant it must amongst other things have a lawful basis which includes a requirement that it is sufficiently accessible and foreseeable by those against whom the police may act.<sup>27</sup>

The Committee also notes that the College of Policing, while a respected professional body, does not purport to direct its policy initiatives and practice guidance to Northern Ireland: it was established to "set standards in professional development, including codes of practice and regulations, to ensure consistency across the 43 forces in England and Wales". While the Committee does not wish to discourage the PSNI from capturing learning and best practice from elsewhere, the PSNI has developed its own policies and procedures over many years with a human rights focus not necessarily shared by other services in England and Wales. The Committee is concerned to ensure that the PSNI does not abandon its bespoke approach in favour of one developed for a different policing environment. This will be explored further during 2016.

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<sup>26</sup> There are 21 active Policy Directives and 90 Service Procedures available to PSNI.

<sup>27</sup> The public who may be subject to police policy are entitled to know and understand what that policy is.

## **POLICY DEVELOPMENTS**

The Committee keeps itself informed of developments in the criminal justice system and, where appropriate, responds to consultations on issues that fall within the Policing Board's statutory remit of securing an efficient and effective Police Service that complies with the Human Rights Act 1998. A summary of some of the developments considered by the Committee during 2015 is set out below.

### **Justice Act (Northern Ireland) 2015**

The Justice Bill was introduced to the Northern Ireland Assembly on 16 June 2014, received Royal Assent on 25 July 2015 and came into force (in part) on 26 July 2015.<sup>28</sup> The stated intention of the Act was, broadly, to improve services for victims and witnesses, to speed up the justice system, and to improve the efficiency and effectiveness of key aspects of the system. For example, services and facilities for victims and witnesses were to be improved by creating new statutory Victim and Witness Charters, by the introduction of a legal entitlement to be afforded the opportunity to make a victim statement (to be known as a 'victim personal statement'), and by extending the power to use video links between courts and a number of new locations. In respect of delay, the Act is intended to speed up the justice system by amongst other things introducing prosecutorial fines to reduce the number of cases proceeding to court unnecessarily, making new arrangements to encourage guilty pleas and new case management powers and responsibilities being given to Judges. Committal proceedings<sup>29</sup> are to be streamlined and prosecutors are to be given the ability to issue summonses directly without having to get them signed off by a lay magistrate. The Act also introduced a

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<sup>28</sup> Various sections will come into force on a date to be appointed: section 106 of the Act.

<sup>29</sup> Committal is a procedure used to determine whether there is sufficient evidence to justify putting a person on trial in the Crown Court. Proceedings can be in the form of oral evidence, where witnesses can be cross-examined, or as a paper exercise, carried out based on written statements and evidence. The practice of hearing oral evidence, particularly cross-examination, can have a significant impact on victims and witnesses, who may have to give (sometimes traumatic) evidence more than once.

range of new civil orders, known as Violent Offences Prevention Orders, to manage the risks posed by violent offenders.

The Committee submitted a comprehensive response to the consultation during the passage of the Bill, which was reported on in the Human Rights Annual Report 2014. The Act has also provided for, but not yet brought into force, new powers for the police to issue Domestic Violence Protection Notices and the courts to make Domestic Violence Protection Orders. The Committee has remained concerned about the incidence of domestic violence and abuse within Northern Ireland and the disappointing outcomes for victims. The availability of DVPNs and DVPOs may have a positive impact on the PSNI's ability to respond more effectively to victims of domestic violence therefore the Committee has given close consideration to the measures, which are set out in some detail below.

### ***Domestic Violence Protection Notices and Orders***

Schedule 7 to the Justice Act (Northern Ireland) 2015 makes provision for Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs). It provides that a police officer not below the rank of Superintendent may issue a DVPN to any person over the age of 18 years if the authorising officer has reasonable grounds for believing that he or she has been violent towards or has threatened violence towards an associated person,<sup>30</sup> and the issue of the DVPN is necessary to protect that person from violence or a threat of violence by him or her. Before issuing a DVPN, the officer must, in particular, consider the welfare of any person under the age of 18 years whose interests the officer considers relevant to the issue of the

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<sup>30</sup> By article 3 of the Family Homes and Domestic Violence (NI) Order 1998, a person is associated with another person if (a) they are or have been married to each other; (b) they are cohabitants or former cohabitants; (c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder; (d) they are relatives; (e) they have agreed to marry one another (whether or not that agreement has been terminated); (f) in relation to any child, they are both persons falling within paragraph (a) to (e) or (g) they are parties to the same family proceedings. A person falls within this definition in relation to a child if (a) he or she is a parent of the child; or (b) he or she has or has had parental responsibility for the child.

DVPN (whether or not that person is an associated person). The officer must also use his or her best endeavours to ascertain and thereafter consider the opinion of the person for whose protection the DVPN is to be issued and any representations made by the alleged perpetrator as to the issuing of the DVPN. If the alleged perpetrator lives in premises shared by the person for whose protection the DVPN is to be issued, the officer must also consider the opinion of any other associated person who lives in those premises.

Importantly, the officer may issue a DVPN even if the person for whose protection it is issued does not consent to its issue. In other words, the officer must exercise independent judgment and not place the onus on the victim to consent to the issue of a DVPN.<sup>31</sup> If an officer considers that a DVPN should be issued, the DVPN must contain a term prohibiting the alleged perpetrator from molesting the person for whose protection it is issued. That may include both the victim and any associated person, such as a child. The DVPN may also contain a term or terms: prohibiting the alleged perpetrator from evicting or excluding from the premises the person for whose protection the DVPN is issued; prohibiting the alleged perpetrator from entering the premises; requiring the alleged perpetrator to leave the premises immediately or within a specified time; and, prohibiting the alleged perpetrator from coming within a certain area around the premises.

The DVPN must state: the grounds on which it has been issued; that a constable may arrest the alleged perpetrator without warrant if the constable has reasonable grounds for believing that the alleged perpetrator is in breach of the DVPN; that an application for a Domestic Violence Protection Order (DVPO) will be heard within 48 hours of service of the DVPN and that a notice of the hearing will be given to the alleged perpetrator; that the DVPN continues in effect until that application has been determined; and, the term or terms that a court of summary jurisdiction may include in a DVPO. A DVPN may therefore remain in place for 48 hours before the matter is heard by a

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<sup>31</sup> So-called 'victimless prosecutions' have been found to be effective in combating domestic abuse.

court which means that the DVPN can be of immediate effect but must be confirmed by a court no later than 48 hours.

A DVPN must be in writing and must be served on the alleged perpetrator personally and on serving the alleged perpetrator the constable must ask him or her for an address for the purposes of being given the notice of the hearing of the application for the DVPO. A person may be arrested for breach of a DVPN. If a person is arrested for breach of the DVPN he or she must be held in custody before being brought before a court to hear an application for a DVPO. The court must hear the application within 24 hours of arrest. If the application is not dealt with within that period the court has power to remand the alleged perpetrator.

If a DVPN has been issued (and the alleged perpetrator was not arrested for breach of it) the application for a DVPO must be heard within 48 hours of service of the DVPN. A constable who has issued a notice must apply for a DVPO. In other words, the constable may not simply decide not to proceed after issue of the DVPN. Notice of the hearing must be given to the alleged perpetrator but it does not require personal service (unlike a DVPN); it may be served by leaving it at the address given by the alleged perpetrator when he or she was issued with the DVPN. However, if the alleged perpetrator did not provide an address and the court is satisfied that the constable made reasonable efforts to give the alleged perpetrator notice of the hearing the court may proceed in the absence of the alleged perpetrator. Once the DVPN has been issued and so long as an application has been brought before a court within the relevant time, if the hearing adjourns for any reasons the DVPN will remain in force until the court has determined the application.

At the court hearing of the application the power to issue a summons to appear and to issue a warrant for failure to appear to give evidence does not

apply to the person for whose protection the DVPO would be made, except where the person has already given oral or written evidence at the hearing.<sup>32</sup>

The court may make a DVPO if the court is satisfied on the balance of probabilities that the alleged perpetrator has been violent towards, or has threatened violence towards, an associated person<sup>33</sup> and that making the DVPO is necessary to protect that person from violence or a threat of violence by the perpetrator. Before making a DVPO, the court must, in particular, consider the welfare of any person under the age of 18 whose interests the court considers relevant to the making of the DVPO (whether or not that person is an associated person) and any opinion of which the court is made aware of the person for whose protection the DVPO would be made, and in the case of any term included in respect of the premises, of any other associated person who lives in the premises to which the term would relate.

As with a DVPN, the court may make a DVPO even if the person for whose protection it is made does not consent to the making of the DVPO. If a court is satisfied that a DVPO should be made it *must* prohibit the perpetrator from molesting the person for whose protection it is made and the court *may* include a term prohibiting the perpetrator from evicting or excluding from the premises the person for whose protection the DVPO is made, prohibiting the perpetrator from entering the premises, requiring the perpetrator to leave the premises, or prohibiting the perpetrator from coming within such distance of the premises as may be specified. A constable may arrest a person without warrant if the constable has reasonable grounds for believing that he or she is in breach of the DVPO. A DVPO may remain in force for no less than 14 days but no more than 28 days beginning with the day on which it is made.

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<sup>32</sup> Article 118 of the Magistrates Courts (NI) Order 1981 enables a court (unless hearing a criminal case) to summon and thereafter to issue a warrant to arrest a person who is able to give material evidence or produce a document or other thing.

<sup>33</sup> An associated person is any person who is associated with the perpetrator. They are associated if they are or have been married to each other; they are cohabitants or former cohabitants; they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder; they are relatives; they have agreed to marry one another (whether or not that agreement has been terminated); in relation to any child, they are both parents of the child or have parental responsibility for the child; or, they are parties to the same family proceedings. Article 3 of the Family Homes and Domestic Violence (NI) Order 1998.



A person arrested for breach of a DVPO must be held in custody and brought before a court of summary jurisdiction within 24 hours of arrest. If the court finds that the person has breached the DVPO, the court may impose a fine on that person<sup>34</sup> or commit the person to prison for a fixed period not exceeding two months. If the hearing is adjourned the court has power to remand the perpetrator in custody or on bail. If the perpetrator is over the age of 21 years the power to remand in custody includes power, on an application made by a police officer not below the rank of Inspector, to commit that person (for up to 3 days) to detention at a police station or the custody (otherwise than at a police station) of a constable. A person may not be committed to detention at a police station unless there is a need for the person to be so detained for the purposes of inquiries into a criminal offence and as soon as that need ceases, the perpetrator must be brought back before the court.<sup>35</sup>

If the court has reason to suspect that a medical report will be required, the power to remand a person may be exercised for the purpose of enabling a medical examination to take place and a report to be made; and if the person is remanded in custody for that purpose, the remand may not be for more than 21 days. If the court has reason to suspect that the person is suffering from mental illness or severe mental impairment it may remand that person to hospital for medical report. If remanding the person on bail, the court may require the person to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that the person does not interfere with persons likely to give evidence at the hearing or otherwise obstruct the course of justice.

The Department of Justice (DOJ) may issue guidance relating to the exercise by a constable of the functions outlined. Before issuing guidance the Department must consult the Chief Constable, the Policing Board and such other persons as the Department thinks fit. The DOJ may, by order, provide

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<sup>34</sup> Not exceeding £5000.

<sup>35</sup> Articles 40 and 41 of the Police and Criminal Evidence (NI) Order 1989 (treatment and reviews etc.) applies to police detainees.

for any provision in respect of DVPNs or DVPOs to be implemented by way of a pilot.

Power for the police to issue DVPNs and courts to make DVPOs has been in operation in England and Wales and has been subject to post-implementation analysis. Prior to the roll out of the powers, the use of DVPNs and DVPOs was trialled in three police areas.<sup>36</sup> The findings of the quantitative elements of the evaluation in England and Wales suggest that DVPOs were effective in reducing domestic violence and abuse. However, the research was unable to rule out the possibility that factors other than DVPOs were responsible for the reduction. Overall, DVPOs were associated with reduced rates of re-victimisation, measured by police call-outs, compared to similar cases dealt with by arrest followed by 'no further action' (NFA): on average, 2.6 fewer repeat incidents of domestic violence per victim-survivor compared to around 1.6 fewer incidents, respectively.

DVPOs were therefore associated with an additional reduction of one incident of domestic violence per victim/survivor, compared to arrest followed by NFA. DVPOs appeared to be most effective in reducing re-victimisation when used in more 'chronic' cases.<sup>37</sup> In those cases, there was an additional reduction of 2.2 repeat incidents of domestic violence per victim/survivor compared to arrest followed by NFA. The analysis did not however look at the severity of incidents or the longer term effects on re-victimisation. It was also reported that the experiences of those involved in the pilot increased the confidence of the researchers in the positive impact of DVPOs.

Given the potential benefits of DVPNs and DVPOs the Committee wrote to the DOJ to urge commencement of the relevant provisions in the Justice Act. It is understood that all relevant partners are considering the issues to ensure that when the powers become operational they are effective and applied

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<sup>36</sup> Between 1 June 2011 and 30 July 2012 in West Mercia, Wiltshire and Greater Manchester. The trial was reviewed in *An evaluation of the Pilot of Domestic Violence Protection Orders Research Report 76*, November 2013.

<sup>37</sup> Chronic cases are those in which there have been 3 or more previous police attendances for domestic violence.

appropriately. Before the powers become operational it is essential that guidance and training is developed for PSNI officers on the application of the powers. There are a number of human rights considerations which apply to the victim, the alleged perpetrator (in the case of a DVPN), the perpetrator (in the case of a DVPO) and any children in the family. In the event that the powers do become operational the Committee wishes to receive a briefing from and be consulted by the PSNI on the policy, guidance and training that is intended to be put in place.

### **Recommendation 3**

**In the likely event that the PSNI will obtain the power to issue Domestic Violence Protection Notices and apply for Domestic Violence Protection Orders within the next 12 months it should provide to the Committee its draft written policy and guidance on the use of the powers and the proposed training plan for officers. In any event, training must be delivered prior to the introduction of the powers.**

### **Mental Capacity Bill**

In May 2014, there was issued for consultation the civil provisions of a draft Mental Capacity Bill. The Department of Justice (DOJ) took the opportunity to consult further on its proposal for extending the Bill to the criminal justice system to provide that a person aged 16 years or above has capacity to refuse an intervention in relation to his or her care, treatment, or personal welfare. Any such decision would have to be respected by all relevant criminal justice organisations. If extended to the criminal justice system, the effect of the proposals on the PSNI will be that while any person aged 16 or over is in the custody of police, proposed interventions in relation to that person's health care (physical or mental) or personal welfare will be governed by a capacity based approach and a statutory framework. If the person *has capacity* to refuse an intervention in relation to his or her care, treatment, or personal welfare, that decision must be respected. Interventions in relation to persons *lacking* capacity will be made in accordance with the Bill's procedures, principles and requirements and will attract various safeguards contained in

the Bill. The principle of capacity to consent to treatment does not extend to the decision to be detained in custody; detention may be imposed regardless of capacity.

The DOJ proposes to retain the existing power exercisable by police officers to remove a person (of any age) from a public place to a 'place of safety' in appropriate circumstances. The current definition of a place of safety, which includes hospitals and police stations, is to be preserved with a provision stating that a police station should only be used if no other suitable place is available.

The Performance Committee responded to the DHSSPS/DOJ consultation. In particular, it stressed the importance of sufficient resources being made available so that police officers and custody receive adequate support and advice from healthcare practitioners when making decisions regarding capacity. Furthermore, it warned against placing any requirement on police officers or custody staff to conduct a complex assessment of capacity. The Committee raised the issue of the suitability of police stations as 'places of safety'. That is particularly pertinent given the conclusion of a 2010 inspection concerning mental health and the criminal justice system by the Criminal Justice Inspection Northern Ireland (CJINI). CJINI found that PSNI was "struggling to deal with mentally disordered persons, with often inadequate support from the Health Service. On occasion it finds hospitals uncooperative and having to return people into the community with every expectation that they will be back into the criminal justice system within a short time".<sup>38</sup> The Committee is unable at this stage to reach any conclusion on the suitability of police stations as places of safety given the findings of the CJINI in particular the difficulty in accessing support from hospitals but it will consider this further in the coming months.

In its response to the DHSSPS/DOJ consultation the Committee encouraged further consideration of the issues by both departments. For example, the

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<sup>38</sup> *Not a Marginal Issue – Mental Health and the Criminal Justice System* Criminal Justice Inspection Northern Ireland, March 2010, page viii.

Committee suggested that an analysis should be undertaken of a recent development in England where assessment suites, based in NHS mental health units, are designated places of safety for vulnerable adults detained by the police. Post implementation assessments of the use of such units in Nottingham and Bolton appear to demonstrate that assessments are carried out with greater expedition, are less intimidating for the detainee and reduce the incidence of the use of restraint such as handcuffs.<sup>39</sup>

The DHSSPS civil provisions of the Mental Capacity Bill do not include children below the age of 16 years. The DOJ has acknowledged certain challenges that would be presented should the age limitations of the Bill be applied to the criminal justice system. For example, while the age of criminal responsibility is 10, the Youth Court can deal with young people up to the age of 17 and the Juvenile Justice Centre has a population that spans above and below the age of 16. However, the DOJ agrees with the strategic approach being adopted by the DHSSPS and its position would appear to be that the capacity based framework for interventions by the criminal justice system in relation to care/treatment/personal welfare will only apply when dealing with persons aged 16 years and over. The Committee expressed its concern that the statutory safeguards to be afforded to persons aged 16 or over would not be afforded to those under the age of 16. The Committee was also concerned that the legislative landscape would become unnecessarily complex for operational officers working with a range of often competing legislative provisions.

An Ad Hoc Joint Committee was subsequently set up to consider the issues further however the DHSSPS/DOJ confirmed that the Bill will extend to the criminal justice system and will not apply to persons under the age of 16. The Performance Committee, in July 2015, therefore made a further written submission to the Joint Committee expressing its continued concern and recommending that police officers and custody staff should receive sufficient support and advice from healthcare professionals when making decisions

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<sup>39</sup> See for example the report of the Care Quality Commission, 22 October 2014.

regarding capacity and the confusing legislative landscape particularly where it is unclear if a person is over or under the age of 16 years. The Performance Committee urged the Joint Committee to consider a specific statutory obligation upon the DOJ to issue a code of practice to criminal justice organisations.

The Performance Committee also repeated its concern at the definition of place of safety contained in the Bill, which will apply to any person regardless of age. A place of safety means (a) any hospital whose managing authority is willing temporarily to receive any person who may be taken there by a police officer; or (b) any police station. The Bill deals with the power to detain in hospitals and police stations. In respect of detention, the DOJ indicated that a police station would be retained in the legislation as a place of safety but only if no other suitable place was available. The Committee believes that a police station should never be used to detain a mentally ill child and should only be used to detain a mentally ill adult if their behaviour cannot be managed elsewhere. That is mirrored by the recommendations in a UK Government report on the operations of the provisions in England and Wales.<sup>40</sup> Importantly, the Bill does not impose upon hospitals any obligation to accept a person brought to them by the PSNI as a place of safety, which the Committee believes would be helpful. In England, there have been some developments in this area. For example, police services recognise that police cells are not appropriate for use as places of safety; street triage has been piloted in a number of police areas (which resulted in a significant reduction in the use of police cells as places of safety and a hospital based assessment suite designated as a place of safety). The Committee suggests that a similar approach should be considered for Northern Ireland.

An important provision in the Bill is the requirement for the PSNI to compile annually and retain records of the numbers of persons detained in police stations and in hospitals. The Committee welcomes that provision which will enable the use of the powers to be kept under review.

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<sup>40</sup> *Review of the Operation of Sections 135 and 136 the Mental Health Act 1983*, Department of Health and the Home Office, 18 December 2014.

Police officers are often the first point of contact for vulnerable mentally ill people who are in crisis but who have committed no criminal offence. They try very hard to provide the care that is needed but if they are to be expected to respond to those persons and care for them while in their custody they must receive sufficient training, support and resources to enable them to discharge their legal obligations and to treat those persons with respect and compassion. They rely heavily on co-operation from mental health professionals and that co-operation should be available whenever it is requested. Ultimately, the Committee wishes to see alternative health-based places of safety so that police cells are never used for detaining mentally ill persons, of any age.

### **Test purchasing of alcohol**

By article 67 of the Criminal Justice (Northern Ireland) Order 2008, a police officer has the power to identify and test the unlawful sale of alcohol to person under the age of 18 by using them to purchase alcohol from licensed premises. Specifically, it permits a person under the age of 18 years to enter licensed premises to seek to purchase alcohol under the direction of a police officer acting in the course of his or her duty. PSNI announced, in November 2011, that it was preparing to roll out the use of the test-purchasing power across Northern Ireland. However, following intervention by a number of stakeholders, the PSNI suspended the roll-out of test purchasing powers to enable a consultation exercise to be undertaken. The PSNI subsequently carried out an equality impact screening on the procedure for exercising test purchasing powers and issued, in November 2012, a draft Equality Impact Assessment (EQIA) report for consideration. The PSNI indicated that in its considered view the test purchasing procedure was sufficiently robust. The PSNI believes the procedure and its safeguards will protect the children who participate in the scheme while also protecting children in wider society by reducing the ready availability of alcohol to those who are under age.<sup>41</sup>

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<sup>41</sup> *Alcohol Test Purchasing Procedures Draft EQIA Final Decision Report*, PSNI, June 2013.

The proposal to use test purchasing powers is criticised by some stakeholders representing the interests of children. To respond to those criticisms PSNI organised a number of meetings during 2014 with representatives from the children's sector, the trade sector and the Policing Board. PSNI has reiterated that its aim is to reduce the harm caused to children through consuming alcohol and to make those involved in the sale of alcohol to children accountable. Within each policing Area there is a range of initiatives including for example the targeting of 'hotspots', visiting off licences in the run up to holiday periods to remind them of their responsibilities and engaging with schools and youth groups to educate young people about the dangers and consequences of consuming alcohol. The PSNI has advised that the test purchasing powers will only be exercised if there is an identified risk to young people and other tactics have been tried and failed. Authorisation to use the powers will be given by an Assistant Chief Constable. The PSNI has also confirmed that it will carry out a post-incident review of the use of the power. The Performance Committee has stressed that the welfare and safety of those children who volunteer to assist with the scheme should be the paramount consideration. PSNI agrees and has provided an assurance to the Committee that the safety and welfare of the young people involved in the scheme is of paramount importance to the PSNI and that the success of any test purchase of alcohol operation will always be secondary to that. That principle is enshrined in the PSNI Manual for Test Purchasing.

The safeguards that have been built into the procedure for the exercise of the powers include, for example, a requirement that a young person may only be involved with the informed consent of the young person and his or her parent, guardian or carer.<sup>42</sup> In addition, the PSNI will consider each application to participate separately and will contact the young person and his or her parent, guardian or carer. A home visit will be undertaken and there will be an assessment of the young person's health and suitability through his or her doctor. Finally, at the conclusion of the home visit, the plain clothes officer

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<sup>42</sup> Young people must apply to participate and will not be approached by PSNI and asked to participate.



must inform the child volunteer and his or her parent, guardian or carer that all eligible applicants will be included in a pool of persons who may be asked to assist in test purchase of alcohol operations. They will also be informed that there is no guarantee that the PSNI will call upon them to assist. The police will carry out a follow-up visit within two weeks of the operation. The young person can stop the operation at any time and will always be accompanied by a police officer in plain clothes who is of the same gender. If evidence obtained by the use of that young person is to be relied upon in any court proceedings, the police officer involved in the operation will give the evidence rather than the young person. The PSNI recognises and accepts, but the Committee wishes to re-emphasise, that the anonymity of the young person and his or her family must be protected and a young person must not participate in any locality where he or she is likely to be recognised. The powers may only be used if an officer of at least the rank of Assistant Chief Constable has considered and authorised the proposed use.

In the Human Rights Annual Report 2013, it was recommended that in the event that PSNI reintroduced a test purchase of alcohol scheme it should notify the Performance Committee of that decision and, in advance of the reintroduction of the scheme, provide to the Committee a detailed briefing on the operation of the scheme with a particular emphasis on those measures intended to protect the welfare and safety of children.<sup>43</sup> PSNI accepted that recommendation and briefed the Committee, on 15 January 2015, on the safeguards built in to the scheme. During the briefing, the Committee expressed its concerns about a number of issues, in particular the welfare and rights of the children involved and the resource implications of the use of the powers. The Committee emphasised the importance of considering alternative measures available to reduce the harm caused by the illegal sale of alcohol. The Committee has been advised that before any decision is made to authorise a test purchase operation the PSNI will inform the Committee and the Policing Board's Human Rights Advisor.

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<sup>43</sup> Recommendation 4 of the Human Rights Annual Report 2013, Northern Ireland Policing Board, March 2014.

The Committee will monitor any use of the powers closely in the coming months. Furthermore, the PSNI will provide the Policing Board's Human Rights Advisor with statistics on the use of the power together with an after the event analysis of operations. The PSNI will review its test purchasing procedures annually in consultation with the Policing Board and members of the PSNI's Youth Champions' Forum, on which a number of relevant stakeholders are represented. The Committee will be reporting on the operation of the scheme in due course.

### **Retention and destruction of DNA samples, profiles and fingerprints**

The Grand Chamber of the European Court of Human Rights decided, in the case of *S and Marper v UK*,<sup>44</sup> that the blanket policy in England and Wales, which is mirrored in Northern Ireland, of retaining indefinitely the DNA samples, profiles and fingerprints (referred to collectively as 'biometric material') of all people who have been arrested but not convicted of an offence, does not comply with Article 8 ECHR (the right to respect for private and family life). This case and the subsequent implications for the PSNI have been discussed at length in previous Policing Board Human Rights Annual Reports and continued as a matter of concern in 2015.

In response to the *Marper* judgment, the Northern Ireland Assembly introduced a new legislative framework for the retention and destruction of biometric material through the Criminal Justice Act (Northern Ireland) 2013. The new framework was due to come into operation on 31 October 2015, but has been delayed.<sup>45</sup> The Committee is disappointed at the uncertainty caused by the delay given the clear findings of the ECtHR.

By Schedule 2 to the 2013 Act DNA samples, profiles and fingerprints must be destroyed by the police in certain circumstances and may only be retained on the DNA database if certain criteria are satisfied. The new framework will

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<sup>44</sup> *S & Marper v UK* [2008] ECHR 1581.

<sup>45</sup> The provisions of the Criminal Justice Act (Northern Ireland) 2013 that relate to biometric material (i.e. section 9 and schedules 2 and 3) came into force on 31 October 2015 by way of an order made by the Department of Justice.

make some distinction between the seriousness of offences and between adults and children. It provides for the appointment of an independent Commissioner for the Retention and Use of Biometric Material. The new framework will operate retrospectively in that it will apply to all fingerprints, DNA profiles and samples whether retained before or after enactment. Until the Criminal Justice Act is brought into force, the PSNI will continue to retain biometric material.

In the UK Supreme Court case of *Gaughran v the Chief Constable of the Police Service of Northern Ireland*<sup>46</sup> the issue was considered further. The appellant (an adult) was arrested for driving with excess alcohol and pleaded guilty to that offence. He was fined and disqualified from driving for 12 months. A conviction for driving with excess alcohol is spent after five years. When the appellant was arrested, the PSNI obtained from him his fingerprints, a photograph and a non-intimate DNA sample.<sup>47</sup> A DNA profile was taken from the DNA sample.<sup>48</sup> The PSNI confirmed during the course of the appeal that the DNA sample would be destroyed as soon as the Criminal Justice Act came into force therefore the appeal did not concern the retention of the DNA sample.

Mr Gaughran argued that the PSNI's retention of his data breached Article 8 ECHR (the right to a private and family life). The PSNI accepted that there was an interference with the right. It was accepted by Mr Gaughran that the interference was in accordance with law and pursued a legitimate aim under Article 8(2). The issue for consideration by the Supreme Court was whether the interference was proportionate. Their Lordships held that it was. It was emphasised that in *Marper* the ECtHR was concerned only with the position of suspected not convicted persons and that its criticism of the UK's blanket and

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<sup>46</sup> [2015] UKSC 29, judgment of 13 May 2015.

<sup>47</sup> Fingerprints are held on a UK-wide database. Photographs are held on a PSNI database but are shared with the Police National Database.

<sup>48</sup> A DNA profile is digitised information in the form of a numerical sequence representing a very small part of the person's DNA. It indicates a person's gender and provides a means of identification. A DNA profile is held on a Forensic Science Northern Ireland database but shared with the National DNA Database.

indiscriminate data retention policy should be read with that in mind.<sup>49</sup> The ECtHR observed that it did not follow that the practice in Northern Ireland and the UK (in relation to convicted persons) was automatically compliant with Article 8 and the policy as it applied to convicted persons could be described as a blanket policy. However, it held that the policy was in fact proportionate. The ECtHR accepted the importance of the use of DNA material in the solving of crime and that the degree of interference in question is low.<sup>50</sup> Their Lordships observed that the present scheme is concerned only with the retention of the DNA profile and applies only to adults, whereas the scheme criticised by the ECtHR in *Marper* provided for the retention of the full sample and did not distinguish between children and adults.<sup>51</sup>

Factors such as the threshold of offence, whether retention is permitted once a conviction has been spent and whether retention is permitted indefinitely or is subject to a time limit are potentially relevant but not decisive in the proportionality analysis.<sup>52</sup> The potential benefit to the public of retaining the DNA profiles of those who are convicted is considerable and outweighs the interference with the right of the individual.<sup>53</sup> The retention may even benefit the individual by establishing that they did not commit an offence.<sup>54</sup> In *Marper* the ECtHR placed some reliance on the fact that the UK was almost alone among ECHR member states in indefinitely retaining biometric data of non-convicted persons. In the case of convicted persons there is a much broader range of approaches, which broadens the margin of appreciation accorded to individual states.<sup>55</sup> Their Lordships held that adopting a blanket measure is legitimate in some circumstances and it was legitimate in these circumstances.<sup>56</sup>

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<sup>49</sup> *Gaughran v Chief Constable PSNI* [2015] UKSC 29, paragraphs 30-32.

<sup>50</sup> *Gaughran* *ibid* paragraph 33.

<sup>51</sup> *ibid* paragraph 35.

<sup>52</sup> *ibid* paragraphs 34, 36-39.

<sup>53</sup> *ibid* paragraph 40.

<sup>54</sup> *ibid* paragraph 41.

<sup>55</sup> *ibid* paragraph 42-44.

<sup>56</sup> *ibid* paragraph 45.

The Policing Board's Human Rights Advisor is invited to attend, as an observer, the Northern Ireland DNA Database Governance Board. The Governance Board, which was established in 2011, comprises representatives from the Department of Justice, the PSNI, the Public Prosecution Service, Forensic Science Northern Ireland, the Information Commissioner's Office, Queen's University Belfast and the Ulster University. The Governance Board keeps under review the arrangements for the control, management and operation of the Northern Ireland DNA database and it will continue to assess the performance of the database once the new biometrics legislative framework comes into effect.<sup>57</sup>

The Policing Board's Human Rights Advisor is also invited to attend, as an observer, a number of meetings of the PSNI Biometric Retention/Disposal Ratification Committee. That Committee represents the final stage of the retention/disposal process. In other words, it sits to decide whether an instruction will be given to destroy biometric materials. That Committee assesses, in an individual application for removal, whether the criteria have been satisfied for retention. The Committee will be required to apply the new criteria to each individual application once the legislation is in force. The PSNI will continue to invite the Policing Board's Human Rights Advisor to attend and observe the meetings.

In June 2015, the Department of Justice (DOJ) launched a consultation on access to and use of DNA and fingerprints data by the Historical Investigations Unit (HIU).<sup>58</sup> In launching the consultation the Justice Minister said "The Department has been alerted to a potential risk that the planned

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<sup>57</sup> The role of the DNA Database Governance Board is to: (i) Assess arrangements for the control, management and operation of the local DNA database and criminal DNA profiling, assessing compliance with relevant legislation, and that practice and procedures are developed in line with national obligations; (ii) Consider applications for the release of data from the database for use in research. Release of such data will only be authorised after taking advice from the Home Office's National DNA Database Ethics Group; (iii) Assess the performance of the database practices and procedures; (iv) Define and regularly review the level of security and the arrangements for storage and access to samples, and the level of security (physical and technical) required for the data held on the database and by suppliers; and (v) Report annually to the Minister of Justice, and provide responses to questions from Ministers, the Assembly and its Committees, and to media enquiries.

<sup>58</sup> The HIU was proposed in the Stormont House Agreement as an independent mechanism for investigating 'legacy cases'. It is yet to be established.

destruction of material under the Act may lead to investigative opportunities being lost to the Historical Investigation Unit (HIU), when established. It is proposed that, before the deletion process takes place, a copy of the police biometric databases will be taken which will be retained and made available to the HIU for its exclusive use.” He continued, “It engages significant ECHR issues, but I believe it provides a fair and balanced approach to the risk presented.” The DOJ is proposing to make a transitional and saving provision that will give statutory cover, until 1 May 2017, for the retention and use of material that would otherwise be destroyed under Schedule 2 to the Criminal Justice Act (NI) 2013. The intention is to legislate for a longer term provision, in the Stormont House Agreement Bill, to permit the retention and use of the material until the HIU fulfils its future investigative responsibilities. Retention will be limited to persons born on or before 10 April 1982.<sup>59</sup>

The Policing Board responded to the consultation and raised concerns about the necessity and proportionality of the proposal. The Committee is not convinced that the measure is lawful *as per Marper* or *Gaughran* in that no special case has been made out for the use by one investigative agency that would not be lawful for another. The Committee is unconvinced that the measure does, in the words of the Justice Minister, “strike a fair and proportionate balance between the competing demands of the Article 8 right to privacy and the State’s obligations under Article 2 ECHR”. Those competing demands were present in *Marper* but insufficient of themselves to justify the interference.

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<sup>59</sup> In other words, it will apply to those aged 16 years or over when the Good Friday Agreement was signed. In practice, this means that of approximately 33,000 DNA profiles due to be destroyed, copies will be made of approximately 50% of them and of 91,000 fingerprints due to be destroyed copies will be made of approximately 20%.

## 4. OPERATIONS

Monitoring the strategy, planning and execution of operations is critical to any overall assessment of the PSNI's compliance with the Human Rights Act 1998. The majority of police operations raise human rights issues. For example articles 2 (the right to life) and 3 (the right not to be ill-treated) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) are engaged in any operation requiring the use of force. Article 8 (the right to a private and family life) is engaged in operations involving the use of surveillance. Operational effectiveness is also a consideration for the Board when monitoring the PSNI's performance in carrying out its general duties to protect life and property, to preserve order, to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice.<sup>60</sup> The Board must also monitor the extent to which the police have secured the support of the local community when carrying out operations and the extent to which they have acted in co-operation with the local community.<sup>61</sup>

The Chief Constable is responsible for making operational decisions. The Board has no power to direct him on how to conduct an operation. However the Board can, and must, hold the Chief Constable to account for operational decisions of the PSNI after they have been taken. Throughout this Human Rights Annual Report there are examples of operational areas that have been kept under review by the Performance Committee during 2015, such as counter-terrorism operations (this Chapter), public order operations (Chapter 6), the use of force (Chapter 7), covert tactics which may be used during operations (Chapter 8), the use of operational equipment such as Small Unmanned Aircraft (SUA) (Chapter 8), the use of Body Worn Video (this Chapter) and tackling child sexual exploitation (Chapter 9).

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<sup>60</sup> Section 3(3)(b)(i) of the Police (Northern Ireland) Act 2000 requires the Policing Board to monitor the performance of the police in carrying out their general duties under section 32 of the Act (i.e. to protect life, preserve order etc.).

<sup>61</sup> Section 31(A)(1) of the Police (Northern Ireland) Act 2000 requires police officers to carry out their functions with the aim of (a) securing the support of the local community; and (b) acting in co-operation with the local community. Section 3(3)(b)(ia) of that Act requires the Policing Board to monitor the performance of the PSNI in complying with section 31(A)(1).

It is worth noting in the context of this Chapter the recent changes to policing structures which will undoubtedly have an impact upon the manner in which operational planning and delivery takes place within the PSNI. In line with the Review of Public Administration, which came into effect on 1 April 2015, PSNI moved from 8 Districts to 11 Districts all of which are aligned to the new Local Government Council boundaries. Each District is commanded by a Superintendent, with the exception of the Belfast District which is commanded by a Chief Superintendent. The Belfast District Commander also acts as Area Coordinator. The 11 Commanders have authority for and command of the delivery of policing in their District.

The 11 Districts are grouped together under three Local Policing Areas: North Area Local Policing; South Area Local Policing; and Belfast City Area Policing. Each of the three Local Policing Areas are led by a Chief Superintendent, known as the Area Coordinator, who has ultimate responsibility for the performance and service delivery within the various Districts in their Area. The Area Coordinator manages a Co-ordination and Tasking Centre (CTC) in their Area and works with Districts to identify emerging risks, prioritise police action, allocate key tasks and ensure the completion of those tasks.

The CTCs provide Area Coordinators and District Commanders with live-time information regarding emerging critical issues. The CTC can influence the deployment of resources across the Area to respond to threat, risk, harm and opportunity and acts as the mechanism through which bids are made to access support assets from the Operational Support Department. For example, if a CTC identifies a series of thefts of agricultural equipment in a District, it will review the series of crimes, identify and focus the investigation and source and task resources to address the issue. In doing so, the CTC will discuss the problem and proposed solution with the relevant Area Coordinator and District Commanders. PSNI believes that by working through the CTCs there will be a closer working relationship between District, Crime Operations and Operational Support Department.



At a local level, the PSNI has moved away from the Response and Neighbourhood model to a new model of Local Policing Teams (LPTs) and Neighbourhood Policing Teams (NPTs). As of 1 October 2015, there are 26 LPTs across Northern Ireland. The LPTs respond to calls, conduct investigations and respond to community issues. In addition, there are 34 NPTs based in areas with higher levels of crime and deprivation and also areas of rural isolation or identified as having a particular policing need. The NPTs are intended to provide an additional dedicated policing presence to such communities. Both LPTs and NPTs are expected to develop in-depth local knowledge and to build and maintain relationships with local people, community groups, clergy and civic leaders.<sup>62</sup> The PSNI has also reviewed and reduced the number of police stations that will remain open to the public. In doing so the PSNI reiterated that police can be contacted 24 hours a day by telephone on either 101 or, in an emergency, 999. The PSNI has assured the Committee that, “all normal policing will carry on. We will patrol in vehicles and on foot, carry out searches, arrest criminals and the public will continue to see police on a daily basis”.<sup>63</sup>

The impact that the aforementioned changes will have upon the delivery of efficient, effective, human rights compliant operations is something that the Committee will keep under review and raise with the Chief Constable and his senior team.

## **BODY WORN VIDEO**

The Committee reported, in 2009, in its Human Rights Thematic Review of Domestic Abuse, that the use of Body Worn Video by police officers responding to domestic abuse incidents appears to contribute to an increase in the positive outcome rate for domestic abuse crimes: the video evidence captured at the scene assisting in the successful prosecution of offenders. The Committee’s recommendation that such technology should be used by all

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<sup>62</sup> This reinforces the importance of consultation and engagement with stakeholders in training as discussed in Chapter 2 of this report.

<sup>63</sup> New PSNI Local Policing Teams are being phased into Districts, PSNI press release, 24 August 2015.

officers responding to domestic incidents was echoed by the Criminal Justice Inspection Northern Ireland (CJINI) in its 2010 inspection.<sup>64</sup> Further to those recommendations and repeated calls from the Committee for the equipment to be introduced for that purpose, the PSNI initiated a pilot of Body Worn Video in G District (Foyle, Limavady, Magherafelt and Strabane) for a period of six months commencing 1 June 2014. The pilot was extended to 31 March 2015 to permit a more complete collection of data. The purpose of the pilot was to assess whether Body Worn Video was delivering improvements in the policing of domestic abuse. The use of the technology was not however confined to domestic abuse incidents. The pilot also considered: oppressive Behaviour (by police officers); officers' confidence and protection; and, impact on officer visibility (i.e. keeping police on the street by allowing more efficient capture of 'evidence').

The Performance Committee met with Temporary Assistant Chief Constable Service Improvement<sup>65</sup> to discuss the findings of the pilot. During the meeting police officers gave Members a demonstration of the equipment. The Committee was advised that there has been a high level of positive feedback in relation to the G District pilot, including from officers using the technology and also Criminal Justice partners in relation to the quality of footage gathered. There has been reported a positive impact on the cases going forward for prosecution Those cases have been for a range of offences, including domestic abuse and public order. The equipment was also reported to have diffused confrontations between police officers and members of the public. PSNI advised that there have been some technical challenges during the pilot: for example, there needs to be a significant investment in the PSNI's computer network before rolling out Body Worn Video.

The Committee will continue to advocate for the routine use of this equipment, particularly in the context of domestic abuse incidents and hate crime, and will

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<sup>64</sup> *Domestic Violence and Abuse, Criminal Justice Inspection Northern Ireland (CJINI)*, December 2010.

<sup>65</sup> This Department has now been replaced with the Legacy and Justice Department but will continue to be referred to as Service Improvement within this report to reflect the relevant reporting period.

monitor the progress being made by PSNI in its procurement and future rollout across Districts. The Committee is particularly keen to hear whether the technical difficulties have been overcome and whether the equipment is operating as it was intended.

## **COUNTER-TERRORISM AND SECURITY OPERATIONS**

The Security Service (MI5) has assessed the threat level in Northern Ireland, from Northern Ireland Related Terrorism (NIRT) as severe. “Severe” is the second highest level of threat and means that a terrorist attack is highly likely. In respect of international terrorism, the threat level across the United Kingdom was upgraded in August 2014 from “substantial” to “severe”.

The PSNI publishes on a monthly basis key statistics on the number of security related deaths, bombing and shooting incidents, paramilitary style attacks, firearms and explosive and ammunition finds. It is evident from those figures that the security situation in Northern Ireland has improved compared to a decade ago, but that there remains a significant threat. During the 12 month period 1 December 2014 to 30 November 2015, the PSNI recorded:<sup>66</sup> 2 security related deaths (compared with 2 in 2013/14); 50 shooting incidents<sup>67</sup> (compared with 73 in 2013/14); 48 bombing incidents<sup>68</sup> (compared with 41 in 2013/14); 25 casualties of paramilitary style shootings (compared with 30 in 2013/14); 59 casualties of paramilitary style assaults<sup>69</sup> (compared with 49 in 2013/14); 38 firearms found (compared with 82 in 2013/14); 2.31 kg of explosives found (compared with 43.75 in 2013/14); 2,574 ammunition rounds found (compared with 4391 in 2013/14). As can be seen, there has been an increase over the relevant 12 month period in the number of bombing

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<sup>66</sup> *Police Recorded Security Situation Statistics*, 1 December 2014 to 30 November 2015, PSNI, 11 December 2015. The monthly security situation statistical bulletins and annual statistical update are available through the PSNI website: [http://www.psni.police.uk/index/updates/updates\\_statistics/updates\\_security\\_situation\\_statistics.htm](http://www.psni.police.uk/index/updates/updates_statistics/updates_security_situation_statistics.htm)

<sup>67</sup> Included as a shooting incident are: shots fired by terrorists; shots fired by the security forces; paramilitary style attacks shootings and shots heard and later confirmed.

<sup>68</sup> Individual bombing incidents may involve one or more explosive devices. Incidents include explosions and diffusions but not hoax devices, petrol bombings or incendiaries.

<sup>69</sup> 11 of which occurred in March 2015.

incidents and a significant increase in the number of casualties from paramilitary style assaults.

As in the previous 12 month period to 30 November 2014, the majority of bombing and shooting incidents and casualties of paramilitary style attacks occurred in the Belfast City Policing Area and the North Area Policing (Antrim and Newtownabbey, Causeway Coast and Glens, Derry City and Strabane, Mid and East Antrim). There were 175 arrests under section 41 of the Terrorism Act 2000<sup>70</sup> (compared with 220 in 2013/14). There were 18 arrests under section 41 where a charge followed (compared with 43 in 2013/14).<sup>71</sup>

The figures only record for obvious reasons, those incidents brought to the attention of the police. It is recognised that paramilitary style attacks are under-reported. Furthermore, the statistics do not reveal the full extent to which attacks have been foiled or deterred.

The PSNI use, primarily, the powers contained within the Terrorism Act 2000 and the Justice and Security (NI) Act 2007. The Terrorism Act 2000 (TACT) provides all police services in the United Kingdom with powers which may be used specifically for the purpose of investigating terrorist activity such as powers to stop and search persons, vehicles and premises; the power to arrest and detain suspected terrorists; powers to cordon areas and place prohibitions or restrictions on parking; port and border controls; and the power to obtain information. The Justice and Security (NI) Act 2007 (JSA) provides the PSNI with additional security related powers of entry, search and seizure that are not available to police services in Great Britain.

The counter-terrorism and security work carried out by the PSNI is discussed regularly at the Performance Committee and at the full Policing Board. The statutory Codes of Practice for the use of TACT and JSA powers state that the “appropriate use and application of these powers should be overseen and

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<sup>70</sup> Section 41 provides that a constable may arrest without a warrant a person whom he or she reasonably suspects to be a terrorist.

<sup>71</sup> The charge may relate to any offence not necessarily one provided for by TACT.

monitored by the Northern Ireland Policing Board”. The Performance Committee is responsible for providing that oversight with the assistance of the Board’s Human Rights Advisor who reviews all stop and search authorisations on a quarterly basis. The Human Rights Advisor has reported to the Committee that she views all material relevant to the authorisations and has been provided with access to all material she wished to view. She further reported that the assistance given by PSNI officers in accessing and explaining material and responding to any queries raised has been exceptional. The Committee also received a comprehensive briefing on the use of the powers with sufficient analysis and break down to enable effective oversight to be conducted.

Furthermore, every year the Committee meets with the Independent Reviewer of Terrorism Legislation and the Independent reviewer of the Justice and Security Act. David Anderson QC was appointed in 2011 as the Independent Reviewer of Terrorism Legislation.<sup>72</sup> Every year he is required to produce a report on his review of the operation of TACT and Part 1 of the Terrorism Act 2006 across the United Kingdom.<sup>73</sup> He also reports (in separate reports) on the Terrorism Prevention and Investigation Measures (TPIMs) Act 2011 and the Terrorist Asset-Freezing Act 2010.<sup>74</sup> David Seymour CB was appointed in February 2014 as the Independent Reviewer of JSA.<sup>75</sup> His role is to review and report annually on the operation of the powers contained in sections 21 to 32 JSA, and to review the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to complaints against the army.<sup>76</sup>

The Committee met with both Reviewers, in September 2015, and discussed a range of issues such as arrest and detention under TACT; charges,

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<sup>72</sup> Replacing Lord Carlile of Berriew CBE, QC who had been in post since 2001. Whilst he is no longer the Independent Reviewer of Terrorism Legislation, Lord Carlile has continued in his role as the Government appointed reviewer of arrangements for national security in Northern Ireland.

<sup>73</sup> David Anderson’s reports can be accessed at:

[www.terrorismlegislationreviewer.independent.gov.uk](http://www.terrorismlegislationreviewer.independent.gov.uk)

<sup>74</sup> He may also report on other specific issues raised during the reporting period.

<sup>75</sup> Replacing Robert Whalley CB, who had been in post since 2008.

<sup>76</sup> David Seymour’s reports can be accessed at: [www.nio.gov.uk/Publications](http://www.nio.gov.uk/Publications)

prosecutions and sentencing; frequency of use of the JSA stop and search and stop and question powers; and engagement with the community. The Committee values the work of both reviewers who bring considerable expertise and integrity to their oversight and welcomes the open and frank manner in which they have continued to discuss their work. The Committee looks forward to continued positive engagement with them.

### **Stop and search powers**

A specific area for the consideration of the Performance Committee continues to be the PSNI's use of powers to stop and search persons and vehicles, to search premises and to stop and question. The Committee receives briefings from the PSNI on its use of the powers and is provided with quarterly statistics which break down use according to geographic area, gender, ethnicity, age, power used and subsequent arrest. Quarterly statistical reports are also available on the PSNI website, albeit the published reports contain slightly less information than the reports provided to the Committee as a result of statistical reporting rules.<sup>77</sup> The Board's Human Rights Advisor reviews regularly the PSNI's use of the powers, observes training, reviews policy and procedures and meets regularly with relevant officers. The Human Rights Advisor produced a thematic review report<sup>78</sup> specifically in relation to the use of powers under TACT and JSA, which will be further up-dated in the coming months. This is considered further below.

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<sup>77</sup> Versions of statistical reports (which are not protectively marked) are published in the statistics section of the PSNI website: [www.psni.police.uk](http://www.psni.police.uk)

<sup>78</sup> *Human Rights Thematic Review on the Police use of Powers to Stop and Search and Stop and Question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007*, NI Policing Board, October 2013. The report can be accessed at: [http://www.nipolicingboard.org.uk/stop\\_and\\_search\\_thematic\\_review\\_final\\_draft\\_15\\_october\\_2013.pdf](http://www.nipolicingboard.org.uk/stop_and_search_thematic_review_final_draft_15_october_2013.pdf)

**Table 1: Number of persons stopped and searched / questioned across all Districts according to the use of the power, 1 April 2014 – 30 September 2015<sup>79</sup>**

Persons stopped under:	2014/15					2015/16		
	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar	TOTAL	Apr-Jun	Jul-Sep	TOTAL
PACE	1,536	1,516	1,692	1,537	<b>6,281</b>	1,467	1,624	<b>3,091</b>
PACE & Misuse of Drugs Act S23	23	19	18	23	<b>83</b>	22	33	<b>55</b>
PACE & Misuse of Drugs Act S23 & JSA S24	0	0	0	0	<b>0</b>	0	0	<b>0</b>
PACE & Firearms Order S53 & Misuse of Drugs Act S23	0	1	0	0	<b>1</b>	0	1	<b>1</b>
PACE & Firearms Order S53	1	0	3	1	<b>5</b>	2	2	<b>4</b>
PACE & JSA 21	5	13	0	6	<b>24</b>	0	0	<b>0</b>
PACE & JSA 24	2	1	0	1	<b>4</b>	3	1	<b>4</b>
PACE & TACT S43	1	0	0	0	<b>1</b>	0	0	<b>0</b>
PACE & Other legislative power	6	2	2	1	<b>11</b>	4	0	<b>4</b>
Misuse of Drugs Act S23	3,816	3,428	3,860	4,421	<b>15,525</b>	3,890	4,201	<b>8,091</b>
Misuse of Drugs Act S23 & Other legislative power	3	1	0	0	<b>4</b>	0	1	<b>1</b>

<sup>79</sup> *Stop and Search Statistics, Quarter 2 2015/2016*, PSNI, November 2015. This table reflects the number of persons stopped and searched/questioned. As more than one legislative power can be used to stop and search/question a person, the total number of powers used will be greater than the number of persons stopped and searched/questioned. Stop and search statistical reports are published by PSNI on a quarterly basis and are available in the statistics section of the PSNI website: [www.psnipolice.uk](http://www.psnipolice.uk)

Firearms Order S53	21	23	42	23	109	58	38	96
Firearms Order S53 & Misuse of Drugs Act S23	1	0	1	0	2	4	0	4
Firearms Order S53 & other legislative power	0	0	0	0	0	0	0	0
Firearms Order S53 & JSA S24	0	0	1	0	1	0	0	0
Firearms Order S53 & TACT S43A	0	0	0	1	1	0	1	1
TACT S43	25	18	27	22	92	19	36	55
TACT S43A	1	1	1	3	6	6	2	8
TACT S47A	0	0	0	0	0	0	0	0
TACT S43 & TACT S43A	5	4	4	14	27	9	20	29
TACT S43 & TACT S43A & JSA S21	1	0	0	4	5	2	0	2
TACT S43A & JSA S21	0	0	0	2	2	0	0	0
JSA 21	199	207	583	261	1,250	371	318	689
JSA S21 & Misuse of Drugs Act S23	4	11	7	5	27	5	0	5
JSA S21 & JSA S24	84	112	232	162	590	97	159	256
JSA S21 & JSA S24 & PACE	0	0	0	0	0	0	0	0
JSA S21 & JSA S24 & Misuse of Drugs Act S23	3	0	0	0	3	1	0	1
JSA S21 & other legislative power	3	0	0	0	3	1	0	1
JSA S24	899	523	1,088	762	3,272	983	1,287	2,270
JSA S24 & other legislative power	3	1	5	2	11	0	1	1
JSA S24 & Misuse of Drugs Act S23	5	2	4	3	14	1	2	3



JSA S24 & Misuse of Drugs Act S23 & other legislative power	0	0	1	0	1	0	0	0	0	0	0	0
JSA S24 & TACT S43A	1	2	0	2	5	1	0	0	0	1	0	1
JSA S24 & JSA S21 & other legislative power	0	1	0	0	1	0	0	0	0	0	0	0
TACT S43 & JSA S21	0	4	3	8	15	4	3	3	4	3	7	7
TACT S43 & JSA S24 & JSA S21	1	0	0	0	1	0	0	0	0	0	0	0
TACT S43 & JSA S24	0	0	0	0	0	2	2	2	2	2	4	4
TACT S43 & Misuse of Drugs Act S23	0	0	0	0	0	1	0	0	1	0	1	1
TACT S43 & TACT S43A & JSA S21 & JSA S24	0	0	0	0	0	0	0	0	0	0	0	0
TACT S43 & TACT S43A & JSA S24	0	0	0	2	2	0	0	0	0	0	0	0
TACT S43A & JSA S21 & JSA S24	0	1	0	0	1	0	0	0	0	0	0	0
Other legislative powers	76	28	35	20	159	21	24	24	21	24	45	45
<b>Total Persons stopped and searched/questioned</b>	<b>6,725</b>	<b>5,919</b>	<b>7,609</b>	<b>7,286</b>	<b>27,539</b>	<b>6,974</b>	<b>7,756</b>	<b>7,756</b>	<b>6,974</b>	<b>7,756</b>	<b>14,730</b>	<b>14,730</b>

As evidenced by Table 1 above, the majority of stops and searches carried out by the PSNI are to search for stolen or prohibited articles, blades or fireworks under the Police and Criminal Evidence (Northern Ireland) Order 1989, or for drugs under the Misuse of Drugs Act 1971. Before exercising such powers the police officer carrying out the search must have a reasonable suspicion that such an item is being carried by the person being searched or is in the vehicle being searched. Some of the counter-terrorism and security powers contained within TACT and JSA do not require such a reasonable suspicion to be held before the power is used.

Section 47A of TACT enables an authorisation for the use of stop and search powers to be given by an officer of the rank of Assistant Chief Constable, if the officer giving it reasonably suspects an act of terrorism will take place and considers the powers are necessary to prevent such an act. An authorisation can last for no longer and cover no greater a geographic area than is necessary to prevent such an act. The Secretary of State is required to confirm authorisations intended to last longer than 48 hours and they may last up to a maximum of 14 days. The authorisation confers powers on police officers to search pedestrians, anything carried by a pedestrian, a vehicle, its driver, passengers and anything in or on the vehicle for evidence that any of the individuals are terrorists (or, in the case of a vehicle, for evidence that the vehicle is being used for the purposes of terrorism). The powers may be exercised whether or not the police officer has reasonable suspicion that there is such evidence. Anything discovered during the course of a search which the police officer reasonably suspects may constitute such evidence may be seized and retained.

Section 24 of JSA enables a senior officer of the PSNI of at least the rank of Assistant Chief Constable to authorise the use of a stop and search power in a specified area if the senior police officer reasonably suspects that the safety of any person might be endangered by the use of munitions or wireless apparatus. The authorisation can be given only if the senior police officer reasonably considers that it is necessary to prevent that danger and the area or place specified in the authorisation is no greater than is necessary and the

duration of the authorisation is no longer than is necessary. The Secretary of State is required to confirm authorisations intended to last longer than 48 hours. Individual authorisations can last for a maximum of 14 days. Where such an authorisation has been given by a senior police officer, police officers are authorised to stop and search any individuals in the area or place specified in the authorisation for the purpose of ascertaining whether the person stopped is carrying munitions unlawfully or wireless apparatus. The powers may be exercised whether or not the police officer has reasonable suspicion that the individual being searched is carrying such equipment.

A police officer has the power to stop and search a person whom he or she reasonably suspects to have munitions or wireless apparatus unlawfully with him or her regardless of whether he or she is in a public place or not (*i.e.* the power can be exercised by a constable where there is no authorisation in place provided the constable reasonably suspects that such items are being held). A constable also has the power under section 24 JSA to enter and search any premises for the purposes of ascertaining whether there are any munitions or wireless apparatus unlawfully on the premises. 'Premises' includes vehicles, tents and moveable structures. Where the search is of a vehicle the constable may remove the vehicle to a place for the purpose of carrying out the search if such removal is necessary or expedient. With the exception of the search of dwellings, no authorisation is required and the constable need not have a reasonable suspicion that munitions or wireless apparatus are on the premises. If a constable intends to search a dwelling, which is defined as a building or part of a building used as a dwelling and a vehicle which is habitually stationary and which is used as a dwelling, the search must have been authorised by a senior officer and the constable must have a reasonable suspicion that the dwelling contains unlawful munitions or wireless apparatus. A distinction is therefore drawn between premises which are regarded as a person's home and those which are not. A police officer may seize, retain and, if necessary, destroy any unlawfully held munitions and may seize and retain any wireless apparatus found during the course of a search of persons, vehicles or premises.

Section 21 of JSA empowers PSNI officers to stop a person for so long as is necessary to question him to ascertain his identity and movements. The power to stop a person includes the power to stop a vehicle. There is no requirement that reasonable grounds for suspicion exist before this power is exercised.

As evidenced by Table 1 above, the PSNI make greater use of the JSA stop and search powers than of the TACT powers. Information contained within the statistical reports provided to the Performance Committee reveal that where the section 24 JSA power has been used to stop and search individuals, the power is most often used on the basis of there being an ACC Authorisation in place. In other words, there has not necessarily been a 'reasonable suspicion' held by the officer exercising the power that the person they are searching is unlawfully carrying munitions or wireless apparatus with them. This is illustrated in Table 2 below.

**Table 2: Number of persons stopped and searched under section 24 JSA according to the basis for the search, 1 April 2014 – 31 March 2015<sup>80</sup>**

<b>No. of persons stopped &amp; searched under s.24 JSA</b>	<b>1 April 2014 – 31 March 2015</b>
<b>Reasonable suspicion</b>	202 (5.2%)
<b>ACC authorisation</b>	3,704 (94.8%)
<b>Total</b>	<b>3,906</b>

The overall number of arrests made following the 3,906 uses of the power to search individuals during 2014/2015 was 77 (2%). During the same financial year, the section 24 power was also used to search 10,061 vehicles, 97 dwellings and 8 other premises.

Use of the without suspicion stop and search powers under TACT and JSA, and the JSA stop and question power, have attracted considerable public debate and concern. The exercise of police powers to stop and search or stop and question without suspicion is a significant intrusion into personal liberties

<sup>80</sup> *Stop and Search Statistics, Financial Year 2014/2015*, PSNI, May 2015 (protectively marked version provided to Performance Committee).

and a potential interference with the rights guaranteed by the ECHR. The Performance Committee has therefore paid particular attention to the PSNI's use of the powers and, as outlined above, meets annually with the Independent Reviewers of TACT and JSA to discuss issues such as PSNI's use of the powers, the operational need for them and community impact.

The Policing Board's Human Rights Advisor has paid particular attention to the geographical and temporal extent of authorisations in light of the requirement that they extend over no greater area and for no longer than is necessary. The Committee also addressed the issue with David Seymour CB. While the authorisations have, as a matter of fact, extended over the whole of Northern Ireland and have been renewed continuously ever since the powers were introduced, both have reported that they are entirely satisfied that the extent and duration of authorisations are justified, necessary and proportionate given the nature and extent of the security threat in Northern Ireland. While content as to necessity and proportionality to date, the Human Rights Advisor will continue to monitor and report to the Performance Committee on whether it is justified, necessary and proportionate to extend authorisations over the whole of Northern Ireland and for the maximum permitted duration.

Both the Independent Reviewer of JSA and the Human Rights Advisor studied closely the material (including the closed material) and rationale for the authorisations and have considered the criteria for the Ministerial confirmation of the authorisations. The applications were accompanied by detailed information on the nature and extent of the security threat. Each contained a careful analysis of the relevant intelligence. A rigorous process is followed which includes review by the authorising officer, the relevant Area/District Commanders and the PSNI's Human Rights Advisor. Each authorisation is considered separately and uniquely according to robust criteria. The relevant legal provisions are set out in the authorisation against which the application is measured. While no authorisation has been rejected by the Minister it is clear that the confirmations are not 'rubber stamped' but subject to a layer of in-depth scrutiny and challenge.

During the quarterly review of authorisations, the Policing Board's Human Rights Advisor is able to challenge officers on the authorisations and the justification for them. She has been impressed by the PSNI's commitment to ensuring that the criteria are met and their willingness to address any challenge fulsomely and self critically.

### **Stop and search thematic review**

In October 2013, the Board published a dedicated human rights thematic review of police powers to stop and search and stop and question under TACT and JSA.<sup>81</sup> The thematic review, which was drafted by the Board's Human Rights Advisor on the Board's behalf, provides in-depth scrutiny of the use of the powers. 11 recommendations were made. The Performance Committee, with assistance from the Human Rights Advisor, oversees implementation of the recommendations. All 11 recommendations have been accepted by PSNI and the Performance Committee has been kept informed of progress. A detailed update report will be published in the coming months. A brief summary of progress is provided below.

Recommendation 1 provided "The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search under section 43, 43A and 47A TACT according to the name and number of the police officer and according to the name of the person searched". An enhanced search facility has been added to the PSNI database which keeps records of TACT stops and searches. The enhanced facility enables searches of records to be carried out according to the individual force number of the officer conducting the search and according to the name of the person searched.

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<sup>81</sup> The thematic review is available to download through the human rights publications section of the Policing Board's website:

[http://www.nipolicingboard.org.uk/index/publications/human-rights-publications/thematic\\_reports.htm](http://www.nipolicingboard.org.uk/index/publications/human-rights-publications/thematic_reports.htm)

Recommendation 2 provided “The PSNI should amend its Aide Memoire and include within its new policy (to be developed as per recommendation 11 of this thematic review) clear instruction that the power to stop and question under section 21(1) JSA may not be used to require a person to confirm identity where identity is already known and may not be used to require a person to produce identification for the purpose of confirming identity”. The PSNI has amended its aide memoire accordingly.

Recommendation 3 provided “The PSNI should include within its new policy on the use of powers to stop and search and question under TACT and JSA (to be developed as per recommendation 11 of this thematic review) a requirement that the relevant District Commander(s) should be consulted before an authorisation is given and he or she should have an opportunity to influence the authorisation”. The PSNI has confirmed that District Commanders are consulted prior to any authorisation being given and have a real opportunity to influence the process.

Recommendation 4 provided “The PSNI should develop a mechanism which enables supervising officers and senior officers to undertake reliable examinations of the records of the use of powers to stop and search and questions under sections 21, 23 and 24 JSA according to the name and number of the police officer and according to the name of the person searched”. An enhanced search facility was added to the PSNI database which keeps records of JSA stop and searches. The enhanced facility enables searches of records to be carried out according to the individual force number of the officer conducting the search and according to the name of the person searched.

Recommendation 5 provided “The PSNI should develop guidance, in consultation with relevant stakeholders, on the conduct of searches under TACT and JSA, which sets out in sufficient detail the range of cultural and religious issues that may arise during a search and which addresses specifically what an officer should do when presented with language barriers or sensory impairment”. The PSNI advised that it includes data on the

ethnicity of persons stopped and searched/questioned in its statistical reports. Those statistics reveal that the TACT and JSA powers are used the vast majority of times (over 98%) in relation to persons classified as 'white'. PSNI therefore qualified its acceptance of this recommendation by suggesting that it would not be delivering a large project, but would instead carry out a smaller scale consultation with stakeholders. Advice to officers was included within training on terrorism and security powers delivered to front line officers in November and December 2015. The Committee will consider this further but reminds PSNI that the size of the community affected should not determine whether it is given due consideration.

Recommendation 6 provided "The PSNI should conduct a review, at least annually, of the ambit and use of the powers to stop, search and question contained within TACT and JSA during the previous 12 months to ensure that the powers are being used in accordance with law and not disproportionately. Thereafter, the Chief Officer responsible for stop and search powers should provide a briefing to the Performance Committee of the Northern Ireland Policing Board. The first review should be completed within 12 months of the publication of this thematic review". The annual review for the period 1 April 2014 – 31 March 2015 took place on 1 June 2015. The annual review was attended by the Board's Human Rights Advisor and the Independent Reviewer of the JSA. A briefing to the Performance Committee on the annual review has been arranged for early 2016.

Recommendation 7 provided "The PSNI should as soon as reasonably practicable but in any event within 3 months of the publication of this thematic review consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A TACT and all persons stopped and searched or questioned under section 21 and 24 JSA. As soon as that has been completed the PSNI should present to the Performance Committee, for discussion, its proposal for monitoring community background. At the conclusion of the first 12 months of recording community background, the statistics should be analysed. Within 3 months of that analysis the PSNI should present its analysis of the statistics to the



Performance Committee and thereafter publish the statistics in its statistical reports". That recommendation has been the subject of substantial discussion and consideration internally within PSNI and also during meetings and correspondence with the Performance Committee. PSNI has developed a methodology for capturing the required information and is trialling it through a three-month pilot which commenced in Derry/Londonderry and Strabane on 1 December 2015. The Performance Committee will be briefed on early findings from the pilot and an evaluation of the trial will be completed by 31 March 2016. Thereafter the PSNI will discuss with the Committee the outcome of the evaluation and plans for future monitoring arrangements

Recommendation 8 provided "The PSNI should develop and thereafter issue guidance to all police officers in Northern Ireland on stopping and searching children. That guidance should draw upon the guidance already produced and issued in G District". The PSNI developed guidance based upon that already produced in G District and has included it within the PSNI Search Manual.

Recommendation 9 provided "Each District Commander should, in consultation with District Policing and Community Safety Partnerships, Independent Advisory Groups, Reference Groups (where applicable) and the Performance Committee, devise a strategy for improved consultation, communication and community engagement in respect of its use of stop and search powers under both TACT and JSA. That strategy should include an agreed mechanism by which the PSNI will explain the use of powers to the community and will answer any issues of concern". In response to that recommendation the PSNI suggested that any proposed strategy for formal engagement should be implemented when the restructure of Policing and Community Safety Partnerships (PCSPs) in line with local boundaries was completed in April 2015. A further update provided by the PSNI, in August 2015, advised that locally based commanders deal with concerns raised by community representatives or PCSPs and the Senior Executive Team are represented on Independent Advisory Groups, for example the PSNI Youth Champions Forum, where issues of concern are raised. In October 2015, as part of Terrorism and Security Powers training for police officers, command

teams were invited to a number of workshops at which engagement opportunities were discussed and responsibilities under the Codes of Practice reinforced.

Recommendation 10 provided “The PSNI should introduce into officers’ performance reviews, where relevant, the use of TACT and JSA powers to stop and search and question. During such a review any substantiated complaint made about an officer’s use of the powers should be considered”. The PSNI has advised that if a complaint is substantiated it is addressed as part of an officer’s performance review.

Recommendation 11 provided “The PSNI should conduct a review of policy and produce a stand-alone policy document setting out the framework within which powers to stop and search and question under TACT and JSA must be exercised. The policy should contain clear guidance on the PSNI’s strategic and policy goals and on the individual exercise of the powers, the conduct of searches, record-keeping and the responsibility of each officer to ensure compliance. The policy should incorporate reference to the statutory Codes of Practice and relevant human rights principles”. Although the PSNI has reviewed its policy framework for stop and search, the policy document to be produced as per recommendation 11 has not yet been finalised. Considerable work has been undertaken and the Committee hopes to receive a satisfactory briefing that the PSNI has considered the recommendation once the pilot referred to above is complete.

The PSNI continues to dedicate resources to implementing the recommendations. The Performance Committee will publish a report in 2016 on progress made against the recommendations.

## 5. COMPLAINTS, DISCIPLINE AND THE CODE OF ETHICS

The Policing Board has a statutory duty to keep informed of complaints and disciplinary proceedings brought in respect of police officers and to monitor any trends and patterns emerging.<sup>82</sup> That work is undertaken by the Performance Committee which is also responsible for monitoring the performance of the PSNI in complying with the Human Rights Act 1998<sup>83</sup> and for monitoring the effectiveness of the Code of Ethics.<sup>84</sup> Those monitoring functions complement each other as a human rights culture is in part demonstrated by the quality of interactions between the police and the public. Such interactions can be measured by an assessment of the formal police complaints process and also the daily, routine contacts between the police and the public. By monitoring PSNI internal disciplinary proceedings and alleged breaches of the Code of Ethics, the Committee can assess the effectiveness of the Code and the extent to which individual officers (and the Police Service as a whole) are respecting the human rights principles that underpin the Code of Ethics.

The Office of the Police Ombudsman for Northern Ireland (OPONI) was established under Part VII of the Police (Northern Ireland) Act 1998, which requires an independent and impartial police complaints system. The OPONI investigates complaints about police officers and 'designated civilians'<sup>85</sup> within the PSNI, police officers within the Northern Ireland Airport Constabulary and Belfast Harbour Police. Since 16 March 2015, the OPONI investigates officials within the UK Border Force. Since 20 May 2015, the OPONI investigates complaints about officers from the National Crime Agency.

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<sup>82</sup> Section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000.

<sup>83</sup> Section 3(3)(b)(ii) of the Police (Northern Ireland) Act 2000.

<sup>84</sup> Section 3(3)(d)(iv) of the Police (Northern Ireland) Act 2000. The Code of Ethics lays down standards of conduct and practice for police officers and is intended to make police officers aware of their rights and obligations under the Human Rights Act 1998.

<sup>85</sup> 'Designated civilians' are those members of police support staff designated as an officer by the Chief Constable pursuant to section 30 of the Police (Northern Ireland) Act 2003 i.e. investigating officers, detention officers and escort officers.

The Committee meets formally with the Police Ombudsman and/or senior officials from the OPONI at least twice a year to discuss a range of issues, including trends and patterns in complaints against police officers and the resolution of those complaints. The Committee also considers individual investigation reports produced by OPONI<sup>86</sup> and it considers Regulation 20 reports.<sup>87</sup> The Committee monitors thereafter PSNI's implementation of recommendations made by the Police Ombudsman.

The Committee is required to monitor PSNI internal disciplinary procedures to ensure that lessons are learned and that best practice is promoted across the organisation for all officers. The Committee has met formally with officers from PSNI Service Improvement Department at least twice a year to discuss professional standards issues.<sup>88</sup> Service Improvement Department was replaced by the Legacy and Justice Department in February 2016. The Committee will continue to meet with the Legacy and Justice Department on the same basis as it did with Service Improvement Department. References in this report however continue to refer to Service Improvement Department, to reflect the reporting period.

To discharge its monitoring duty effectively the Performance Committee relies upon PSNI and OPONI sharing information with it. A Professional Standards Monitoring Framework, devised by the Committee's Professional Standards Advisor, provides the Committee with a formal structure to undertake its monitoring function and to address broader concerns, such as quality of

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<sup>86</sup> Under section 62 of the Police (Northern Ireland) Act 1998 the Police Ombudsman may make public statements following major investigations. Decisions as to when to publish such reports and what material to include in them are taken at the discretion of the Police Ombudsman.

<sup>87</sup> A Regulation 20 report is produced by the Police Ombudsman following an investigation into a specific matter instigated by the Ombudsman of his/her own volition or referred to him/her under section 55 of the Police (Northern Ireland) Act 1998 by the Policing Board, the Department of Justice, the Secretary of State, the Director of Public Prosecutions or the Chief Constable.

<sup>88</sup> Discipline Branch within Service Improvement acts as the 'gatekeeper of integrity' for the organisation. It is responsible for providing guidance to Districts and Departments in respect of disciplinary matters and must ensure that consistent standards are applied. The Department decides on disciplinary recommendations arising from OPONI investigations into complaints, delegating each recommendation to the appropriate District or Department to progress or referring the matter to a formal misconduct hearing. Discipline Branch can also initiate its own criminal or misconduct investigations.

service, accountability and evidence of learning. In accordance with the Framework PSNI and OPONI provide the Committee with complaints and disciplinary information on a periodical basis. The information is used by the Committee at meetings with the PSNI to challenge the organisation's performance and to seek further information from the police or OPONI on any areas of concern. During 2014 and 2015, the Committee agreed revisions to the Monitoring Framework with PSNI and OPONI. Under the new Framework the Committee receives formal six-monthly reports on complaints received by OPONI; self-referrals by PSNI to OPONI; updates on Policing Plan targets to reduce incidences of oppressive behaviour and incivility; and the number of statute barred cases.<sup>89</sup> In addition, annual information is provided in relation to misconduct matters; performance against recognised risks, including threats from corruption; and evidence of learning from complaints, OPONI investigations and civil litigation. Some of the key issues considered by the Performance Committee in relation to complaints and discipline during 2015 are set out in the remainder of this Chapter.

An annual report against the Professional Standards Monitoring Framework was received by the Committee in June 2015. The Performance Committee also met with representatives from OPONI and PSNI to discuss trends and patterns in complaints over previous months. Both OPONI and PSNI recognised the ongoing work to improve engagement between the organisations for the purpose of identifying trends in policy recommendations. OPONI highlighted the overall reduction in the number of complaints and allegations in particular the significant reduction in the number of allegations of incivility and oppressive behaviour. The PSNI has focused on those allegations and their efforts appear to have effected directly an improvement in practice and a consequent reduction in complaints and allegations. The PSNI also referred to the fewer confrontations between police and public during parades and demonstrations as a contributing factor in the reduction of complaints. That is welcomed by the Committee. However, the Committee noted an increase in the number of complaints arising from criminal

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<sup>89</sup> A statute barred case is a summary case (tried in the magistrates court) which cannot proceed to prosecution because a statutorily imposed time limit has expired.

investigations, the most common complaint being an alleged failure in duty (42.6% of all allegations).

The statistics are collated and considered in detail below.

## **COMPLAINTS - STATISTICS**

### **Number of complaints**

OPONI produces quarterly and annual statistical reports which provide detail on trends and patterns in complaints and allegations received during the relevant period. OPONI also reports upon trends in equality monitoring, public attitudes to the Police Ombudsman, complainant satisfaction and police officer satisfaction.<sup>90</sup> With regard to complaint statistics, OPONI received 3,367 complaints in 2014/2015.<sup>91</sup> That compares to 3,738 complaints in 2013/14, which was the highest number of complaints since the Office of the Police Ombudsman opened in November 2000. The number of complaints received in 2014/15 reduced from the previous year by 9.9%. Complaints in all PSNI Districts reduced in 2014/15 save for H District<sup>92</sup> which experienced an increase of 4.7%. A and B Districts<sup>93</sup> experienced the greatest decrease in complaints with an 18.4% and 20.8% reduction respectively. The number of allegations also reduced in 2014/15 from 6,171 in 2013/14 to 5,587 in 2014/15 (a reduction of 9.5%).

The Committee received a six monthly update on the Professional Standards Monitoring Framework in November 2015 relating to the period 1 April 2015 to 30 September 2015. During that period, there were 1,589 complaints, which is a reduction from 1,849 (14%) in the same period in the previous year.

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<sup>90</sup> [www.policeombudsman.org](http://www.policeombudsman.org)

<sup>91</sup> *Trends in Complaints and Allegations Received by the Police Ombudsman for Northern Ireland 2014/15, Annual Statistical Report*, OPONI, June 2015. The number of complaints received by OPONI includes complaints made by members of the public; matters that have been referred to OPONI by the PSNI, the Public Prosecution Service, the Policing Board or the Department of Justice; and any matter which the Police Ombudsman has decided is in the public interest for him to investigate.

<sup>92</sup> H District (Ballymena, Ballymoney, Coleraine, Larne and Moyle).

<sup>93</sup> A District (North and West Belfast) B District (South and East Belfast).

Complaints relating to Parade/Demonstration in that period increased from 19 in the same period in the previous year to 37 in the current period.

### **Number of allegations<sup>94</sup>**

The Committee received a six monthly update on the Professional Standards Monitoring Framework in November 2015 relating to the period 1 April 2015 to 30 September 2015. During that period, there were 2,474 allegations, which is a reduction from 3,116 (21%) allegations received in the same period in the previous year. There was a reduction in allegations in all Districts save F District where there was an increase in allegations of 1.7%. A and B Districts experienced the greatest decrease in allegations with an 18.8% and 14.6% reduction respectively. The total number of oppressive behaviour allegations reduced from 1,994 in 2013/14 to 1,440 (27.8%) in 2014/15. The number of incivility allegations reduced from 550 to 421 (23.5%). Failure in duty allegations increased from 2,278 in 2013/14 to 2,381 (4.5%) in 2014/15. F District experienced the greatest increase in failure in duty allegations (31.5%).

Where sufficient information is available, OPONI records the main factor underlying each complaint received, or the main situation giving rise to the complaint. Criminal Investigation is the most common factor underlying complaints in 2014/15 and has been the most common factor underlying complaints over the past 6 years, followed by Arrest, with the exception of 2013/2014 in which arrest accounted for 24% of all complaints overtaking Criminal Investigation as the most common factor in that year. Search, Traffic Enquiries, Domestic Incident, Police Enquiries (no investigation), Historic Investigation and Parade/Demonstration are also common factors behind complaints as demonstrated by the table below.

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<sup>94</sup> Each complaint received by OPONI consists of one or more allegations. Allegations are divided into 11 different categories. For example, a complaint that a police officer was rude and failed to take a statement is recorded as one complaint but two allegations.

**Table 3: Main factor underlying complaints received by OPONI, 2009/2010 – 2014/2015<sup>95</sup>**

Main factor	09/10	10/11	11/12	12/13	13/14	14/15
Criminal Invest.	741	790	762	721	807	828
Arrest	595	578	661	617	885	624
Search	320	330	339	317	362	287
Traffic Incident	472	360	313	251	264	241
Dom Incident	175	182	168	164	236	238
Police Enquiries	518	310	237	184	235	199
Parade/Demo	36	41	20	170	132	23
Historic	9	7	35	73	68	88
Other	520	643	681	663	650	689
Unknown	156	94	128	112	99	150
<b>Total</b>	<b>3,542</b>	<b>3,335</b>	<b>3,344</b>	<b>3,272</b>	<b>3,738</b>	<b>3,367</b>

There was a peak in Parade/Demonstration complaints between December 2012 and March 2014 when OPONI received 280 complaints around half of which were attributable to the ‘flag protest’ street demonstrations that took place across Northern Ireland. Complaints in respect of parades and demonstrations have decreased in 2014/2015 and are lower than in two of the three years between 2009 and 2012. There has been an increase in the number of complaints regarding failure in duty. It has been suggested that the increase can be attributed at least partly to an increase in media reporting of historic sexual abuse cases such as those considered by the Historic Abuse Inquiry. However there is, as yet, no empirical evidence to support that. It will require further attention and the Committee will devise a means of interrogating the statistics in the coming months. In respect of failure in duty allegations generally, the Policing Board has included a specific target in its Annual Policing Plan 2015/2016 to reduce complaints by 2%.

The Committee was concerned, in 2014, at the significant increase in the number of complaints arising from domestic incidents from 164 in 2012/2013 to 236 in 2013/2014. That was followed by an increase in the number of

<sup>95</sup> *Annual Statistical Bulletin 2014/15*, OPONI.



domestic Incident complaints increasing by 23% in the first six months of 2014/2015 compared to the first 6 months in 2013/2014. The Committee is disappointed that the trend appears set to continue with domestic incident complaints in the relevant 12 months (238) having increased again, albeit the increase is by less than 1%. The Board's Human Rights Advisor was provided with details of those 2014/2015 complaints. It became apparent that the category 'domestic incident' included complaints relating to police conduct at the complainant's property, complaints involving neighbourhood disputes and complaints relating to telephone calls. In other words, 'domestic incident' did not refer solely to cases involving domestic abuse. It does however include domestic abuse incidents therefore the Committee is concerned to understand whether, despite the work undertaken following a thematic review of domestic abuse policing, the improvements in police practice have or have not been reflected in a decreased number of complaints relating to domestic abuse incidents. The precise nature of the allegations requires further explanation. In particular, it is essential that the PSNI understands the nature and extent of complaints arising from the police response to reports of domestic abuse. Therefore, the Committee wishes to see a more detailed analysis of complaints arising from the policing of domestic abuse.

#### **Recommendation 4**

**The PSNI, in co-operation with OPONI, should identify those complaints which relate specifically to the police response to reports of domestic abuse (within the more general complaint heading of domestic incident) and disaggregate those complaints in the presentation of its six-monthly reports.**

Each complaint received by OPONI consists of one or more allegations. In line with the decrease in the number of complaints received by OPONI in 2014/2015, there was a decrease in the number of allegations received: there were 5,587 allegations received in 2014/2015 compared with 6,171 allegations received in 2013/2014.<sup>96</sup>

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<sup>96</sup> *Professional Standards Monitoring Framework 2014/15*, NIPB, June 2015.

Oppressive behaviour allegations, which typically relate to allegations of physical aggression such as being pushed, grabbed, struck by a baton, handcuffs too tight or twisted etc.; non-physical conduct which is seen as being aggressive or threatening; and harassment (allegations of this type frequently relate to stop and search), has been a continuing priority for the Committee. In the Human Rights Annual Report 2012, a recommendation was made for PSNI to consider the findings of an OPONI report on allegations of Oppressive Behaviour<sup>97</sup> and present to the Performance Committee the PSNI's analysis of the findings together with its proposed means of reducing allegations of Oppressive Behaviour.<sup>98</sup> During 2013, PSNI developed a control strategy to reduce Oppressive Behaviour allegations. However, the number of allegations of oppressive behaviour continued on an upward trend in 2013/2014 so further analysis was completed by PSNI. A further report was provided to the Performance Committee which set out the action taken to reduce those allegations.<sup>99</sup> The Policing Plan 2014 – 2017 also set a target to reduce the number of Oppressive Behaviour allegations by 10%. The Committee welcomes the reduction in 2014/15 of oppressive behaviour allegations from 1,991 in 2013/14 to 1,440 in 2014/15 (27.8%)<sup>100</sup> but expects to see a further reduction and will continue to monitor allegations and complaints closely through the Professional Standards Monitoring Framework.

Reducing Incivility allegations has also been an area of focus for the Performance Committee and the PSNI over the past number of years. Between 2009/2010 and 2012/2013 the number of Incivility allegations reduced by 50% and a target in the Policing Plan 2011 – 2014 to reduce the number of allegations was achieved. To maintain that focus the Policing Plan 2014 – 2017 contained a target to reduce further the number of Incivility

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<sup>97</sup> *Analysis of Oppressive Behaviour Allegations Received by the Office of the Police Ombudsman for Northern Ireland, 2000 – 2012*, OPONI, November 2012.

<sup>98</sup> Recommendation 7 of the Human Rights Annual Report 2012, Northern Ireland Policing Board, February 2013.

<sup>99</sup> *Understanding the Rise in Complaints and Allegations against PSNI Officers 2013/2014*, PSNI, January 2014. Recommendation 7 of the Human Rights Annual Report 2012 has therefore been implemented.

<sup>100</sup> *Professional Standards Monitoring Framework 2014/15*, June 2015.

allegations. The Committee is reassured to note that the number of incivility allegations has decreased by 23.5% from 550 allegations in 2013/14 to 421 allegations in 2014/15.<sup>101</sup> It suggests that when the PSNI addresses specific allegations directly there is a real impact on the ensuing number of allegations. While the Committee appreciates that time and effort is required to adopt such a focused approach the model used in respect of specific allegations should be considered and applied across all allegation types.

### Complaint outcomes

When a complaint is made, it is dealt with by OPONI in accordance with Part VII of the Police (Northern Ireland) Act 1998. During 2014/2015 there were 3,537 complaints closed by OPONI. A complaint is closed when a final decision is made by the OPONI on the matter, when the complainant and the officer have reached an agreement on the matter or when the complainant no longer wishes to engage with the process.

**Table 4: Complaint closures: 1 April 2014 - 31 March 2015<sup>102</sup>**

<b>Complaints closed after initial assessment</b>	<b>423</b>
Outside OPONI remit	361
OPONI called in but no further action required	25
Other	37
<b>Complaints closed after initial inquiries</b>	<b>1,564</b>
Complainant did not engage	1,085
Complaint ill founded	310
Complaint withdrawn	152
Other	17
<b>Complaints received informally</b>	<b>219</b>
Informally resolution	191
local resolution	28
<b>Complaints closed after full investigation</b>	<b>1,331</b>
Not substantiated & no issue of concern identified	963
Substantiated or an issue of concern identified	368
<b>Total Complaints closed</b>	<b>3,537</b>

<sup>101</sup> *Professional Standards Monitoring Framework 2014/15*, June 2015.

<sup>102</sup> *Trends in Complaints and Allegations Received by the Police Ombudsman for Northern Ireland 2014/15 Annual Statistical Report*, OPONI, June 2015.

If OPONI believes that a criminal offence may have been committed by an officer, a file will be sent to the Director of Public Prosecutions. The OPONI file will include any recommendations the OPONI considers appropriate. During 2014/2015, prosecution was recommended by OPONI for an officer on 12 occasions.

If OPONI considers that internal action is required in respect of an individual officer's conduct, it will send to the Chief Constable (or the Policing Board in the case of a complaint against an officer of the rank of Assistant Chief Constable or above) a memorandum containing OPONI's recommendations as to disciplinary action that should be taken. During 2014/2015, OPONI made 380 recommendations relating to police officers' conduct, of which 226 were for advice and guidance, 85 for a Superintendent's Written Warning, 65 for management discussion or training and 4 for formal disciplinary proceedings.<sup>103</sup>

OPONI has the additional power to make recommendations to the Chief Constable to improve police policy and practice. Those recommendations are as important as recommendations relating to individual police officer's conduct. It is particularly important that the PSNI take account of recurring recommendations which may alert the PSNI of the need for a specific course of action. In the Human Rights Annual Report 2013 a recommendation was made for the PSNI to develop a system which identified trends and patterns in OPONI policy recommendations and that where recurring recommendations were made, to highlight those requiring further action.<sup>104</sup> In response to that recommendation the PSNI established a Policy Evaluation Group (PEG), which comprises members from OPONI, PSNI, Her Majesty's Inspectorate of Constabulary (HMIC) the Criminal Justice Inspection Northern Ireland and the Policing Board. The PEG is designed to "give priority to reviewing recommendations made which are of a strategic and/or service improvement

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<sup>103</sup> *Ibid.*

<sup>104</sup> Recommendation 5 of the Human Rights Annual Report 2013, Northern Ireland Policing Board, March 2014. This echoed a Criminal Justice Inspection Northern Ireland (CJINI) recommendation that PSNI should develop and implement systems for monitoring the implementation and the effectiveness of policy recommendations: *The Relationship Between PSNI and the Office of the Police Ombudsman for Northern Ireland*, CJINI, December 2013.

nature, as well as those recommendations not accepted by the PSNI. When and where appropriate the PEG will consider the evaluation of the effectiveness of policy recommendations. Responsibilities, purpose and terms of reference for any evaluation exercise will be decided by the group on a case by case basis".<sup>105</sup>

The PEG produced its second annual report to the Committee in June 2015, which responded both to the spirit and the letter of the recommendation. 66 policy recommendations, arising from 33 complaints, were received in 2014/15. Of those 66 recommendations 24 were strategic recommendations, 30 were operational recommendations and 12 were areas for minor improvement. The recommendations are divided according to theme which enables trends to be quickly and easily identified. Of the 66 recommendations made in 2014/15, 20 related to custody, 7 related to disputes and harassment and 26 were categorised as 'other' meaning they did not fit within any identified theme. Recommendation 5 of the Human Rights Annual Report 2013 has therefore been implemented. The recommendation was intended to be and the PSNI accepts it as an ongoing process. Therefore, the PEG will produce a report each year which deals with action taken in respect of policy recommendations.

The Independent Police Complaints Commission (IPCC) for England and Wales developed and now produces three times per year a 'Learning the Lessons' report. In those reports, it is intended that lessons learned by police services will be shared. PSNI adopted a similar approach and produced its first report, based upon the IPCC template, in June 2015. The theme agreed with the Policing Board was domestic abuse. The report is extremely useful in that it considers the key issues in the policing of domestic abuse and asks pertinent questions. Those questions are answered within the report and action points agreed. The report is considered in further detail in the Victims Chapter of this Human Rights Annual Report.

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<sup>105</sup> PEG Terms of Reference, May 2013.

The PEG annual report and *Learning the Lessons* reports will be submitted to the Performance Committee in June each year alongside the Professional Standards Monitoring Framework.

### **Informal resolution and local resolution**<sup>106</sup>

Less serious complaints can be dealt with by way of informal resolution if, and only if, the complainant agrees. The informal resolution process is provided for by the Police (Northern Ireland) Act 1998. With informal resolution OPONI refers appropriate complaints to PSNI Service Improvement Department which then appoints an officer of the rank of Inspector or above to speak to the complainant and the officer who is the subject of the complaint with a view to reaching a satisfactory resolution. During 2014/2015 there were 477 complaints deemed suitable for informal resolution (out of 3,306 total complaints received against the PSNI), compared to 478 in 2013/2014.<sup>107</sup> Of the 200 complaints resolved by Informal Resolution, 166 were deemed successful, 34 were deemed to have failed and 0 were withdrawn.<sup>108</sup>

Local resolution was piloted in D District (Antrim, Carrickfergus, Lisburn and Newtownabbey) between June 2010 and November 2010. Through the local resolution process responsibility for resolving less serious complaints is returned to Local Resolution Officers, that is, appointed Inspectors and Sergeants in the unit in which the complaint arose. Local resolution depends upon the consent of the complainant. The success or otherwise of local resolution depends upon the willing co-operation and involvement of both the complainant and the police officer about whom the complaint has been made. Local resolution is similar to informal resolution in that the same type of complaints may be dealt with and both are monitored by OPONI. However, local resolution is not underpinned by statute. Unlike informal resolution, local resolution does not involve PSNI Service Improvement Department. OPONI

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<sup>106</sup> Figures for informal resolution are derived from Trends in Complaints and Allegations, 2014/15 (Pivot Tables), OPONI, June 2015.

<sup>107</sup> There were 858 complaints deemed suitable for informal resolution in 2009/2010; 619 in 2010/2011; 502 in 2011/2012; 461 in 2012/2013; and 476 in 2013/2014.

<sup>108</sup> 477 complaints were received in 2014/15 which were deemed suitable for informal resolution, with 200 closed after being informally resolved.

refers complaints for local resolution to D District Local Resolution Officers directly. During 2014/2015 33 complaints were resolved locally in D District.<sup>109</sup>

### **Complaints against senior officers**

A complaint made by, or on behalf of, a member of the public about a senior officer (an officer of the rank of Assistant Chief Constable or above) must be considered by OPONI. If, following a formal investigation by OPONI, there is a recommendation for disciplinary proceedings, the recommendation will be referred to the Policing Board as the appropriate disciplinary authority for senior officers. If the complaint is suitable for informal resolution, OPONI will refer it to the Policing Board to resolve. During 2014/2015, there were no recommendations for disciplinary proceedings and no cases referred to the Policing Board for informal resolution.

### **Direction and control complaints**

Direction and control complaints relate to the delivery of the policing service and concern, typically, PSNI policy or operational matters. When a direction and control complaint is made, the relevant District or Department contacts the complainant, either in person or by letter and provides an explanation for the action about which the complaint has been made. If appropriate, an apology may be offered or reparation made. PSNI Service Improvement Department oversees all direction and control complaints and provides the Policing Board with a summary of all new complaints, together with a summary of all complaints finalised.<sup>110</sup> Those summaries contain sensitive and confidential information which cannot be published in this Annual Report but they are reviewed by the Policing Board's Human Rights Advisor. Any area of concern is reported by her to the Performance Committee. Between 1 April 2014 and 31 March 2015, PSNI received 138 direction and control complaints.

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<sup>109</sup> Information provided by OPONI to the Performance Committee further to the Committee's Professional Standards Monitoring Framework.

<sup>110</sup> As required by Recommendation 27(h) of the Policing Board's Human Rights Annual Report 2005.

## **Counter-allegations**

During 2014 the Committee raised an issue with the PSNI and OPONI concerning counter-allegations of criminality made by an officer against the person whose complaint gave rise to the OPONI investigation where the officer had not previously reported that allegation to PSNI. A police officer is bound, by section 5 of the Criminal Law Act (Northern Ireland) 1967, to report crime. The Committee was concerned that in those circumstances a counter-allegation would not be capable of being substantiated, investigated or countered by the complainant<sup>111</sup> and may be made for the sole improper purpose of undermining the credibility of the complainant. For the avoidance of doubt, the Committee is not referring to counter-allegations that the complainant's version of events is untrue.

The Committee's concern was with allegations of criminality raised for the first time in the course of an OPONI investigation and for the purpose of undermining the credibility of the complainant in circumstances in which the allegations cannot be investigated. In an effort to address that the Committee recommended that the PSNI should amend Service Procedure 4/2013 (Handling Public Complaints and the Role of the Police Ombudsman) to include a policy on counter-allegations. The Committee recommended that prior to making any amendment the PSNI should first consult with OPONI. That recommendation was not accepted but PSNI and OPONI did meet to consider the issue and agreed that there was a mutually acceptable response to addressing the substance of the concern. Recommendation 3 of the Human Rights Annual Report 2014 has therefore been implemented.

## **Regulation 20 Reports**

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<sup>111</sup> OPONI has advised that section 63 of the Police (NI) Act 1998 places strict conditions on how it may deal with information received in connection with an investigation and that while OPONI investigators will seek to clarify points with complainants, there is no automatic entitlement for a complainant to be advised of all counter-allegations made against him or her. Furthermore, if the counter-allegation is that the complainant has committed an offence, OPONI is not required to report such allegations to PSNI or for those counter-allegations to be investigated.



The Police Ombudsman may investigate non-complaint matters *i.e.* matters about which no complaint has been made by a member of the public.<sup>112</sup> Non-complaint matters can be investigated by the Police Ombudsman of his own volition (often referred to as ‘call-ins’) or as a result of a referral by the Policing Board, the Department of Justice, the Secretary of State, the Director of Public Prosecutions or the Chief Constable of any matter indicating criminality or misconduct by a police officer. The Chief Constable *must* refer all discharges of a firearm, an Attenuating Energy Projectile (AEP) or Taser to the Police Ombudsman for investigation. Any incident in which a person dies either in police custody or shortly following police contact (regardless of whether it is suspected that there was any wrongdoing on the part of the police) must also be referred. At the conclusion of an OPONI investigation into non-complaint matters a report, known as a Regulation 20 report, is sent to the Department of Justice, the Policing Board and the Chief Constable. The report outlines the background to the incident under investigation, OPONI’s findings and, where appropriate, recommendations for the Chief Constable.

During 2014/2015, there were a number of Regulation 20 reports issued by OPONI which related to matters such as the discharge of a firearm, discharge of Taser, discharge of CS Spray, use of a baton, search of a suspect, alleged failure to develop information received, alleged mishandling of money and alleged failures in police investigations.<sup>113</sup> If the Police Ombudsman considers it in the public interest he may publish a press statement setting out his findings. A Regulation 20 report is not published as a matter of course however the Performance Committee receives confidential copies of Regulation 20 reports and monitors any adverse findings. As noted above, under its revised Professional Standards Monitoring Framework, the Performance Committee receives an annual report from PSNI which sets out learning identified through OPONI recommendations, which may be made in relation to both complaint and non-complaint matters.

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<sup>112</sup> By section 55 of the Police (Northern Ireland) Act 1998.

<sup>113</sup> Although the reports were published in 2015 some relate to incidents which occurred in previous years.

## INTERNAL DISCIPLINE

Police misconduct is dealt with by PSNI<sup>114</sup> through the PSNI disciplinary structure either at a local level or by PSNI's Discipline Branch.<sup>115</sup> Allocation depends upon the seriousness of the alleged breach. If the allegation is substantiated the sanction(s) may vary from a formal sanction, to a local misconduct sanction, to no further action.

<b>Formal sanction</b> (imposed following a formal disciplinary hearing conducted by a misconduct panel)	<b>Local misconduct sanction</b> (imposed at local level)
Dismissal from the PSNI	Superintendent's Written Warning
A requirement to resign	
A reduction in rank or pay	Advice and Guidance
A fine	
A reprimand	Management Discussion
A caution	

The PSNI provides the Policing Board's Human Rights Advisor annually with summary details of all cases that resulted in formal disciplinary hearings; details of Superintendent's Written Warnings; information on the number of officers convicted of criminal offences and the disciplinary action taken by PSNI against those officers; and, information on officers who are currently suspended or who have been repositioned pending an investigation into alleged criminality or a gross misconduct matter. That information enables the Human Rights Advisor to monitor how PSNI Service Improvement Department deals with the most serious misconduct allegations and the sanction(s) imposed for allegations that are substantiated.

PSNI Discipline Branch prepares an annual report for the PSNI Audit and Risk Committee which provides an overview of strategic priorities and work carried out during the previous financial year in relation to discipline, anti-corruption

<sup>114</sup> Unless the misconduct relates to a police officer of rank Assistant Chief Constable or above, in which case the Policing Board is the relevant disciplinary authority.

<sup>115</sup> Discipline Branch works closely alongside PSNI's Anti-Corruption and Vetting Branch, with both branches sitting within PSNI's Service Improvement Department (the latter now called Legacy and Justice Department).

and vetting. The report provides summary information on the most commonly breached articles of the Code of Ethics in the previous financial year.<sup>116</sup> During 2014/2015 there were 400 recorded breaches of the Code of Ethics, the most common of which were Article 7, Integrity (25.2% of breaches), followed by Article 2, Police Investigation (24.5% of breaches), followed by Article 1, Professional Duty (22.5% of breaches). As has been reported in previous Human Rights Annual reports, these are the three Articles which each year are most commonly breached.

The report to the PSNI Audit and Risk Committee contains additional information as follows: the number and type of misconduct files opened and being investigated by Discipline Branch (these files will relate to serious misconduct allegations as less serious cases will be dealt with by supervisors at a local level); the number and type of criminal investigation files opened and being investigated by Discipline Branch; the number and type of criminal investigation files opened during the year which have been passed to Districts to investigate; the number of officers who are currently suspended whilst under investigation, the nature of the allegations against them, their gender and rank, and the total number of days lost through police officer suspension each year; and the number and type of complaints made to OPONI, together with a summary of strategies to reduce certain types of complaint.

PSNI provided the Performance Committee with a confidential copy of that audit and risk report in June 2015 and will provide a report annually hereafter. The Committee welcomes that. The analysis contained within the audit and risk report is rigorous and detailed. While it contains information of a sensitive nature that cannot be published the Committee does monitor it closely and discusses its findings with Senior Officers and OPONI during Committee meetings.

## **Culture and Ethics Committee**

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<sup>116</sup> The purpose of the Code of Ethics is to lay down standards of conduct and practice for police officers and to make police officers aware of the rights and obligations arising out of the ECHR.

The PSNI is in the process of establishing a Culture and Ethics Committee to develop further a positive culture and ethos which, amongst other things, is intended to embrace the principles of Policing with the Community, promote equality, diversity and good relations within the service and have at its heart the protection and vindication of human rights in all aspects of policing. The Committee is internal to the PSNI and will focus entirely on operational matters relating to police. The Policing Board will have some oversight of the Committee's business, for example by the attendance of the Board's Human Rights Advisor, but will play no part in the deliberations or decision-making of the Committee. The Culture and Ethics Committee is intended to inform the PSNI on what steps are required: it is separate but additional to the external oversight provided by the Performance Committee. Culture and Ethics Committee's business will be confidential but minutes will be published on the PSNI intranet site. The Performance Committee looks forward to discussing it further with the PSNI and to considering the issues in due course.

### **Civilian personnel**

The legislation which provides the Police Ombudsman with power to investigate and which applies the PSNI Code of Ethics to police conduct came into force in 1998 and 2000 respectively.<sup>117</sup> At that time almost all policing functions were carried out by police officers. However, since then a programme of civilianisation has been initiated in accordance with the Report of the Independent Commission on Policing for Northern Ireland (the Patten report).<sup>118</sup> More civilian staff perform roles for example as station enquiry assistants and call handlers that were previously carried out by police officers. Those roles involve interaction with the public and a high level of responsibility. Civilian staff play an increasingly important role in ensuring that PSNI complies with the Human Rights Act.

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<sup>117</sup> The Police (Northern Ireland) Act 1998 and the Police (Northern Ireland) Act 2000.

<sup>118</sup> *A New Beginning: Policing in Northern Ireland, Report of the Independent Commission on Policing for Northern Ireland*, September 1999, paragraphs 10.22 – 10.24.

However, the majority of civilian staff are not subject to the PSNI Code of Ethics<sup>119</sup> and are instead subject to a Police Staff Handbook and the Northern Ireland Civil Service (NICS) Code of Ethics and Code of Conduct.<sup>120</sup> Furthermore, the Office of the Police Ombudsman (OPONI) does not have remit to deal with complaints made against the majority of civilian staff.<sup>121</sup> It was reported, in the Human Rights Annual Report 2013, that there was no formal procedure for dealing with complaints received by a member of the public in respect of such civilian staff. If a complaint was made, it was considered internally by the PSNI to determine whether it warranted investigation as a disciplinary matter. If so the disciplinary matter was dealt with in accordance with the procedures contained within the Staff Handbook. Records of civilian staff misconduct proceedings were not, however, held centrally. They were retained by Human Resources Managers in each District or Department. That meant that it was difficult for the PSNI (and by extension the Performance Committee) to monitor trends and patterns in civilian staff misconduct matters. The PSNI advised that it was aware of the concern and that it was developing a system to address it. A recommendation was subsequently made which required the PSNI to report to the Performance Committee on the processes it had in place to monitor trends and patterns in complaints and misconduct matters arising in respect of civilian staff.<sup>122</sup>

In September 2014, the PSNI's Human Resources Department reported that the system to electronically record, monitor and report on all aspects of police staff discipline was in place. All cases from April 2014 onwards were recorded on the new system. The recommendation from the Human Rights Annual Report 2013 was therefore recorded as implemented. Since then, PSNI

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<sup>119</sup> Unless they have been designated under sections 30, 30A or 31 of the Police (Northern Ireland) Act 2003 as an Investigating Officer, a Detention Officer or an Escort Officer in which case they will be subject to the Code of Ethics insofar as they are carrying out their designated functions. The Code of Ethics was made applicable to designated staff by the Police Powers for Designated Staff (Code of Ethics) Order (Northern Ireland) 2008.

<sup>120</sup> As regards civilian staff recruited through an agency on a temporary basis, PSNI has agreed a Protocol with the agency which deals with discipline matters.

<sup>121</sup> Unless they have been designated under sections 30, 30A or 31 of the Police (Northern Ireland) Act 2003 as an Investigating Officer, a Detention Officer or an Escort Officer. The Police Ombudsman's remit was extended to include designated staff by the Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008.

<sup>122</sup> Recommendation 6 of the Human Rights Annual Report 2013, Northern Ireland Policing Board, March 2014.

Discipline Branch has monitored police staff discipline and provided an overview to the Performance Committee in November 2015. To ensure that the Performance Committee can discharge its monitoring function the Committee would benefit from annual reports from the PSNI, as part of the Professional Standards Monitoring Framework, including a summary analysis of police staff discipline and steps taken to address any issues of concern. While the PSNI has already indicated its willingness to provide those reports, a formal recommendation is made to ensure that the PSNI continues to report on an ongoing and formal basis.

### **Recommendation 5**

**The PSNI should include as part of the information provided for the Professional Standards Monitoring Framework trends and patterns identified in complaints and misconduct matters arising in respect of police civilian staff who are not designated officers within the remit of the Office of the Police Ombudsman.**

## **CIVIL CLAIMS AND JUDICIAL REVIEWS**

### **Civil claims**

The PSNI provides the Policing Board with details of civil claims brought against it on a monthly basis, including details of compensation paid either by court order or by out-of-court settlement. Information demonstrating the frequency, cost and outcome of civil claims is considered by the Policing Board's Resources Committee on a quarterly basis and by the Performance Committee on an annual basis, the latter as part of its Professional Standards Monitoring Framework.

### **Judicial reviews**

The Performance Committee also maintains a keen interest in judicial review proceedings, particularly those which challenge PSNI human rights

compliance.<sup>123</sup> Of particular interest to the Committee during 2015 were the following.

### ***Retention of DNA profiles, fingerprints and photographs***

The UK Supreme Court considered the retention by the PSNI of fingerprints and photographs in the case of *Gaughran v the Chief Constable of the Police Service of Northern Ireland*.<sup>124</sup> The appellant (an adult) was arrested for driving with excess alcohol and pleaded guilty to that offence. He was fined and disqualified from driving for 12 months. A conviction for driving with excess alcohol is spent after five years. When the appellant was arrested, the PSNI obtained from him his fingerprints, a photograph and a non-intimate DNA sample. Fingerprints are held on a UK-wide database. The photograph is held on a PSNI database to which only authorised PSNI personnel have access. A DNA profile was taken from the DNA sample.<sup>125</sup> The profile is held on a Forensic Science Northern Ireland database. The PSNI confirmed in the appeal that the DNA sample would be destroyed as soon as the Criminal Justice Act came into force therefore the appeal did not concern the retention of the DNA sample.

Mr Gaughran argued that the PSNI's retention of his data breaches Article 8 ECHR and the PSNI accepted that there was an interference with the right. It was further accepted by Mr Gaughran that the interference is in accordance with law and pursued a legitimate aim under article 8(2). The issue for consideration therefore by the Supreme Court was whether the interference was proportionate. Their Lordships held that it was. It was emphasised that in *Marper* the ECtHR was concerned only with the position of suspected not convicted persons and that its criticism of the UK's blanket and indiscriminate

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<sup>123</sup> Judicial review is a public law remedy by which a person with sufficient interest can challenge the lawfulness of a policy, decision, action or failure to act, alleged against a public authority.

<sup>124</sup> [2015] UKSC 29, judgment of 13 May 2015.

<sup>125</sup> A DNA profile is digitised information in the form of a numerical sequence representing a very small part of the person's DNA. It indicates for example a person's gender and provides a means of identification.

data retention policy should be read with that in mind.<sup>126</sup> It was recognised that it does not follow that the practice of Northern Ireland and the UK in relation to convicted persons is automatically compliant with Article 8 and that the policy as it applies to convicted persons could be described as a blanket policy. However, the policy is in fact proportionate: The ECtHR accepted the importance of the use of DNA material in the solving of crime and that the degree of interference in question is low.<sup>127</sup> Their Lordships observed that it was also important to note that the present scheme is concerned only with the retention of the DNA profile and applies only to adults, whereas the scheme criticised by the ECtHR in *Marper* provided for the retention of the full sample and did not distinguish between children and adults.<sup>128</sup>

Factors such as the threshold of offence, whether retention is permitted once a conviction has been spent and whether retention is permitted indefinitely or is subject to a time limit are potentially relevant but not decisive in the proportionality analysis.<sup>129</sup> The potential benefit to the public of retaining the DNA profiles of those who are convicted is considerable and outweighs the interference with the right of the individual.<sup>130</sup> The retention may even benefit the individual by establishing that they did not commit an offence.<sup>131</sup> In *Marper* the ECtHR placed some reliance on the fact that the UK was almost alone among ECHR member states in indefinitely retaining biometric data of non-convicted persons. In the case of convicted persons there is a much broader range of approaches, which broadens the margin of appreciation accorded to individual states.<sup>132</sup> Their Lordships held that adopting a blanket measure is legitimate in some circumstances and it was legitimate in these circumstances.<sup>133</sup> The retention policy is therefore within the UK's margin of appreciation so the court had to decide for itself whether the policy was proportionate.

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<sup>126</sup> *Gaughran v the Chief Constable of the Police Service of Northern Ireland* paragraphs 30-32.

<sup>127</sup> *Ibid* paragraph 33.

<sup>128</sup> *Ibid* paragraph 35.

<sup>129</sup> *Ibid* paragraphs 34, 36-39.

<sup>130</sup> *Ibid* paragraph 40.

<sup>131</sup> *Ibid* paragraph 41.

<sup>132</sup> *Ibid* paragraph 42-44.

<sup>133</sup> *Ibid* paragraph 45.



### ***Surveillance of a detainee's legal consultation***

In a judgment, dated 27 October 2015, the European Court of Human Rights (ECtHR) considered whether the PSNI's refusal to give an undertaking<sup>134</sup> that covert surveillance was not being carried out of a detainee's consultations with his lawyer and with the person appointed because of his vulnerability as his appropriate adult was a violation of Article 8(1) of the ECHR.<sup>135</sup> Such surveillance was permitted by the Regulation of Investigatory Powers Act 2000 (Part II), when read with the Covert Surveillance Code of Practice.<sup>136</sup>

In *RE v United Kingdom*, the applicant was arrested and detained by the PSNI on three occasions between May 2009 and March 2010. During the first two periods of detention his solicitor sought and received assurances from the PSNI that his consultations with the applicant would not be the subject of covert surveillance.<sup>137</sup> On the third occasion, however, his solicitor sought but did not receive the same assurance. He was detained without charge, under the Terrorism Act, for four days. The applicant applied for judicial review of that decision but his application was dismissed. The application was dismissed because the High Court in Belfast was satisfied that the statutory framework (RIPA and the Code) were clearly defined, sufficiently detailed and precise.

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<sup>134</sup> In line with its policy of neither confirming nor denying (NCD).

<sup>135</sup> Article 8 ECHR provides "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>136</sup> This issue had been considered by the House of Lords. In the House of Lords the continued treatment by the PSNI of legal consultations as directed surveillance which attracted the less rigorous of two statutory schemes (see below) was criticised. The case was then referred to as *Re McE* [2009] UKHL 15. Following the decision in *Re McE* the legislation and Code was amended to make it compulsory to treat all such surveillance as intrusive surveillance and subject to the more rigorous regime: Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010.

<sup>137</sup> As a result of the prosecution of a solicitor (Manmohan Sandhu) in 2006 for, amongst other things, inciting Loyalist paramilitaries to murder and pervert the course of justice, which relied upon the produce of covert surveillance of his consultations with clients, criminal defence solicitors in Northern Ireland became aware of the risk that consultations might be subject to covert surveillance. Thereafter, many solicitors requested an assurance before consulting with a client that the consultation would not be subjected to such surveillance.

The applicant's reference to the ECtHR was accepted and proceeded on the basis that there had been an interference with the Article 8(1) right (to a private and family life). The ECtHR found that the interference pursued the legitimate aims of protecting national security and preventing disorder and crime, that it had a basis in domestic law (RIPA and the Code of Practice) and that the law was sufficiently accessible. It went on to consider whether the law was also adequately foreseeable and necessary in a democratic society.

The United Kingdom Government argued that the jurisprudence of the ECtHR distinguished between covert surveillance cases (such as this one) and interception of communication cases under Part 1 of RIPA.<sup>138</sup> It was argued that the distinction, which meant there were less stringent safeguards in the former category of cases, was justified. The ECtHR disagreed: the decisive factor was not the technical definition of the interference, but the *level* of interference with the Article 8 right. The surveillance of legal consultations

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<sup>138</sup> RIPA provides for two schemes: intrusive surveillance and directed surveillance the latter of which is subject to a less restrictive regime. By section 26 of RIPA, its provisions apply to all surveillance which is defined as "directed" or "intrusive". By section 48(2) of RIPA, surveillance is the monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications; the recording of anything monitored, observed or listened to in the course of surveillance; and the surveillance by or with the assistance of a surveillance device. Under RIPA, surveillance may be categorised as "directed" and/or "intrusive". Surveillance is "directed" if it is covert but not intrusive and is undertaken: (a) for the purposes of a specific investigation or a specific operation; (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and, (c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation to be sought for the carrying out of the surveillance. Directed surveillance includes for example the filming and covert monitoring of specific people in public places. An authorisation for directed surveillance may be given if: it is considered necessary in the interests of national security; it is for the purpose of preventing or detecting crime (which is not limited to serious crime) or of preventing disorder; or, it is in the interests of the economic well-being of the United Kingdom. Surveillance is "intrusive" if it is covert surveillance that: (a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and, (b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device. However, surveillance is not defined as intrusive if it is carried out by means only of a surveillance device designed or adapted principally for the purpose of providing information about the location of a vehicle. Surveillance which is carried out by means of a surveillance device in relation to anything taking place on any residential premises or in any private vehicle, but which is carried out without that device being present on the premises or in the vehicle, is not defined as intrusive unless the device is such that it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle. Covert surveillance of legal consultations was treated previously by the PSNI as directed surveillance.

constituted an extremely high degree of intrusion and was analogous to the interception of a telephone call between a lawyer and his client. The ECtHR held that Article 8 afforded “strengthened protection” to exchanges between lawyers and their clients, as lawyers would be unable to defend their clients if they were unable to guarantee that their exchanges would remain confidential. Therefore, The ECtHR held that the same safeguards from arbitrary interference were required for surveillance of legal consultations as in interception of communications cases, at least insofar as those principles could be applied to the form of surveillance in question.

The ECtHR found that the relevant provisions were sufficiently clear as regards (i) the nature of the offences that could give rise to covert surveillance, (ii) the categories of persons liable to such surveillance and (iii) the duration, renewal and cancellation of the surveillance measures. However, it was not satisfied that the provisions of Part II of RIPA and the Code afforded persons affected with sufficient safeguards as regards the examination, use and storage of the material, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings were to be erased or the material destroyed. The provisions contrasted with the more detailed provisions of Part I of RIPA and the Interception of Communications Code of Practice which the ECtHR had approved.<sup>139</sup>

The ECtHR had regard to the PSNI’s new Service Procedure (Covert Surveillance of Legal Consultations and the Handling of Legally Privileged Material, SP 19/2010), which had put in place further safeguards for the secure handling, storage and destruction of material obtained through covert surveillance but that Service Procedure had not been in force at the relevant time in this case. The ECtHR appears to have been satisfied that the new and current Service Procedure would provide the necessary safeguards but in the absence of those the applicant’s Article 8(1) right had been violated and the

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<sup>139</sup> In *Kennedy v UK* (No. 26839/05), judgment of 18 May 2010.

surveillance measures applied to him did not meet the requirements of Article 8(2).

The ECtHR reached a different view in respect of the surveillance of the consultations between the applicant and the Appropriate Adult. While such surveillance also constituted a significant degree of intrusion but were not subject to legal privilege and did not attract the “strengthened protection” afforded to consultations with lawyers (or, indeed, medical professionals). The applicant did not have the same expectation of privacy as he did during a legal consultation. In those circumstances, the relevant question was whether the legislation adequately protected detainees against arbitrary interference and was sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the PSNI were entitled to resort to covert surveillance.

The ECtHR concluded that the provisions concerning the possible surveillance of consultations between vulnerable detainees and appropriate adults had been accompanied by adequate safeguards against abuse. Important in this context was the fact that authorisations for surveillance had to be reviewed regularly and were cancelled if the criteria were no longer met. Furthermore, the authorisation could only be granted for three months at a time with detailed records of all authorisations being kept, it was supervised by surveillance commissioners, the admissibility of evidence obtained through surveillance was subject to the control of the trial judge. Lastly, there was the additional safeguard that an aggrieved party could bring a complaint to the Investigatory Powers Tribunal, which had power to award compensation, to quash or cancel an authorisation and to order the destruction of any records. In those circumstances, covert surveillance of a consultation between the applicant and his appropriate adult did not amount to a violation of the Article 8(1) right.

This decision of the ECtHR in *RE v United Kingdom* is important in that it clarifies the principles to be applied but has little effect on the current practice of the PSNI which is now governed by the Service Procedure apparently

approved by the ECtHR. Therefore, since June 2010 the PSNI has applied sufficient safeguards to satisfy the requirements of Article 8 ECHR.

### ***Release of images of children***

The Supreme Court has delivered judgment in a case, reported upon in previous Human Rights Annual Reports, concerning the release to local newspapers of images of children involved in rioting.<sup>140</sup> The appellant, referred to as JR38, on account of his age (he was 14 years old at the material time), was involved in serious rioting which took place in Derry/Londonderry in July 2010. CCTV images taken of him in the course of rioting were later published in two newspapers as part of a police campaign designed to identify individuals involved in the riots and also to discourage further sectarian rioting.

The factors relied upon by the PSNI to justify publication were as follows. The violence at the interface was persistent, extending over a period of months, and was exposing vulnerable people to fear and the risk of injury. There was, therefore, a pressing need to take steps to bring it to an end by identifying and dealing with those responsible. Detection by arresting those at the scene was not feasible so use of photographic images was necessary. All reasonably practicable methods of identifying those involved short of publication of the photographs had been tried. The participation of children in groups engaged in public disorder inevitably corrodes the child's sense of proper respect for the rights and freedoms of others. That is particularly the case where the public disorder has a sectarian overtone. Where a child has become involved in such a group it is in the child's interest that his participation should be identified so that the child can be provided with the support necessary to prevent offending. Early identification of the participation of the child can help to ensure that the child benefits from those supports before he engages in very serious offending. The safeguards included in the PSNI guidance

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<sup>140</sup> *In the matter of an application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42, On appeal from [2013] NIQB 44.

document ensured a rigorous approach to the need to publish and the publication of the images was likely to lead to the identification of a high proportion of those involved and therefore ensure the referral to the appropriate diversionary services.

The appellant complained that the publication of the images breached his rights under Article 8 ECHR and applied for judicial review of the decision to release the images. Dismissing the application, the Divisional Court in Northern Ireland held that his Article 8 right was engaged and publication risked stigmatising him and impairing his rehabilitation and reputation. The court held however that the interference was justified because it was necessary for the administration of justice and not excessive in the circumstances. The Supreme Court dismissed his appeal. Of the five Justices who sat in the case, two held that Article 8 was engaged but that the interference was justified. Three Justices held that Article 8 was not engaged but if it were it was justified.

Lord Kerr, who held that Article 8 was engaged, concluded that a nuanced approach was needed to reach a conclusion and that the test is essentially a contextual one, involving not only whether the person asserting the right had a reasonable expectation of privacy but also many other possible factors such as the applicant's age, consent, the risk of stigma and the use to which the published material is put. Reasonable expectation of privacy may be a factor of considerable weight but it is not determinative.<sup>141</sup> In the circumstances of this case Article 8 was engaged because the appellant's age and the effect on him of the publication of the images. Furthermore, that the emphasis under Article 8 should be on the publication of the photographs rather than the activity in which he was engaged.<sup>142</sup> Despite that, the interference was justified. The police were entitled to disclose the image under the Data Protection Act 1998 as the publication was for the purposes of the prevention and detection of crime and the apprehension and prosecution of offenders and publication furthered those objectives as well as seeking to divert young

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<sup>141</sup> Lord Kerr at paragraph 56.

<sup>142</sup> Lord Kerr at paragraph 65.

people from criminal activity.<sup>143</sup> The police's painstaking approach showed that this was a measure of last resort.<sup>144</sup> Furthermore, the publication struck a fair balance between the interests of the appellant and the community. It was relevant that the appellant stood to benefit from being diverted from criminal activity, as did his community from the prevention of crime and apprehension of offenders.

Lord Toulson, who concluded that Article 8 was not engaged, considered that the "touchstone" for engagement of Article 8 is whether the person seeking to assert their rights had a reasonable expectation of privacy.<sup>145</sup> The fact that the appellant was a child at the relevant time does not justify using another test but may be relevant to its application. The test is an objective one and there was no reasonable expectation of privacy in the circumstances. Lord Toulson observed that Article 8 does not exist to protect rioting and the appellant's involvement in the riot was not an aspect of his private life which he was entitled to keep private.<sup>146</sup> He went on that even if Article 8 were engaged any interference with the right was justified for the reasons given by Lord Kerr.

The Supreme Court did not consider, because it was not part of the appellant's case, the application of Article 2 ECHR (the right to life) and any risk, as a result of paramilitary activity, that may arise from publication. That is an additional factor which is taken into account by the PSNI when considering publication. A thematic review<sup>147</sup> of policing with children and young people was published by the Policing Board on 26 January 2011. Within that thematic review the Committee had considered the issue of the release of images of children in the context both of Article 8 and Article 2 ECHR, accepted that such release could be justified in certain circumstances but recommended

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<sup>143</sup> At paragraph 73.

<sup>144</sup> Paragraphs 76-78.

<sup>145</sup> At paragraph 88.

<sup>146</sup> At paragraph 100.

<sup>147</sup> Thematic reviews are complementary to the Board's human rights monitoring framework and have been taken forward on behalf of the Policing Board by the Human Rights and Professional Standards (HRPS) Committee and the Policing Board's Human Rights Advisor. The purpose of a thematic review is to provide focused scrutiny on a specific area of police work. A key feature of this approach is use of the community's experience of policing as the evidence base to evaluate police policy and practice.

that images should not be released save where the release was necessary for the purpose of protecting the public or the young person and only after all reasonable methods had been tried and failed. The PSNI accepted that recommendation and amended its policy to include revised guidance. Each and every decision to release a single image or other detail which may identify a child is subject to a detailed risk assessment and consultation with relevant individuals and agencies. A record of the risk assessment and consultation is recorded. The Performance Committee will monitor whether this policy is adhered to.

### ***Parades and protests: advance notification***

In *CE's Application*, the applicant participated in a parade on 1 February 2014, against which there were protests said to be “against a Republican parade and against a Republican rally near a NI war memorial”. The applicant complained that the protest had not been notified correctly and applied for judicial review of the decisions of the PSNI and the Parades Commission decision to accept the notifications as valid.<sup>148</sup> The deficiency about which complaint was made was that Form 11/3 was inaccurate and incomplete because the name of the person signing the form was illegible.<sup>149</sup> It was suggested that was a deliberate tactic to disguise and therefore protect from prosecution those organising a protest if conditions are subsequently breached. Accordingly, it was argued, the form should not and could not lawfully have been accepted by PSNI and should not have been forwarded to the Parades Commission or considered by the Commission.

Mr Justice Horner considered that the legislature did not intend that any failure to comply to the letter with the completion of the form would render it invalid and/or void and/or incapable of being accepted either by the PSNI or by the Parades Commission. Furthermore, he held that a refusal to issue a determination on foot of a potentially innocuous omission would run contrary

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<sup>148</sup> *CE's Application* [2015] NIQB 55.

<sup>149</sup> Form 11/3 is required to be submitted by a parade organiser to the PSNI which then must forward it to the Parades Commission.



to the Commission's overarching functions which included the duty to "promote greater understanding by the general public of issues concerning processions" and "to promote and facilitate mediation as a means of resolving disputes concerning public processions".

The Judge went on to find that there was no prejudice to the applicant caused by the protestors failure to complete the form strictly in accordance with the prescribed forms but the likelihood of prejudice would arise if the Parades Commission was unable to discharge or prevented from discharging its statutory function by, for example, being precluded from imposing conditions either on the organisers or the participants of a parade. The obligation on the PSNI, or more particularly the Chief Constable, ensure that a copy of a notice given under the Act<sup>150</sup> is immediately sent to the Commission, does not require the Chief Constable to only send the Commission a notice strictly in accordance with the Act. The duty in ensuring the form is correct and accurate rests on the organiser not on the PSNI or the Commission and the power of the Commission to make determinations for parades or protests is not conditional upon receipt of a notice strictly in accordance with the provisions of the Act. Mr Justice Horner did however suggest how the form could be made clearer to prevent difficulties in the future.

### ***Automatic disclosure of criminal convictions: Article 8 ECHR***

In *Gallagher's (Lorraine) Application*, the applicant contended that the automatic disclosure and potential future disclosure of her criminal record information and information relating to her 'spent' convictions in particular, on a criminal record disclosure certificate, breached her rights under Article 8 of the ECHR and sought judicial review of the regime.<sup>151</sup> Mr Justice Treacy considered the statutory framework under the Police Act 1997 Act<sup>152</sup> which provides that, for certain exempted areas of employment, AccessNI can disclose an applicant's conviction(s) to potential employers on an Enhanced

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<sup>150</sup> Section 7 of the Public Processions (NI) Act 1998.

<sup>151</sup> *Gallagher's (Lorraine) Application* [2015] NIQB 63. This judicial review challenged the statutory provision, for which the PSNI is not responsible.

<sup>152</sup> In particular section 113B of the Act.

Disclosure Certificate. Where an applicant has more than one conviction they will all be disclosed automatically by AccessNI.<sup>153</sup> He or she must disclose all convictions by way of a personal declaration to a potential employer for certain exempted areas of employment irrespective of whether they are 'spent', the nature of the convictions, and other pertinent factors. The applicant argued that even if a person has only one conviction which was received as an adult, it will automatically be disclosed if the EDC is requested within 11 years of the conviction.<sup>154</sup>

It was accepted by the Department of Justice (respondent to the challenge) that the retention, storage and disclosure of criminal information engages the Article 8 ECHR right (to respect for private life, the home and correspondence) so the court should consider whether the interference is justified. Mr Justice Treacy considered relevant to that assessment the following: Is the objective behind the interference sufficiently important to justify limiting the right in question; were the measures rationally connected to the objective; did the measures go any further than was necessary to achieve it; and, did the measures strike a fair balance between the rights of the individual and the interests of the community.

The UK Supreme Court had held previously that the regime for disclosure was unlawful because it "operated indiscriminately" and because there were no "rules which identify the entries which should then be disclosed".<sup>155</sup> The Department of Justice argued that there was introduced following the Supreme Court's judgment new rules which filter entries to be disclosed, that the new regime represents a justified interference and that the new system "is plainly not a blanket, indiscriminate one". Mr Justice Treacy observed that while issues identified by the Supreme Court had been "partially resolved" by the introduction of some filtering for age of conviction, for an individual like the applicant it is correct that the current scheme does not permit consideration of the relevance of the information to be disclosed or proportionality of that

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<sup>153</sup> In accordance with section 113A of the 1997 Act.

<sup>154</sup> Under section 113A(6).

<sup>155</sup> *R (T & Another) v Secretary of State for the Home Department* [2014] UKSC 35.

disclosure. He held that it was the complete lack of consideration that made the scheme indiscriminate and thus unlawful. He found that the measure went further than was necessary to achieve the legitimate end – the objective of protecting vulnerable persons – which could be achieved with a less invasive disclosure regime and that the measure failed to strike a fair balance between the rights of the individual and the interests of the community.

Mr Justice Treacy noted in particular that under the Act,<sup>156</sup> a person who has more than one conviction will have all of their convictions disclosed automatically, irrespective of their relevance to the job applied for, their age, and whether the convictions have become ‘spent’ under the Rehabilitation of Offenders framework. He said that even if a person has only one conviction on their record which they received as an adult it will automatically be disclosed on an Enhanced Disclosure Certificate if that was within 11 years of the conviction and “While this allows for limited consideration of the age of the conviction, it takes no account of any other pertinent factors such as its nature, relevance to the form of employment sought, or whether it may otherwise be considered spent.” He concluded that the scheme was unlawful. The Performance Committee will seek assurances from the PSNI that the scheme has been amended to take account of Mr Justice Treacy’s findings.

### ***Informed warning to 11 year old without a solicitor present***

In *D’s Application*, the Divisional Court in Belfast quashed a decision of the PSNI to administer an informed warning to an 11 year old boy without referring him to the possibility of seeking legal advice beforehand.<sup>157</sup> In September 2013, the PSNI received a report of an 11 year old out of control. Officers arrived at the child’s father’s premises to find the father restraining the child on the floor. The father alleged that the child had attacked him and another and attempted to stab him with a knife. The police officer handcuffed and restrained the child until he calmed down. He was then arrested upon suspicion of having committed assault occasioning actual

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<sup>156</sup> By virtue of new s.113A(6)(c) of the 1997 Act.

<sup>157</sup> *D’s Application* [2015] NIQB 78.

bodily harm, possession of an offensive weapon with intent, resisting police and issuing threats to kill. The child was interviewed the following day in the presence of an appropriate adult and, after consultation with his solicitor, the child was interviewed under caution. He was advised that the matter may be dealt with should there be sufficient evidence including by an informed warning (“IW”), a restorative caution or being reported for prosecution. He was told by the police that an informed warning or a restorative caution could only be given if he admitted the offence, but even if he did admit the offence, he may still be referred for prosecution. The child’s solicitor indicated that it was going to be a “no comment” interview. The child was then released unconditionally on all charges except for that of resisting the police.

A report was submitted to the PPS recommending no prosecution<sup>158</sup> but the PPS decided that it was in the public interest to prosecute and considered a number of diversionary options including an Informed Warning, a caution or a youth conference. The PPS decided an Informed Warning was appropriate. The Informed Warning was administered by a PSNI Youth Diversion Officer (“YDO”) in the presence of the child’s father and social worker. The YDO explained the nature of the procedure, confirmed that it was an alternative to going to court and that, if accepted, it appear on the child’s police record. The child said that he understood and agreed to that disposal. The YDO then read the Informed Warning and confirmed that the child admitted the offence and consented to the Informed Warning. Subsequently, the child made an application for judicial review of the decision to administer the Informed Warning without providing him with legal representation during the process. The complaint turned upon the question of consent which was based upon an admission of offending without the benefit of legal advice contrary to Article 8 ECHR.

Cautions or warnings, despite the fact that they are received in private, do engage Article 8 ECHR. Therefore, the context in which consent may be given

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<sup>158</sup> In respect of the offence of resisting police on the grounds that it was not believed to be in the public interest to pursue that single matter. The recommendation was based on the applicant’s age, his troubled family background, his lack of offending history and the decision by his father and aunt not to pursue the complaint.

was considered. The court noted that the child was initially interviewed by the police in the presence of his solicitor and an appropriate adult and was, at that stage, informed of the potential outcomes including that the informed warning would appear on his criminal record and might be disclosed in subsequent proceedings. Thereafter, when the YDO met the applicant, his father and his social worker he was informed that it was an alternative to going to court, that by it would appear on his police record and would remain “live” for a period of 12 months.

The PSNI’s Youth Diversion Scheme (“YDS”) is not contained in statutory or regulatory provision but sets out three conditions to be satisfied before an Informed Warning can be administered lawfully: there has to be evidence judged to be sufficient to support a successful prosecution; the young offender has to admit the offence; and, the parent or guardian has to give informed consent.

The Divisional Court said it was inclined to the view that the administration and receipt of an IW in accordance with the PSNI’s YDS procedure engaged Article 8(1) and that the PSNI would not have been in a position to give objective advice in relation to whether there would be a prosecution and that although the child may have been told that the warning would be ‘live’ for 12 months, there was no evidence that he received any information explaining that the offence of resisting arrest was one of a list of offences which was not eligible for ‘filtering out’ and therefore remained liable to be disclosed by Access NI. The Divisional Court observed that the legal requirement of procedural fairness, reflecting the principles of natural justice, has always been an entirely contextual principle within the content of the duty depending upon the circumstances of the particular case. It incorporates the basic right to be given sufficient information to enable an informed decision to be reached by the subject whose future may be adversely affected. Noting the “damaging and destabilising” background of the child, the Court commented “Diversionary schemes... represent praiseworthy attempts on the part of the PPS and PSNI to recognise the risk and to achieve a just balance between those rights of the individual and those of the community. It is accepted that

those concerned sought to conscientiously comply with [the YDS procedure] in administering the IW. However, the court is obliged to subject the operation and outcome of any such scheme to the closest scrutiny so as to ensure compliance with the law”.

The Divisional Court concluded that, in the particular circumstances of the case, the child’s consent could not be regarded as sufficiently or properly informed and that, consequently, the decision of the PSNI to administer the Informed Warning without referring to the possibility of seeking legal advice beforehand was not in accordance with the law and should be quashed. It was further ordered that the Informed Warning should be removed from the applicant’s record.

Since the judgment was delivered, the PSNI has reconsidered the training offered to relevant officers and staff. PPS staff have been involved in that training. The Committee wants to ensure that the issue in this case has been addressed conclusively.

### **Recommendation 6**

**The PSNI should forthwith amend its Youth Diversion Scheme to include clear guidance that a child must always be referred to the possibility of seeking legal advice when an Informed Warning is to be administered. Thereafter the PSNI should confirm in writing to the Performance Committee that the Scheme has been amended and that officers have received appropriate advice on the amendment.**

### ***Inquest into the death of Pearse Jordan***

Mr Justice Stephens determined previously that the Coroner was not responsible for delays which occurred in the conclusion of the inquest into the death of Pearse Jordan but that the Police Service of Northern Ireland had delayed progress of the inquest. He ordered the PSNI to pay an award of

damages of £7,500.<sup>159</sup> Mr Jordan's father (Hugh Jordan) appealed the finding in respect of the coroner and the PSNI appealed the award of damages.<sup>160</sup> The Court of Appeal reiterated that the issue of delay has been addressed in a number of earlier proceedings.<sup>161</sup> For example, Mr Justice Hart, in 2009, conducted a review of the progress of this inquest between January 1995 and June 2009. He concluded that in the period up to 2007 the delay had been caused by deficiencies in the Coroners Rules, inaction on the part of the government in making changes to the Rules, the non-availability at the early stages of legal aid for inquests, the steadfast resistance of the Chief Constable to making available to Mr Jordan various categories of documents which he sought and frequent, complex and protracted litigation over those issues. Mr Justice Hart found that none of those matters could properly be considered to be the responsibility of the Senior Coroner. He then considered the period between March 2007 and June 2009 and was satisfied that the repeated delays in commencing the inquest during that period were entirely due to the "continuing efforts" of the PSNI to avoid providing to the next of kin the documents they sought. He said that the Senior Coroner had made every effort to ensure, so far as was within his power, that the inquest was heard.

In the proceedings before Mr Justice Stephens, Mr Jordan complained about delay caused by the coroner who held the inquest and claimed that the coroner failed to proceed with the inquest until 2012. In his decision, however, Mr Justice Stephens largely adopted the conclusions of Mr Justice Hart but also noted in particular the over-redaction of documents by the PSNI and the failure to put in place a memorandum of understanding with the Security Service in relation to threat assessments as a result of which further adjournments were required.

On the instant appeals, the Court of Appeal noted further issues that came to light after 2009 including the coroner's decision to view material relating to

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<sup>159</sup> On 17 November 2014, the Court of Appeal directed that a fresh inquest into the death of Patrick Pearse Jordan should be held. This judgment concerns only appeals from findings in relation to delay and damages.

<sup>160</sup> *Jordan's Applications* 13/002996/1; 13/002223/1; 13/037869/1 [2015] NICA 66.

<sup>161</sup> In May 2001 before the European Court of Human Rights; and in 2009 before Mr Justice Hart and subsequently the Court of Appeal.

previous shooting incidents concerning some of the police officers in the Jordan case and to search the 'Stevens' database on the basis of the real possibility that it contained material which was potentially relevant to the inquest. Additionally, there was a delay due to late disclosure concerning two police witnesses and the failure of the Security Service to produce risk assessments necessary for the determination of anonymity and screening applications. The Court of Appeal rejected the allegation that any of that showed a lack of expedition on the part of the coroner. It did, however, endorse the views of Mr Justice Hart and Mr Justice Stephens that there had been "considerable delays as a result of obstacles and difficulties created by the PSNI".

In respect of the PSNI's appeal on the award of damages, the Court of Appeal set out the provisions of the Human Rights Act<sup>162</sup> which provides for the award of damages against a public authority which has acted in a way which is incompatible with an ECHR right, and in particular that such a claim must be brought before the end of a year beginning with the date on which the act complained of took place or such longer period as the court considers equitable having regard to all the circumstances. The PSNI contended that Mr Jordan was outside that limitation period and he should have brought his claim when he instituted proceedings in 2009. Mr Jordan contended that it would not have been open to him to make a claim for damages in 2009 because at that time the law was that the Article 2 obligation did not arise in domestic law in respect of deaths occurring prior to the commencement of the Human Rights Act 1998.<sup>163</sup> Mr Jordan also contended that there was a catalogue of continuing failures in disclosure by the PSNI and that the time limit in relation to a failure does not start running until the failure is corrected.

The Lord Chief Justice, delivering the judgment of the Court of Appeal, said it was apparent that delay as a result of failures of disclosure has been a recurrent problem in this case and in other legacy cases. He also noted that the Court of Appeal had ordered that the inquest in this case should now

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<sup>162</sup> Section 7(5) of the Human Rights Act 1998

<sup>163</sup> *i.e.* 1 October 2000. That position changed however in May 2011.



proceed before a different coroner and that “If that inquest does not take place within a reasonable timeframe that would constitute a fresh breach of the Convention for which a remedy, including damages, may be available. It is when the inquest has been completed that it will be possible to examine all of the circumstances surrounding any claim for delay and the court will then be in a position to determine whether adequate redress requires an award of damages and if so against which public authority and in which amount”.

The Court of Appeal considered, therefore, that in legacy cases the issue of damages against any public authority for breach of the Article 2 obligation ought to be dealt with once the inquest has finally been determined. The Lord Chief Justice said that each public authority against whom an award is sought should be joined. He said that the principle that the court should be aware of all the circumstances and the prevention of even further litigation in legacy cases are compelling arguments in favour of it being equitable in the circumstances to extend time if required: “Where the proceedings have been issued within 12 months of the conclusion of the inquest, time should be extended” and concluded that the claim for damages for delay in this case should be assessed after the completion of the inquest but should be made within one year of the completion.

This case is an example of the many issues that have arisen in the handling of legacy cases which have concerned the Committee for many years. The Committee has sought, not always successfully, to obtain explanations from the PSNI and is continuing to pursue the issues robustly. Legacy cases are considered separately in this report<sup>164</sup> but for present purposes it is important to note a report by the Parliamentary Joint Committee on Human Rights, of March 2015, which highlighted as an area of concern six cases (the McKerr cases) from Northern Ireland<sup>165</sup> concerning the inadequacy of investigations of the use of lethal force by State agents.<sup>166</sup> In the McKerr cases the ECtHR

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<sup>164</sup> At page 174.

<sup>165</sup> The so-called ‘McKerr Group’ of cases: McKerr, Jordan, McShane, Shanaghan, Kelly and Finucane

<sup>166</sup> *Human Rights Judgements - Seventh Report of Session 2014-15*, Joint Committee on Human Rights, published 11 March 2015. The Joint Committee on Human Rights is

found a number of violations of the procedural obligation under Article 2 ECHR (the right to life) to conduct an effective investigation into the deaths. The ECtHR found a lack of independence of the police officers investigating the deaths, defects in the police investigations, inadequate public scrutiny and information to victims' families on reasons for decisions not to prosecute and defects in the inquest procedure.<sup>167</sup>

While the UK Government adopted a number of general measures to give effect to those judgments including reforms to the inquest procedure in Northern Ireland and the establishment of bodies to carry out investigations such as the Police Ombudsman of Northern Ireland and the (now abolished) Historical Enquiries Team, the Joint Committee is concerned that a number of outstanding issues remain including ongoing concerns about the lack of independence of police investigators. The Joint Committee expressed its concern that in the absence of the Historical Investigations Unit (agreed initially in the Stormont House Agreement in December 2014), the PSNI Legacy Investigations Branch “cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence of the police service.”<sup>168</sup> The Board’s Performance Committee shares that concern.

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appointed by the House of Lords and House of Commons to consider matters relating to human rights in the United Kingdom, proposals for remedial orders and remedial orders. The Committee currently comprises 12 members, six members from each House.

<sup>167</sup> *McKerr v UK*, Application 28883/95, judgment of 4 May 2001; *Jordan v United Kingdom*, Application 24746/94, judgment of 4 May 2001; *Finucane v UK*, Application 29178/95, judgment of 1 July 2003; *Kelly v United Kingdom*, Application 30054/96, judgment of 4 May 2001; *Shanaghan v UK*, Application 37715/97, judgment of 4 May 2001; *McShane v UK*, Application 43290/98, judgment of 28 May 2002.

<sup>168</sup> Human Rights Judgments - Seventh Report of Session 2014-15, Joint Committee on Human Rights, published 11 March 2015, paragraph 3.7.

## 6. PUBLIC ORDER

Public order policing inevitably engages a number of rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR). In the context of public processions and protest meetings a number of articles of the ECHR are engaged such as the right to freedom of thought, conscience and religion (Article 9 ECHR), the right to freedom of expression (Article 10 ECHR), the right to freedom of peaceful assembly and freedom of association with others (Article 11 ECHR) and the right to respect for private and family life (Article 8 ECHR). Where there is potential for *disorder*, the right to life (Article 2 ECHR) and the right not to be subjected to torture, or inhuman or degrading treatment or punishment (Article 3) are clearly engaged.

The PSNI's duty to balance those often competing rights calls for careful consideration of a number of complex issues. The PSNI operates within an environment in which it is not responsible solely for the management of parades and protests. For example, parades and associated protest meetings are considered by the Parades Commission which decides whether to issue a determination and/or impose conditions under the Public Processions (Northern Ireland) Act 1998. As a public authority the Parades Commission must take into account the ECHR rights of all involved before reaching a decision. However, it clearly is the sole responsibility of the PSNI to *police* parades, protests and other public assemblies and to deal with any outbreaks of disorder.

In doing so, the PSNI must comply with the Human Rights Act 1998. The exercise of police public order powers<sup>169</sup> and the duties to protect life and property, to preserve order, to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice<sup>170</sup> must be informed by and comply with the Human Rights Act 1998. A

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<sup>169</sup> Primarily contained within the Public Order (NI) Order 1987, although there are also relevant powers contained within the Police (NI) Act 1998, the Roads (NI) Order 1983, the Road Traffic (NI) Order 1995, the Protection from Harassment (NI) Order 1997 and a power of arrest contained within the Police and Criminal Evidence (NI) Order 1989.

<sup>170</sup> By Section 32(1) of the Police (NI) Act 2000.

detailed account of the legal framework within which the police must operate is set out in the Human Rights Annual Report 2013.<sup>171</sup>

In summary, where there is the possibility of violence and disorder the police are required to respond so as to protect the Article 2 ECHR rights of those in the immediate vicinity of the disorder and those of the wider community. Article 11 ECHR (the right to peaceful assembly) does not require the police to facilitate the assembly if doing so would expose the community to a real risk of serious violence. Police are obliged to take all steps that are reasonable in the circumstances to avoid a real and immediate risk to life once they have or ought to have knowledge of the existence of the risk. The standard of reasonableness brings into consideration the circumstances of the case, the ease or difficulty of taking preventative measures and the resources available.

The police are entitled, bearing in mind their experience of managing disorder and their access to intelligence, to exercise judgment to balance the competing rights and obligations. Within that the police may decide not to apprehend and arrest perpetrators of violence and disorder who had a means of retreat and instead concentrate on dealing with the disorder as it arises. The police are obliged, by section 32 of the Police (Northern Ireland) Act 2000 to prevent crime but that does not impose a requirement on them to intervene on every occasion when an offence is in the course of commission: the police have a wide area of discretionary judgment as to the appropriate response.

The PSNI, in responding to large scale public order incidents in which unlawful acts have been, or are likely to be, carried out and where community tensions are running high, are faced with an enormous challenge. They have demonstrated, with their many years of experience and the intelligence available to them, that they are capable of and do respond so as to protect and respect the rights of all involved while managing disorder in a lawful and proportionate manner. The PSNI's decision making process must be well

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<sup>171</sup> Pages 68 – 75 of the Human Rights Annual Report 2014, Northern Ireland Policing Board, March 2014.

documented and must stand up to scrutiny. Importantly, the PSNI must also be prepared to account for any decisions made.<sup>172</sup> PSNI has repeatedly demonstrated its willingness to do so. 2015 was no different. The Policing Board's Human Rights Advisor reported to the Committee that PSNI senior command once again afforded her unlimited access to public order planning, strategy, live operations and de-briefs.

## **MONITORING THE POLICING OF PUBLIC ORDER EVENTS**

The Policing Board regularly meets to consider public order issues that do or may arise. That includes training, policing tactics, the public order strategy, the use of force, the criminal justice strategy (arrests, prosecution etc.), the management of parade notifications, the welfare of officers, mutual aid, engagement between the police and communities and resource implications (financial and personnel). Furthermore, the Policing Board's Human Rights Advisor, in addition to attending some live operations, is briefed regularly by PSNI on its public order strategy, its planning of public order events and the operational decisions that are taken. For example, on 13 July 2015, the Human Rights Advisor attended the Silver Command room throughout the operation. As in previous years, she reported to the Committee her satisfaction with the policing of the operation save in respect of one incident which is currently under investigation and will be reported upon once complete.

The Performance Committee also receives and considers, on a six-monthly basis, use of force reports prepared by PSNI. Those reports, which are considered in more detail in Chapter 7 of this Human Rights Annual Report, provide details of any correlation between high incidents of use of force by the police and public disorder incidents. In addition, the relevant District Commander is required to submit to the Policing Board, as soon as reasonably possible after a major public disorder incident, a written record

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<sup>172</sup> In *DB's Application* [2014] NICA 56 for example the Court of Appeal was assisted in reaching its decision through a consideration of PSNI's Criminal Justice Strategy documents and revisions, the relevant operational strategy and the decisions recorded within the Events Policy Book.

containing details of the nature of the disorder, any force used, any injuries sustained by police officers or members of the public and any damage caused to property.<sup>173</sup> Those records are considered by the Performance Committee.

In June 2015, a report by the Office of the Police Ombudsman criticised the PSNI for failing to protect the Orange Order as it marched through Belfast. While the policing operation occurred in 2013, the report is mentioned in this Annual Report for completeness. The report was considered by the Policing Board and discussed with the Chief Constable. The Chief Constable accepted the findings in the report and apologised for the PSNI's failure to plan for the subsequent disorder and the inability to deploy sufficient resources in time to prevent the disorder. The Police Ombudsman rejected an allegation that the police stood by and did nothing.

The Policing Board's Human Rights Advisor reported previously to the Committee that the PSNI had not on that occasion envisaged the disorder that subsequently ensued and the number or locations of officers that needed to be deployed. Immediately after the incident and in subsequent planning meetings however the PSNI clearly demonstrated that the lessons to be learned from the incident had been learned and provision made to better ensure that the problem was unlikely to recur. There is, currently, under investigation an alleged failure to plan in respect of the policing operation at Ardoyne shop fronts on 13 July 2015. The outcome of that investigation is awaited but will be reported upon when the investigation is complete.

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<sup>173</sup> Requirement for early reporting to the Policing Board following discharge of Attenuating Energy Projectiles (impact rounds) and other public order incidents, Appendix J to the Manual of Policy, Procedure and Guidance on Conflict Management, PSNI, 2013. The report to the Board must be made where (i) an AEP is discharged; (ii) the incident involves 200 persons; or (iii) where the incident is of such intensity there is likely to give rise to widespread media reporting or public interest (e.g. a person has died/been seriously injured as a result, there has been significant damage to property, there have been prominent arrests etc.).

## 7. USE OF FORCE

The use of force by police officers engages in a direct and fundamental way the rights protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR) such as Article 2 (the right to life); Article 3 (the right not to be subjected to torture, inhuman or degrading treatment or punishment) and Article 8 (the right to respect for private and family life).<sup>174</sup> Police officers have the authority to use force in order to defend themselves or another person, to effect an arrest, to secure and preserve evidence or to uphold the peace, but any such use must be justified on each and every occasion. Consideration must always be given to whether there is a viable alternative to the use of force.

Furthermore, Article 4 of the PSNI Code of Ethics, which draws upon the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, states “Police officers, in carrying out their duties, shall as far as possible apply non-violent methods before resorting to any use of force. Any use of force shall be the minimum appropriate in the circumstances and shall reflect a graduated and flexible response to the threat. Police officers may use force only if other means remain ineffective or have no realistic chance of achieving the intended result”.

All PSNI decision making, including the decision to use force, is taken in accordance with the Association of Chief Police Officers (ACPO) National Decision Model (NDM). The NDM is an established approach to managing conflict and it can be applied to spontaneous incidents or planned operations, by an individual or a team of people. The NDM has a central statement of mission and values which recognises the need to protect and respect the human rights of all, surrounded by 5 key steps which should be continually assessed as a situation develops: (i) gather information and intelligence; (ii) assess threat and risk and develop a working strategy; (iii) consider powers and policy; (iv) identify options and contingencies; and (iv) take action and

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<sup>174</sup> Which can encompass the physical, moral and psychological integrity of a person: *Botta v Italy* 26 EHRR 241.

review what happened. Any tactical option chosen must be proportionate to the threat faced in any set of circumstances, which includes any decision to use force, be it through use of hands-on restraint techniques or use of a weapon.

The PSNI has a number of technologies at its disposal including CS Spray, PAVA irritant spray, Water Cannon, Taser and Attenuating Energy Projectiles (AEPs). Use of such weapons is not incompatible with the ECHR provided strict guidelines are applied for use. In recognition of the very serious and potentially lethal effects of AEP, the threshold that must be met before AEP are used is that of absolute necessity. The test for use of Taser is set just below the threshold that must be met for use of AEP or conventional firearms. The test for the use of Taser in Northern Ireland is set at a higher threshold than in Great Britain. Before using any of the above, a police officer should identify him/herself and give a clear warning of the intent to use force affording sufficient time for the warning to be observed unless affording time would put the officer or another person at risk of death or serious harm. Even where the use of lethal or potentially lethal force is unavoidable the police must continue to exercise restraint in the use of that force, minimise damage and injury caused, render assistance and medical aid at the earliest opportunity and notify relatives or other persons if a person has been injured or killed.

As detailed in previous years' Human Rights Annual Reports, mechanisms are in place, both internally and externally, to ensure that PSNI is held to account for all uses of force by its officers, which includes the submission of an electronic use of force monitoring form, in some instances a Police Ombudsman investigation,<sup>175</sup> and scrutiny by the Policing Board.<sup>176</sup> The

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<sup>175</sup> The Police Ombudsman will investigate all instances where death occurs following contact with police. The Ombudsman must also be notified of all incidents where a firearm, AEP or Taser has been discharged.

<sup>176</sup> PSNI must notify the Policing Board every time an AEP is discharged and also of any force used where there are public order incidents which either involve 200 people or more or where the incident is of such an intensity there is likely to be wide scale media reporting or public interest in it. PSNI also provides the Policing Board with six monthly statistical reports on police use of force. The Policing Board is provided a copy of all Police Ombudsman Regulation 20 reports which are produced following an investigation into certain incidents



PSNI's Manual of Policy, Procedure and Guidance on Conflict Management is available to the public through the PSNI website, with only a limited amount of very sensitive operational information redacted.<sup>177</sup>

### **Use of Force Statistics**

Officers using the following types of force must record the use on an electronic use of force monitoring form: Attenuating Energy Projectile (AEP); Baton; CS Spray; PAVA Spray;<sup>178</sup> Firearms; Police Dog; Taser and Water Cannon.

The PSNI collates the data captured on the electronic use of force monitoring forms and includes it within a six monthly statistical report that is provided to the Performance Committee.<sup>179</sup> While a statistical report does not in itself measure PSNI human rights compliance when using force, the six monthly reports do provide the Committee with a broad overview of the use of force. Any issues identified are raised directly with PSNI's senior command team. The six-monthly statistical reports received by the Committee contain very detailed information which correlates use of force according to district/area, date, incident, reason for use and the gender and age of person on whom the force was used. That information is in restricted form due to statistical reporting rules which means the detailed reports cannot be published but the Committee is able to and does analyse very closely the incidence of use. The table below provides an overview of the use of force by the PSNI between 1 April 2011 and 30 September 2015.

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where force has been used. If any issues or concerns arise through any of these reporting mechanisms, the Policing Board can raise these directly with the PSNI senior command team.

<sup>177</sup> The Manual can be found on the PSNI website [www.psni.police.uk](http://www.psni.police.uk) under About Us – Freedom of Information – Publications by Category – Policies and Service Procedures.

<sup>178</sup> PAVA was not authorised for use in Northern Ireland until the end of 2015. In future use of force monitoring forms its use will be recorded.

<sup>179</sup> Versions of the use of force statistical reports which are not protectively marked are published on the PSNI website: [www.psni.police.uk](http://www.psni.police.uk)

**Table 5: Police use of force between 1 April 2011 and 30 September 2015<sup>180</sup>**

<b>Use of Force</b>	<b>1/4/11-31/3/12</b>	<b>1/4/12-31/3/13</b>	<b>1/4/13-31/3/14</b>	<b>1/4/14-31/3/15</b>	<b>1/4/15-30/9/15 6 mths</b>
AEP Pointed	20	32	38	39	25
AEP Discharged	96 <sup>181</sup>	20 <sup>182</sup>	34 <sup>183</sup>	3 <sup>184</sup>	6 <sup>185</sup>
<b>AEP Total</b>	<b>116</b>	<b>52</b>	<b>72</b>	<b>42</b>	<b>31</b>
Baton Drawn Only	537	588	485	353	193
Baton Used	284	333	352	165	80
<b>Baton Total</b>	<b>821</b>	<b>921</b>	<b>837</b>	<b>518</b>	<b>273</b>
CS Drawn Only	187	200	154	170	105
CS Sprayed	330	262	274	212	103
<b>CS Total</b>	<b>517</b>	<b>462</b>	<b>428</b>	<b>382</b>	<b>208</b>
Firearm Drawn or Pointed	360	364	419	265	167
Firearm Discharged	0	1	0	0	1
<b>Firearm Total</b>	<b>360</b>	<b>365</b>	<b>419</b>	<b>265</b>	<b>168</b>
<b>Police Dog Used</b>	<b>33</b>	<b>45</b>	<b>49</b>	<b>51</b>	<b>69</b>
Taser Drawn	126	171	223	104	88
Taser Fired	9	11	16	22	10
<b>Taser Total</b>	<b>135</b>	<b>182</b>	<b>239</b>	<b>126</b>	<b>98</b>
W/Cannon Deployed	31	158	130	45	26
W/Cannon Used	14	17	12	0	4
<b>W/Cannon Total</b>	<b>45</b>	<b>175</b>	<b>142</b>	<b>45</b>	<b>30</b>

While AEP can be used as a less lethal option during stand-alone incidents, it can also be used during public order incidents against a targeted individual. Importantly, the AEP cannot be used for the purposes of crowd control. Because the use of AEP has attracted considerable concern amongst the community the Committee pays particularly close attention to its use and

<sup>180</sup> *PSNI Use of Force Statistics, 1 April 2012 – 31 March 2013*, PSNI, June 2013; *PSNI Use of Force Statistics, 1 April 2013 – 31 March 2014*, PSNI, June 2014; *PSNI Use of Force Statistics, 1 April 2014 – 30 September 2014*, PSNI, December 2014; *PSNI Use of Force Statistics, 1 April 2014 – 31 March 2015*, PSNI, June 2015; 1 April 2015 – 30 September 2015, December 2015.

<sup>181</sup> 350 AEPs were fired by 96 officers.

<sup>182</sup> 34 AEPs were fired by 20 officers.

<sup>183</sup> 99 AEPs were fired by 34 officers.

<sup>184</sup> 3 AEPs fired by 3 officers.

<sup>185</sup> 6 AEPs fired by 2 officers.

produces in its Human Rights Annual Reports a detailed breakdown per month.

**AEP discharges between 1 April 2008 and 30 September 2015<sup>186</sup>**

<b>Month</b>	<b>No. of occasions AEP discharged</b>	<b>Rounds fired</b>
November 2008	3 <sup>187</sup>	3
July 2009	13	24
August 2009	1	6
February 2010	1	3
July 2010	50	180
January 2011	1	1
June 2011	29	130
July 2011	67	220
July 2012	2	6
September 2012	1	6
December 2012	2	3
January 2013	15	19
July 2013	20	59
August 2013	13 <sup>188</sup>	39
March 2014	1 <sup>189</sup>	1
April 2014	1 <sup>190</sup>	1
May 2014	0	0
June 2014	0	0
July 2014	0	0
August 2014	0	0
September 2014	0	0
October 2014	0	0
November 2014	0	0
December 2014	0	0
January 2015	2	2
February 2015	0	0
March 2015	0	0
April 2015	0	0
May 2015	0	0
June 2015	0	0

<sup>186</sup> PSNI Use of Force Statistics.

<sup>187</sup> All three discharges of AEP in November 2008 related to a single firearms incident where AEP was used as a less lethal alternative (i.e. it wasn't used during a public disorder situation).

<sup>188</sup> Two of the occasions when AEP were discharged in August 2013 related to a stand-alone situation (rather than a public disorder situation) where AEP was used as a less lethal option.

<sup>189</sup> On this occasion in March 2014 where AEP was discharged, it related to a stand-alone situation (rather than a public disorder situation) where AEP was used as a less lethal option.

<sup>190</sup> On this occasion in April 2014 where AEP was discharged, it related to a stand-alone situation (rather than a public disorder situation) where AEP was used as a less lethal option.

July 2015	2	6
August 2015	0	0
September 2015	0	0

Between April 2014 and January 2015, all AEPs were pointed or discharged in stand-alone situations against an individual aggressor for example a person wielding a knife or firearm. The incidents in July 2015 during which AEPs were discharged were public order incidents.

### **Baton use**

Officers must report any use of a baton to their immediate supervisor as soon as practicable and submit an electronic use of force monitoring form. The baton is made available for inspection. Even if a baton is not used but is drawn the officer must submit an electronic use of monitoring form where it is reasonable to expect that a person may have anticipated a threat of force being used. A supervisor may give a direction to officers to draw their batons, for example, during serious public order incidents. In such situations, the only the supervising officer is required to submit an electronic use of force monitoring form but any officer who used the baton during that incident will also submit a form. Between 1 April 2014 and 30 September 2015, baton was drawn and used on 245 occasions.

### **CS Spray**

CS spray<sup>191</sup> is issued only to officers trained in the Personal Safety Programme. Those officers carry CS Spray as part of their patrol equipment. CS spray is designated personal protection equipment. Police policy states that it is not to be used during serious public order situations as a crowd dispersal tactic. An officer who draws the CS Spray device and points it at any individual or group must report that use and any warning given even if it is not sprayed. Upon impact the solvent evaporates rapidly leaving CS particles to gain compliance of the subject. Effects last on average for about 20 minutes.

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<sup>191</sup> CS Spray is an irritant spray that has a 5% concentration of CS in the solvent MIBK (Methyl Isobutyl Ketone).

Between 1 April 2014 and 30 September 2015, CS Spray was sprayed on 315 occasions. A person who has been sprayed with CS spray will be classified as 'injured' and police officers will, if possible, administer aftercare advice. During 2015, the Police Ombudsman considered the use of CS Spray and concluded that each use was lawful, necessary and proportionate. No recommendations were made.

## **Firearms**

The Chief Constable has issued standing authority for all officers, so long as he or she has completed the necessary training, to be issued with a personal issue firearm. That standing authority is kept under regular review. Officers are required to report any instance when a personal firearm has been drawn or pointed even if it is not discharged. A police officer is deemed to have used a firearm when it is: pointed at another person; fired at another person in self-defence or in defence of another person, whether or not injury or death results; discharged in any other operational circumstances. In addition, officers are required to report any instance when he or she had occasion to draw their personal issue handgun. District Commanders/Heads of Branch ensure that an appropriate number of officers are trained in order to meet locally identified needs, based upon an evaluation of the prevailing security situation and risk assessment. There are also a number of specifically trained firearms officers to deal with pre-planned and spontaneous firearms incidents. Those officers deploy with Heckler and Koch weapons and the personal issue handgun. They also have available other less lethal options including Taser and the Attenuating Energy Projectile (AEP) system. Between 1 April 2014 and 30 September 2015, a firearm was discharged on 1 occasion.

## **Police Dog**

All Police dogs are under the control of the Operational Support Department. They are considered as an option in a variety of scenarios including public disorder. Use of force, however, accounts for only a very small proportion of the work that police dogs are used for. The most common types of force that

are recorded for dog use include: when the dog is deployed to achieve control of an immediate threat to the handler, other officers, other persons or the dog itself whether or not the dog bites or causes injury; when the dog is deployed to apprehend a fleeing offender/subject, whether or not it bites or causes injury; when the dog bites at the direction of the handler and there is no injury; when the dog bites not at the direction of the handler and there is no injury. The Committee receives a breakdown of the occasions on which a person is bitten by a dog. Between 1 April 2014 and 30 September 2015, police dogs were used on 120 occasions. The number of uses of police dogs, as recorded in the use of force monitoring forms has increased between April 2015 and September 2014 not because dogs have been used on a greater number of occasions but because the means of recording the use has changed. If a dog is taken to an incident that is now included within the monitoring form.

## **Taser**

Taser<sup>192</sup> is one of a number of tactical options available to an officer who is faced with violence or the threat of violence, which may escalate to the point where the use of lethal force would be justified. Its purpose is to temporarily incapacitate an individual in order to control and neutralise the threat that they pose. TASERS were introduced to PSNI in a limited pilot on 25 January 2008. They were issued to specialist firearms officers and have also been made available to authorised firearms officers attached to Armed Response Vehicles<sup>193</sup> who have completed NPCC approved accredited training. If Taser is drawn and/or aimed (at which stage a red dot appears on the subject indicating where the Taser will hit), it is reported, even if it is not subsequently discharged. During 2015, the Police Ombudsman considered a number of uses of Taser.<sup>194</sup> In respect of all uses, the Police Ombudsman was satisfied that the use was lawful, necessary and proportionate. No recommendations resulted from the investigations.

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<sup>192</sup> TASER is a single shot weapon designed to temporarily incapacitate a subject through the use of an electrical current, which temporarily interferes with the body's neuromuscular system.

<sup>193</sup> Since 19 December 2008.

<sup>194</sup> Subsequent to which Regulation 20 reports were shared with the Policing Board.

## Water cannon

Water cannon are used during large scale and sustained public disorder. There has been much attention in the media on the use of water cannon given the recent decision of the Home Secretary to refuse authority for use in England and Wales. The Committee therefore considered the use of water cannon in more detail this year. The following puts in context the use of water cannon in Northern Ireland.

Water cannon were first used in Northern Ireland in 1969 and were then described by Her Majesty's Inspectorate of Constabulary (HMIC) as "mechanised creators of distance between police and protestors". Water cannon were developed during the 1980s and were officially authorised for use in Northern Ireland in 1999.<sup>195</sup> In the report *A New Beginning: Policing in Northern Ireland* by the Independent Commission on the Future for Policing in Northern Ireland (1999) the Commissioners considered alternatives to the use of lethal technology and recommended that a broader range of options should be available to reduce reliance on for example Plastic Baton Rounds. It was said that "an alternative worth exploring is the water cannon, where new technology has transformed what used to be a rather ineffective weapon into something which now looks much more promising for police purposes. We know the Northern Ireland police are looking into this (and had water cannon available at Drumcree in July 1999) and we welcome that"<sup>196</sup>. The *Somati RCV9000 Water Cannon* has been authorised for use in Northern Ireland since 2004.

Sir Denis O'Connor also carried out a review and commented that "Water cannon are especially valuable at predictable sites, and offer a lower level of force to other options. In a fast-moving environment they would be of a much more limited value".<sup>197</sup> He went on "Water cannon are an effective means of

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<sup>195</sup> The water cannon in use in 1999 were a different vehicle to that currently in use.

<sup>196</sup> Paragraph 9.16 and recommendation 70.

<sup>197</sup> *The Rules of Engagement – A Review of the August 2011 disorders*, HMIC 2011.

dispersal and incur fewer injuries to the public; they are effective in static and slow-moving scenarios. They provide a good tactical option to protect vulnerable areas and premises, but they have limitations (particularly in terms of deployment in the sort of disorders seen in August: which involved mobile and agile groups)... but before any such radical shift in policing style is made available on the mainland this option requires very detailed discussion, consultation and consideration”.

The PSNI has said “the predominant method of deployment for the PSNI is within a pre-planned public order operation with cannon deployed to either a reserve, holding or forward location, depending on an assessment of ‘immediacy’ of use”.<sup>198</sup> Referring to the deployment of water cannon between 2012 and 2014, it was observed that all deployments related to anticipated serious disorder such as at contentious parades and the ‘flag disputes’ and that water cannon enhanced the tactical options available to police commanders which are best utilised in support of, and supported by, other tactical options such as Protected Officers and AEPs. The PSNI has also commented that the “water cannon tactics relating to Show of Force (the visible presentation of the cannon as part of continuing negotiation/ communication with the crowd to facilitate a peaceful conclusion to the potential for disorder), Static Support (stationary position providing protection to cordon lines, Moving Support (measured advance to identified tactical objectives such as advancing cordon lines) and Withdrawal Support (measured withdrawal protecting assets who are retreating), have all been demonstrated effectively within serious disorder but also in ‘diffusion’ mode to assist in the dispersal of sit down protestors”.<sup>199</sup>

The PSNI has six water cannon (the Somati RCV9000).<sup>200</sup> The pressure of water from the Somati is limited mechanically. The water cannon are kept at

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<sup>198</sup> T/DCC Finlay in August 2014.

<sup>199</sup> Letter T/DCC Finlay to CC David Shaw, August 2014.

<sup>200</sup> The Somati RCV 9000 is reported as being capable of: Flow rate approximately 20 litres per second through each monitor; Maximum operating pump pressure of 15 isobars, which can be reduced by the cannon controller and Tank capacity 9000 litres. Guidance has been produced for the training of water cannon crews which recommends the maximum jet pipe



different police stations across Northern Ireland. Usually, water cannon are deployed in pairs, with each vehicle crewed by four officers. With each pair of water cannon, four Land Rovers are deployed with four officers in each Land Rover. Water cannon are not authorised for use by any police service in Great Britain or Ireland. The *deployment* of water cannon by the PSNI may be considered for the following: to keep crowds at a distance; to support a police cordon; to assist in the dispersal of groups and to provide a platform so that evidence and intelligence can be gathered and from which information and warnings can be given to the crowd. Water cannon may be considered for *use* when conventional methods of policing have been tried and failed or are unlikely to succeed if tried in situations of serious disorder where there is potential for loss of life, serious injury or widespread destruction if the use is likely to reduce that risk. Only officers trained to use water cannon may operate the vehicles.

Before deploying and using water cannon, officers must consider: the impact upon the community; media impact and interpretation; other resources available that may be used to reduce the likelihood of resorting to the use of force including the use of water cannon; the environment within which the water cannon will be used and the capability of the equipment. Furthermore, as required by the PSNI's own policy and procedure, "special consideration should be given to the heightened vulnerabilities of children and members of other vulnerable groups in relation to the use of force. Although not incorporated into domestic legislation, officers should take cognisance of the United Nations Convention on the Rights of the Child (UNCRC). Article 3 of the Convention requires the best interests of children to be a primary consideration in all actions concerning children". Warnings must always be given and recorded of any use of water cannon.<sup>201</sup>

Water cannon are deployed only when authorised by a senior officer of at least the rank of Assistant Chief Constable but the authority to use water

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output pressures as: 15 bar for a subject greater than 10 m away; 20 bar for a subject greater than 15 m away. Other substances may be added such as dyes.

<sup>201</sup> Such as PSNI *Manual of Policy, Procedure and Guidance on Conflict Management*.

cannon thereafter rests with the Silver Commander. The Silver Commander will keep the authority to use it under constant review and to do so he or she will liaise with the Bronze Commanders and other relevant personnel on the ground. The PSNI adheres to the ACPO *Manual of Guidance on Keeping the Peace* (2010), which also contains relevant public order standards and training. The PSNI also has a number of Public Order Tactical Advisers (POTAs) who are available to Operational Commanders to advise on the deployment and use of water cannon during public order incidents. In all pre-planned operations POTAs are consulted and advise on the range of tactical options including the use of water cannon. Those POTAs then attend the command room during the operation. In a spontaneous incident POTAs are called in to provide advice during the incident.

Officers using water cannon must record that use on an electronic use of force monitoring form. The reporting officer must be the officer using the force. Records of force used during public order incidents must be copied to the Policing Board as soon as possible after the incident. PSNI carry out a post-operational review of operations in which force was used which considers in particular whether the use of force was justified and proportionate. Recording the use of force is an important element of oversight and accountability. PSNI collates the data captured on the electronic use of force monitoring forms and includes it in a six monthly statistical report that is provided to the Performance Committee.<sup>202</sup> While a statistical report does not in itself measure PSNI human rights compliance, the six monthly reports do provide the Board with a broad overview of the use of force and any issues identified through the reports can be raised directly with PSNI's senior command team.

The table below provides an overview of the use of force by the PSNI between 1 April 2011 and 30 September 2015.

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<sup>202</sup> Versions of the use of force statistical reports which are not protectively marked are published on the PSNI website: [www.psnipolice.uk](http://www.psnipolice.uk)

**PSNI use of water cannon between 1 April 2011 and 31 March 2015<sup>203</sup>**

<b>Use of Force</b>	<b>1/4/11-31/3/12</b>	<b>1/4/12-31/3/13</b>	<b>1/4/13-31/3/14</b>	<b>1/4/14-31/3/15</b>	<b>1/4/15-30/9/15</b>
Water Cannon Deployed	31	158	130	45	26
Water Cannon Used	14	17	12	0	4
<b>Water Cannon Total</b>	<b>45</b>	<b>175</b>	<b>142</b>	<b>45</b>	<b>30</b>

On 13 July 2015, the principal areas of disorder in which water cannon was used were Woodvale Road/Woodvale Parade where there was an attack on police lines with a variety of missiles, rocks, stones and bottles and Twaddell Avenue where there was a sustained attack on police with paint bombs, petrol bombs and various missiles. At Twaddell Avenue a total of 6 AEPs were fired with 5 strikes. Water Cannon were also used “in efforts to quell the disorder that was taking place”.<sup>204</sup> On 9 August 2015, there was disorder on the Oldpark Road when the police stopped an Anti-internment League parade. A number of missiles and petrol bombs were thrown at police in the area of Rosapenna Street. Water cannon were used in the area “to manage the disorder and a number of officers sustained minor injuries”.<sup>205</sup> Following both incidents the police undertook a review of the operations including the justification for the use of force.

Deployment of water cannon is also considered by PSNI to act as a deterrent, which is supported to some extent by the above: deployed frequently, used considerably less frequently. In the five years to July 2015, there has been 1 incident of injury to a civilian noted by PSNI resulting from the use of water cannon. That incident occurred in July 2013 when a man was toppled from the roof of a police Land Rover.<sup>206</sup>

<sup>203</sup> *PSNI Use of Force Statistics An update – to 30 September 2015* - is expected on 11 December 2015.

<sup>204</sup> Statement of ACC Stephen Martin, 14 July 2015.

<sup>205</sup> Statement of ACC Stephen Martin, 9 August 2015.

<sup>206</sup> No complaint however was received or any claim made.

In 2013, the Scientific Advisory Committee on the Medical Implications of Less Lethal Weapons (SACMILL<sup>207</sup>) issued a statement on the use of water cannon.<sup>208</sup> SACMILL has also carried out an assessment of those circumstances in which injuries were more likely from the use of water cannon. For example: if used where there is loose debris such as gravel, stones and masonry there is a risk of injury from the energising of that debris; if the water jets strike the head injury may occur; if the person struck is using hand held equipment such as a mobile telephone that may present an impact hazard; if a person is carrying a placard or board that may take the full impact of the jet thereby concentrating it; if the jet strikes a weak or flimsy structure there may be damage from falling debris; if the jet strikes a person he or she may be toppled into another hazard; if the ground becomes slippery there may be injuries caused by falling.<sup>209</sup> In Northern Ireland, the use of water on raised surfaces has been considered frequently for example the potential for injury caused by falling from slippery shop roofs. Those considerations are always taken into account by the PSNI during the planning of operations and during spontaneous incidents.

In its 2015 statement, SACMILL referred to an assessment of the Defence Advisory Council's Sub-Committee on the Medical Implications of Less Lethal Weapons (DOMILL) from 2004<sup>210</sup> which considered the use of the *Somati* water cannon in Northern Ireland and concluded that the medical evidence in respect of the *Somati* remained the same.<sup>211</sup> The earlier DOMILL assessment on the use of the *Somati* in Northern Ireland concluded that use of the *Somati*

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<sup>207</sup> SACMILL replaced the Defence Scientific Advisor Council Sub-Committee on the Medical Implications of Less Lethal Weapons in 2012.

<sup>208</sup> SACMILL 18 November 2013.

<sup>209</sup> *Statement on the Medical Implications of Use of the Ziegler Wasserwerfer 9000 Vehicle-Mounted Water Cannon System*, SACMILL, 23 February 2015.

<sup>210</sup> *Statement on the medical implications of the use of the Somati RCV9000 Vehicle Mounted Water Cannon*, DSAC Sub-Committee on the Medical Implications of Less Lethal Weapons (DOMILL), 3 March 2004.

<sup>211</sup> *Ibid* at paragraph 23.

within ACPO guidance was unlikely to result in serious or life threatening injuries.<sup>212</sup>

### **PAVA Irritant Spray**

PAVA<sup>213</sup> Spray has been authorised for use by a limited number of officers in Northern Ireland as an alternative to CS Spray.<sup>214</sup> PAVA was not authorised for use in Northern Ireland until the end of 2015. In future use of force monitoring forms its use will be recorded. The PSNI took account of the *Comparison Report on CS and PAVA Sprays*,<sup>215</sup> by the Centre for Applied Science and Technology (CAST). The CAST report considered the benefits and disadvantages for the use of both sprays but concluded ultimately that the decision was one for each police service based upon an assessment of operational need. The PSNI recognised that CS and PAVA were appropriate in different operational scenarios and that PAVA should be trialled for use by Firearms Officers<sup>216</sup> only for a six month period. The Committee will monitor and report on the outcome of that trial. The PSNI will present to the Performance Committee in early 2016 on its assessment of the use of PAVA, the deployment of PAVA, guidance for use and the rationale for when PAVA is preferred over CS Spray.

### **Alternative Technologies**

PSNI keeps under review the range of weaponry at its disposal and actively considers less lethal alternatives through participation on the Home Office led United Kingdom Less Lethal Technology and Systems Strategic Board. This Strategic Board considers technological developments, both within the United

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<sup>212</sup> *Statement on the Medical Implications of Use of the Ziegler Wasserwerfer 9000 Vehicle-Mounted Water Cannon System*, SACMILL, 23 February 2015, at paragraph 12.

<sup>213</sup> PAVA is a Pelargonic Acid Vanillylamide irritant spray.

<sup>214</sup> PAVA is authorised for use by officers attached to Armed Response Vehicles, Specialist Firearms Officers and Portal Officers (i.e. officers at ports and airports). PAVA has been used by police in England and Wales for some time and is issued for use within the Prison Service Northern Ireland.

<sup>215</sup> Publication Number: 24/14, Home Office.

<sup>216</sup> The officers who will carry PAVA are officers with Armed Response Units, Specialist Firearms Officers and Special Operations Branch officers who carry Taser.

Kingdom and internationally, and it also provides a forum through which various operational issues with existing technology can be discussed by law enforcement agencies with key partners such as the National Police Chief's Council, formerly the Association of Chief Police Officers (ACPO), the Centre for Applied Science and Technology (CAST), the Scientific Advisory Committee on the Medical Implications of Less Lethal Weapons (SACMILL), the Defence Science and Technology Laboratory (DSTL) and others. The International Law Enforcement Forum (ILEF) was established in 2001 to develop the capabilities of the international law enforcement community in relation to minimal force options and less lethal technology.

To date, there has not been developed an alternative to AEP or TASER which are considered appropriate for use as alternative tactical options.

## 8. COVERT POLICING

Covert policing raises significant issues in which various rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR) must be considered. As technology advances and the temptation builds for police to use every means at their disposal to combat crime and keep people safe so does the potential for interference with those rights. Increasingly, officers are required to explain to courts their rationale for the intrusion, to demonstrate how they applied the relevant human rights principles and demonstrate that they followed assiduously the practical steps involved in the application of the principles. If the PSNI do not have robust policies and procedures which guide the practical application of human rights principles the police are likely to fall foul of the courts. The great effort expended in obtaining evidence from the use of covert techniques will be wasted.

The prevalent ECHR right (but by no means the only one) concerned in covert policing is Article 8 commonly referred to as the right to privacy.<sup>217</sup> Article 8 however extends beyond a mere right to privacy. It protects four distinct interests: private life, family life, the home and correspondence albeit with a degree of overlap between them. In the context of this chapter there is little doubt but that Article 8 is engaged in for example every interception of communications, every covert surveillance operation whether involving technology or otherwise, every intelligence gathering operation and the capture and retention of material. Article 8 is a qualified right which means that interferences that engage Article 8 may be permitted, but only if they are in accordance with the law, pursue a legitimate aim and are necessary in a democratic society.

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<sup>217</sup> Article 8 ECHR provides “1) Everyone has the right to respect for his private and family life, his home and correspondence; 2) There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

Even if no use is made of material or information gathered the very act of storing it will almost always engage Article 8 if the material relates to some aspect of private life. The concept of 'private life' has been described as illusory but it certainly covers the physical and physiological integrity of a person and includes multiple aspects of a person's physical and social identity (including the right to a person's image). Importantly, in this context, Article 8 also protects a person's right to personal development and the right to establish and maintain relationships. 'Family life' tends to be relevant more in the context of considerations of proportionality and collateral intrusion. For example, private information should be taken to include a person's relationships. The protection of the 'home' will often be central to any property interference or intrusion into the home whether by listening device or otherwise. Importantly, the scope of 'home' extends to business premises and relationships in certain circumstances.<sup>218</sup> 'Correspondence' extends beyond traditional means of communication such as letter and includes all forms of communication such as emails, text messages, telephone calls, video calls, instant messaging and communication through social networking sites.

Article 8 as a means of protecting a person from interference or intrusion is well known but there is also a positive obligation on the State: to ensure that the rights protected are effective and meaningful; to prevent interference by others; or require those others to provide access to information acquired by the interference. In every covert operation a police officer must establish whether Article 8 is engaged, whether it has been interfered with (it almost always will be in a covert policing operation), whether the interference is in accordance with the law and, whether the interference is necessary in a democratic society. It is the last part of the sequence which presents the most challenge to police officers. 'Necessary' is not defined but the European Court of Human Rights (ECtHR) has made clear that it may be less than indispensable but must be more than reasonable, useful or desirable. Necessity itself is further broken down into two parts: whether there is a

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<sup>218</sup> For example, in *Niemietz v Germany* (1992) 16 EHRR 97 and *R v Broadcasting Standards Commission, ex parte the BBC* (2000) 3 WLR 1327.



pressing social need for the interference in all of the circumstances and if so, whether that interference is proportionate.

Proportionality is not expressed within the ECHR itself but derives from and is a defining characteristic of the courts' interpretation of ECHR as a whole. Proportionality has been imported into PSNI vocabulary to such an extent that its articulation is present in all considerations of the use of policing powers. That has been the great success in Northern Ireland of approaching policing from a human rights perspective and incorporating human rights at the centre of decision making. There is always a risk however that proportionality is approached in a formulaic manner so that all proposed action can be justified *because* it will likely result in useful intelligence or evidence. In other words, there is a risk that the articulation of human rights (proportionality in particular), becomes a substitute for the proper consideration of the principles. Even if the interference with the right has an obvious legitimate purpose police must still consider whether the proposed interference goes no further than what is strictly necessary for achieving that purpose.<sup>219</sup>

In every operation less intrusive measures should always be considered before a decision is made even though in this context there is no requirement to have first tried other measures which have failed. The question is not whether the right can be balanced against the interference (a mistake commonly made) but whether the nature and extent of the interference is balanced against the reasons for interfering. In other words, a blanket policy which dictates when a measure is proportionate will likely offend against the principle of proportionality.<sup>220</sup> It is precisely because police officers are motivated to combat crime and keep people safe that there is always a risk of 'overstepping the mark'. That is why oversight both internal and external is so

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<sup>219</sup> For example, in *Digital Rights Ireland Limited v Minister for Communications* C-293/12, 8 April 2014 the Court of Justice of the European Union held that the utility of the Data Retention Directive in the fight against serious crime was not enough to render it necessary, in the absence of adequate safeguards.

<sup>220</sup> In *Campbell v UK* (1993) 15 EHRR 137 for example it was held by the ECtHR that opening all prisoners' mail for the purposes of determining whether there were prohibited articles was in breach of Article 8 because the decision-making was not informed and it was only justifiable where there was a reasonable suspicion that the mail may have contained prohibited material.

important, accepting that the *fact* of oversight in itself does not equate with human rights compliance.

The PSNI must be alert to that and continue to review its policies but more importantly its practices to ensure that the principles are applied 'on the ground'. The PSNI must continue to invest in training (regularly refreshed) which is practical and scenario-based. Policy writers must have a developed and up to date understanding of human rights and resources must be deployed to oversee internally the application of the principles. For example, authorising officers including Chief Officers must subject applications to critical and objective scrutiny.

Human rights and proportionality are not simple concepts particularly for an officer having to decide what he or she may do when confronted with a potential interference for example with the Article 2 right to life. The law recognises that the right to respect for private life and correspondence can be overridden (where it is necessary and proportionate to do so) in the interests of national security, public safety and the prevention of disorder or crime but officers charged with determining when and how that right may be overridden are presented with an almost insurmountable challenge, not assisted by the impenetrability of the domestic regulatory regime. The Performance Committee is mindful of the challenge faced by police officers and staff but is sure that continued transparency, scrutiny and public accountability lessens their burden.

It is essential that officers have expert knowledge of the domestic legal framework, an in-depth and instinctive understanding of the Human Rights Act 1998 and access to excellent local knowledge and intelligence. The Human Rights Act provides a framework of principles that help guide that officer to improve his or her decision-making. It is in this aspect of policing that the Human Rights Act has perhaps had its greatest impact. In this area, perhaps more than any other, comprehensive written policy which incorporates human rights combined with effective training, including refresher training, is essential to equip officers to respond to fast-moving and stressful situations.

That is particularly so given the concern of the Independent Reviewer of Terrorism Legislation, David Anderson Q.C. “RIPA, obscure since its inception, has been patched up so many times as to make it incomprehensible to all but a tiny band of initiates. A multitude of alternative powers, some of them without statutory safeguards, confuse the picture further. This state of affairs is undemocratic, unnecessary and – in the long run – intolerable”.<sup>221</sup> Unless and until that is remedied there is an onerous but unavoidable burden on the PSNI to monitor the use of covert powers.

It is within that brief context, that the remainder of this chapter should be read.

## **Regulatory regime**

The following is a very brief overview of the regulatory regime. It does not cover every piece of legislation or Code of Practice. There are a number of other pieces of legislation that apply (not always consistently) in respect of the interception of communications<sup>222</sup> which are not considered here but compliance with which is considered by others including the Policing Board’s Human Rights Advisor.

### ***Regulation of Investigatory Powers Act 2000***

In 2000, the Government introduced the Regulation of Investigatory Powers Act 2000 (RIPA),<sup>223</sup> which stated intention was to better regulate and make human rights compliant rules on covert activity. RIPA must be interpreted and applied where possible so as to comply with the ECHR. Therefore, even with a regulatory regime which contains a number of safeguards the requirement

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<sup>221</sup> *A Question of Trust - Report of the Investigatory Powers Review*, David Anderson Q.C. Independent Reviewer of Terrorism Legislation, June 2015.

<sup>222</sup> For example the Telecommunications Act 1984, the Wireless Telegraphy Act 2006 and Schedule 7 of the Terrorism Act 2007.

<sup>223</sup> RIPA is supplemented by additional provisions contained in for example the Regulation of Investigatory Powers (Source Records) Regulations 2000 S.I. 2000 No. 2735 and the Criminal Procedure and Investigations Act 1996. Furthermore, The Home Office has issued a number of Codes of Practice: Code of Practice for Covert Surveillance; Code of Practice for Covert Human Intelligence Sources; Code of Practice for Interception of Communications; and Code of Practice for the investigation of Electronic Data protected by Encryption. ACPO also produces Manuals of Standards for covert techniques.

to consider the various elements, such as proportionality, remains. Slavish attention to the technical aspects of RIPA does not guarantee human rights compliance.

The police powers governed by RIPA are: the Interception of Communications (in the course of its transmission by means of a public postal service or public communication system); intrusive surveillance on residential premises and in private vehicles; covert (directed) surveillance; the use of Covert Human Intelligence Sources (commonly referred to as police informants, agents and undercover officers); the acquisition of communications data (for example itemised telephone billing and telephone subscriber details; and, the Investigation of electronic data protected by encryption. One of the safeguards provided by RIPA is the requirement that covert operations must be subject to an authorisation regime. Only a distinct category of person is entitled to grant authorisations and, save in urgent cases, any police authorisation of intrusive surveillance must be approved by a Surveillance Commissioner.<sup>224</sup>

RIPA requires the Secretary of State to publish guidance concerning the use and exercise of RIPA powers which include the Interception Code, Covert Surveillance and Covert Human Intelligence sources Code of Practice the new Acquisition Code and the Retention of Communications Data Code of Practice.

### ***Data Retention and Investigatory Powers Act 2014***

On 17 July 2014, the UK Government introduced the Data Retention and Investigatory Powers Act 2014 (DRIPA) following a decision of the Court of Justice of the European Union (CJEU)<sup>225</sup> which declared as invalid the Data

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<sup>224</sup> Intrusive surveillance is defined by section 26(3) of RIPA as covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle and that involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device. An application for authority to use intrusive surveillance may be made by a limited number of public authorities, which includes the police but excludes local authorities.

<sup>225</sup> *Digital Rights Ireland Limited v Minister for Communications* C-293/12, judgment of 8 April 2014.

Retention Directive.<sup>226</sup> The stated intention of DRIPA was to ensure that UK law enforcement and security and intelligence agencies could maintain their ability to access the telecommunications data they need to investigate criminal activity and protect the public. DRIPA was a temporary measure which was reviewed by the Independent Reviewer of Terrorism Legislation.<sup>227</sup> He recommended amongst other things, that RIPA Part I and DRIPA should be replaced with a comprehensive new law, from scratch.<sup>228</sup> The Performance Committee will watch with interest what develops from that review.

## NATIONAL SECURITY

Not all covert policing operations will involve a national security element, but national security policing is one area in which covert techniques are frequently deployed. Primacy for national security intelligence was transferred from the PSNI to the Security Services in 2007. However, in all circumstances, including where national security is in issue, it is the PSNI which mounts and is responsible for executive policing operations. Therefore oversight through for example the Policing Board is increasingly important but complex. To clarify the oversight arrangements, Annex E to the St. Andrews Agreement was intended to provide a clear line of oversight and accountability following transfer of primacy. It includes a commitment by the British Government in relation to future national security arrangements in Northern Ireland. It was

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<sup>226</sup> Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, 15 March 2006.

<sup>227</sup> *A Question of Trust - Report of the Investigatory Powers Review*, David Anderson Q.C. Independent Reviewer of Terrorism Legislation, June 2015.

<sup>228</sup> The compatibility of DRIPA with EU law is currently before the courts. In July 2015, the High Court upheld a claim by two MPs that the 2014 Act was not compatible with EU law (relying on the *Digital Rights Ireland* case) but it suspended its order until 31 March 2016 to allow the government time to correct the matter (see *R (Davis) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin)). The judges pinpointed the need to reform the law so that access to communications data retained pursuant to a retention notice is permitted only for the purposes of preventing and detecting serious offences and so that access is made dependent on a prior review by a court or an independent administrative body whose decision limits access to what is strictly necessary for the purpose of attaining the objective pursued. As well as appealing the High Court decision in the Court of Appeal, the government is attempting to reform the law through new legislation: it published a draft Investigatory Powers Bill in November 2015 and, having taken account of the many comments made on that draft, including by three parliamentary committees, it issued a new version on 1 March 2016.

drafted in anticipation of the transfer of responsibility to the Security Services. The UK Government confirmed that it accepted those five key principles. Adherence to those principles is crucial to the effective operation of national security arrangements. Those principles are:

1. All Security Service intelligence relating to terrorism in Northern Ireland will be visible to the PSNI;
2. PSNI will be informed of all Security Service counter-terrorist investigations and operations relating to Northern Ireland;
3. Security Service intelligence will be disseminated within PSNI according to the current PSNI dissemination policy, and using police procedures;
4. The great majority of national security CHIS in Northern Ireland will continue to be run by PSNI officers under existing police handling protocols;
5. There will be no diminution of the PSNI's ability to comply with the Human Rights Act 1998 or the Policing Board's ability to monitor that compliance.

### **Oversight by the Policing Board**

The Policing Board has a statutory duty under the Police (Northern Ireland) Act 2000 to maintain and secure an efficient and effective police service. Amongst other things, the Policing Board must monitor the performance of the police in carrying out their general duties (to protect life and property, to prevent the commission of offences etc.) and in doing so must monitor police compliance with the Human Rights Act 1998. The Policing Board must also monitor the performance of the police in carrying out their functions with the aim of (a) securing the support of the local community; and (b) acting in co-operation with the local community. The Policing Board must make arrangements for obtaining the co-operation of the public with the police in the prevention of crime. In discharging those duties, the Policing Board has retained oversight of and held the Chief Constable to account in respect of all aspects of police work, including that which relates to National Security. The

Policing Board has no remit in respect of the Security Service, however the Chief Constable of PSNI remains responsible for and accountable to the Policing Board in respect of all PSNI officers and staff including those working alongside the Security Service.

Annex E to the St. Andrews Agreement states “There will be no diminution in police accountability. The role and responsibilities of the Policing Board and the Police Ombudsman *vis-a-vis* the Police will not change... The Policing Board will, as now, have the power to require the Chief Constable to report on any issue pertaining to his functions or those of the police service. All aspects of policing will continue to be subject to the same scrutiny as now. To ensure the Chief Constable can be fully accountable for the PSNI’s policing operations, the Security Service will participate in briefings to closed sessions of the Policing Board to provide appropriate intelligence background about national security related policing operations. On policing that touches on national security the Chief Constable’s main accountability will be to the Secretary of State, as it is now”.

### **National security arrangements**

On 20 March 2015, the Secretary of State for Northern Ireland presented the main findings from the report by Lord Carlile, the independent reviewer of national security arrangements in Northern Ireland, covering the period from 1 December 2013 to 31 December 2014. The main findings are reproduced below.<sup>229</sup>

“During 2014, I have met a range of stakeholders. I have engaged with PSNI and MI5 and examined the relationship between them and others. I have held meetings with HM Inspectorate of Constabulary concerning activities relevant to this Report, and with the Police Ombudsman for Northern Ireland and the Northern Ireland Executive's Minister of Justice, David Ford MLA. The liaison

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<sup>229</sup> Report by Lord Carlile of Berriew QC CBE on the National Security Arrangements in Northern Ireland: Written statement - HCWS436, statement made by Secretary of State on 20 March 2015.

between Mr Ford and those responsible for national security issues is satisfactory. I have also engaged with the Independent Human Rights Advisor to the Northern Ireland Policing Board (NIPB) and the Board itself. The Policing Board can feel reassured that the Human Rights Advisor is well able to discharge her duties in respect of national security. I am satisfied that the periodic briefings provided to me have been full and not selective, and that I have a good understanding of relevant matters. I note that when matters of moment occur, active steps are taken to ensure that I am briefed. When I request access, it is given. I have asked questions again this year about the relationship between MI5 and PSNI staff working alongside each other in security operations in Northern Ireland. Comments made to me in 2014 about the relationship between the two services were strongly mutually supportive. That they work together well and in the national interest is beyond question. The effectiveness of what they do is demonstrated by the successful disruptions that have taken place over the year”.

“This year once again I have reviewed in some detail the arrangements for Covert Human Intelligence Sources (CHIS). Overall, the use of CHIS has been effective. All activity and decision making concerning CHIS are documented carefully and European Convention on Human Rights issues are fully considered. There is a rigorous legal and policy framework for dealing with CHIS. The Regulation of Investigatory Powers Act (RIPA) 2000, and associated orders and codes, provide the legal framework for authorising and managing CHIS within the UK in a way that is compatible with the European Convention on Human Rights, and particularly the right to privacy. It requires that use of a CHIS is subject to prior senior officer authorisation, limits the purposes for which the CHIS may be used, ensures detailed records are maintained, establishes independent oversight and inspection, and provides an independent appeals mechanism to investigate complaints. I have also considered a number of issues relating to terrorism prosecutions including arrangements for the continuation of the temporary and renewable non-jury trial arrangements provided under the Justice and Security (Northern Ireland) Act 2007”.



“The situation continues to improve. The number of cases requiring non-jury trial diminishes. The Director of Public Prosecutions for Northern Ireland uses considerable and proper care in the identification and selection of such cases. It is fully recognised that the norm is jury trial but the residual serious and lethal threat of terrorism justifies the continuation of the non-jury system. There is no evidence of any disadvantage in terms of outcome to defendants in the current system of non-jury trials. They are as likely to be acquitted as in jury trials, and have the advantage of reasoned judgments, and less inhibited access to appeals. Part of the criminal justice setting in need of appraisal is sentencing in terrorism related cases. Generally such sentences are considerably shorter than comparable sentences in England and Wales, with notably different tariffs in murder cases. I remain as concerned as before about the disclosure regime operated in scheduled cases in Northern Ireland. In England and Wales issues of Public Interest Immunity and other disclosure issues are dealt with by the trial judge, who of course is not the tribunal of fact save in the rarest of trial exceptions, or in ‘Newton’ hearings where there has been a plea of guilty on a disputed factual basis. In Northern Ireland in non-jury trials there is a separate disclosure judge. This still leads not only to delays in trials, but to a disconnect between the day by day reality of the trial and the insulated disclosure process”.

“I remain concerned that the disclosure issue outlined above is a real difficulty in dealing with non-jury cases. Given the high regard held generally for the quality of the reasoned judgments given in such cases, and also for the fairness of the trials, I find it difficult to accept that there would be any diminution in actual fairness if the trial judge dealt with disclosure too. I have enquired about the use of intercept evidence. I remain satisfied that there is solid scrutiny and review of interception, in an environment in which communications technology is developing quickly. As before, I have asked about loyalist paramilitaries. These are people and groups whose real interest is in making money from crime. The authorities are well sighted against these organisations. I have enquired about violent Islamism in Northern Ireland. For the present this is not a significant threat. Continued vigilance and the maintenance of counter-terrorism resourcing are essential. However, once

again I have drawn comfort from the successful joint operations between MI5 and the PSNI. Normality is a genuine and mostly realisable ambition, rather than merely an aspiration. I have measured performance in 2014 against the five key principles identified in relation to national security in Annex E to the St Andrews Agreement of October 2006”.

Lord Carlile’s assessment of compliance with Annex E was provided by way of the following schedule.

<b>Text of Annex E</b>	<b>Conclusions</b>
All Security Service intelligence relating to terrorism in Northern Ireland will be visible to the PSNI.	There is compliance. Arrangements are in place to deal with any suspected malfeasance by a PSNI or MI5 officer
PSNI will be informed of all Security Service counter terrorist investigations and operations relating to Northern Ireland.	There is compliance
Security Service intelligence will be disseminated within PSNI according to the current PSNI dissemination policy, and using police procedures.	There is compliance. Dissemination policy has developed since the new arrangements came into force
The great majority of national security CHIS in Northern Ireland will continue to be run by PSNI officers under existing police handling protocols	The majority of CHIS are run by the PSNI. Protocols have not stood still. A review of existing protocols and the development of up to date replacements should always be work in progress and clearly accountable
There will be no diminution of the PSNI’s responsibility to comply with the Human Rights Act or the Policing Board’s ability to monitor said compliance	The PSNI must continue to comply. The Policing Board, with the advice of their Human Rights Advisor as a key component, will continue the role of monitoring compliance

The Policing Board’s Human Rights Advisor met with Lord Carlile CBE QC to discuss any issues arising from his reports (and more generally). She emphasised to the Committee the importance of that engagement and access to documents, which she explained was critical to any meaningful assessment of compliance with the Human Rights Act 1998.

## **Use of counter-terrorism and security powers**

In respect of the exercise of specific counter-terrorism powers and security powers, the Performance Committee considers quarterly PSNI statistics on police use of stop and search and stop and question powers (as discussed in Chapter 4 of this Human Rights Annual Report). The Policing Board also takes account of the work carried out by other relevant oversight authorities.<sup>230</sup> In addition to meeting with the Independent Reviewer of National Security Arrangements in Northern Ireland, the Performance Committee meets regularly with the Independent Reviewer of Terrorism Legislation and the Independent Reviewer of the JSA.

The Office of Surveillance Commissioners (OSC) was established to oversee covert surveillance and property interference. It is led by the Chief Surveillance Commissioner who reports directly to the Prime Minister and is supported by surveillance commissioners, assistant surveillance commissioners, inspectors and a secretariat based in London and Belfast. The commissioners are appointed under part 3 of The Police Act 1997 and parts 2 and 3 of RIPA to oversee operations carried out under those Acts. The OSC is responsible for: considering notifications of authorisations for property interference; giving or withholding approval for authorisations for certain operations under Police Act 1997 and RIPA 2000; and, oversight of the use of powers conferred by the Acts relating to encryption keys. OSC inspectors conduct annual inspections of PSNI and makes recommendations. Each year the Policing Board's Human Rights Advisor reviews the OSC inspection report and the PSNI's response to it. Those documents contain sensitive confidential material which cannot be reproduced but the Human Rights Advisor advised the Committee that the 2015 report noted the excellence of PSNI practice and procedure but made five recommendations of a technical nature. None of those recommendations in the view of the Human Rights Advisor any issues

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<sup>230</sup> An overview of the main oversight authorities for ensuring PSNI accountability in respect of RIPA and national security was provided in the Human Rights Annual Report 2013 at pages 92 – 97.

of human rights compliance. The Performance Committee will receive, as in previous years, a redacted copy of the report and response by the PSNI.

Given the nature of covert and national security policing, there are limitations in respect of the amount of information that can be provided to Members of the Policing Board.<sup>231</sup> Section 33A(1) of the Police (Northern Ireland) Act 2000 requires the Chief Constable to provide the Board with such documents and information that it requires for the purposes of, or in connection with, the exercise of any of its functions. Section 33A(2) qualifies that obligation and permits the Chief Constable to refuse to provide any information that falls within specified categories; the Chief Constable may refuse to provide information if it is not in the interests of national security to disclose the information to the Board or disclosure of the information would likely put an individual in danger. The Chief Constable is not *prohibited* from providing the Board with such information; but neither is he *obliged* to provide it. In the event of any dispute about whether the information is properly withheld there is a mechanism (both statutory and by an agreed protocol) for that dispute to be resolved.<sup>232</sup>

## **SMALL UNMANNED AIRCRAFT (SUAS)**

In June 2013, PSNI purchased a number of small unmanned aircraft (SUAs), commonly referred to as drones.<sup>233</sup> They were first used during the G8 Summit, in June 2013. Since then, the primary use of SUAs has been to provide overt support to policing. The Policing Board, as a condition of its

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<sup>231</sup> However the Policing Board's Human Rights Advisor who is vetted so as to enable her to access secret material has not been denied access to any document which she wished to inspect.

<sup>232</sup> Police (NI) Act 2000. The Policing Board agreed, in December 2012, a formal protocol for requiring the Chief Constable to submit a report under section 59 of the 2000 Act.

<sup>233</sup> The PSNI currently has available to it 9 SUA systems. There are 3 RQ-20 Puma (All Environment) systems, which have a range of over 15 kilometres. The RQ-20 can be used for periods of approximately 2 hours, can be used during daylight or in the dark and are hand thrown. There are 3 WASP III Micros, which have a range of 5 kilometres. The WASP Micro can be used for up to 45 minutes, can be used during daylight or in the dark and are hand thrown. There are technical limitations to the WASP III, which are currently under development. There are 3 SHRIKE VTOL Advantage systems, which have a range of 5 kilometres. The SHRIKE can be used for up to 40 minutes and can perch and stare or hover and stare. The SHRIKE is not hand thrown but has a vertical take-off and landing capability.

approval for the expenditure on SUAs, required the PSNI to carry out a review of their use to include; the technical operation of the systems and their effectiveness; value for money; legal compliance in deployment and oversight by the Chief Surveillance Commissioner. A recommendation was also made in the 2013 Human Rights Annual Report that in carrying out the post-implementation review the PSNI should identify and explain the extent to which the SUAs had been used for surveillance purposes together with a detailed explanation of the framework within which the PSNI used SUAs for overt surveillance and for surveillance which did not relate to a specific operation or investigation.<sup>234</sup> The PSNI, following completion of the post-implementation review in 2015, reported to the Performance Committee. Recommendation 8 of the Human Rights Annual Report 2013 has therefore been implemented. However, while Recommendation 8 has been implemented the Committee raised some concerns with the PSNI about the procurement and assessment of the use of SUAs which are being considered and will be the subject of further monitoring and report.

There has been considerable and understandable interest in the use by the PSNI of SUAs therefore the Committee paid particularly close attention to the issues this year. A comprehensive overview is provided as follows.

The Committee's concern - to ensure the lawful use of SUAs - is timely. The perceived increase in the use of surveillance has become a cause for concern for many stakeholders. To enable the Committee to consider whether the use of SUAs is compliant with the Human Rights Act 1998, the Policing Board's Human Rights Advisor sought and received a comprehensive briefing from PSNI's Air Support Unit.<sup>235</sup> The Human Rights Advisor subsequently provided advice to the Committee on the operational context, the legal and regulatory frameworks and use of SUAs. The Committee recognises that certain

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<sup>234</sup> Recommendation 8 of the Human Rights Annual Report 2013, Northern Ireland Policing Board, March 2014. If surveillance is overt, RIPA is not the applicable framework as it only relates to covert surveillance. If surveillance is carried out in a public place but it is not being carried out in relation to a specific operation or investigation, then it does not come within the scope of RIPA.

<sup>235</sup> The Air Support Unit was first formed in 1992. It has a Police Air Operators Certificate issued by the UK Civil Aviation Authority.

information on operational *capabilities* and *techniques* cannot be published to ensure that lawful surveillance is operationally effective however the Human Rights Advisor did receive information on those capabilities and operational techniques.

The Air Support Unit, which is attached to Specialist Operations Branch (C4) and sits within Crime Operations, assists front line officers on for example crime investigations, public order, traffic management, search and rescue and counter-terrorism. C4 is responsible through its head of department for providing the PSNI with specialist advice, assistance and command in those investigations involving: serious, organised and volume crime; matters affecting national security; and, any other issues which require the specialist knowledge or the technical support of C4. That might include the use surveillance in planned or spontaneous public order operations. If air support is requested for a pre-planned operation a written request must be made to the Air Support Unit (C4) together with sufficient reason(s) for the request and the circumstances relevant to an assessment of whether to the request should be granted. A record is maintained of all requests and the reason(s) for the grant or refusal of the request. An SUA might be deployed, for example, in search and rescue; aerial mapping; scene or aerial photography; and, either covertly or overtly, to support operational policing. SUAs were used effectively during the G8 operation for the overt surveillance of police lines. SUAs have been used overtly on 143 occasions since their first deployment.<sup>236</sup>

If air support is requested for a spontaneous incident, a request may be made by telephone. Each and every request for air support is assessed individually on a merits basis. If the request is granted in principle, an assessment is carried out to establish which of the available resources is most appropriate in all of the circumstances. In addition to environmental and geographic factors, the community impact of a deployment is considered. An SUA, for example, is less likely to create a noise disturbance than conventional air support so if all

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<sup>236</sup> Whether and if so on how many occasions SUAs have been used covertly is information which might impact adversely on national security and therefore cannot be published. The Board's Human Rights Advisor has however received a briefing and reports no issues of concern.

other factors are equal an SUA will be considered. Once deployed, the SUAs remain under the command and control of the Air Support Unit. Furthermore, importantly, SUAs may not be flown over or within a set distance of any congested area of a city, town or settlement; within a set distance of any person, vessel, vehicle or structure during take-off or landing; or within a set distance of any person (not during take-off or landing) unless that person is a member of the crew. All flights of all SUA systems are recorded including training exercises, pre-test flights, launches and recoveries. In other words, it is not technically possible to deploy an SUA without a record being made of the entire period of that use.

The handling and retention of all material recorded by an SUA is governed by the Home Office Handling and Retention Rules and the Human Rights Act 1998. Processing of the material is governed by the Data Protection Act 1998. All material is stored securely for 28 days, after which time it is deleted unless required as evidence or for other legitimate policing purposes. A record is made and retained of all material generated, destroyed or retained. That record is not capable of being overridden manually. In other words it is not possible to handle the material without an automatic record (which itself cannot be deleted) from being created. Each record is unique to the system, the operation and the operator. The SUAs convey digital data transfer, which means the system does not store data. That prevents any material from being compromised if the system is retrieved or intercepted.

The use of SUAs is subject to regulation by the Civil Aviation Authority (CAA). The CAA has granted authority to the PSNI to use all three systems but has dictated strict parameters within which they may be used. The CAA has issued Air Navigation Order 2009 SI 2009 No. 3015, last amended and updated on 1 April 2015, and Rules of the Air Regulations 2015 SI 2015 No.840, which came into force on 30 April 2015. The Order and Rules provide for example that: a person must not cause or permit any article to be dropped from a SUA so as to endanger persons or property; the person in charge of a SUA may only fly the aircraft if reasonably satisfied that the flight can safely be made; the person in charge of a SUA must maintain direct, unaided visual

contact with the aircraft sufficient to monitor its flight path in relation to other aircraft, persons, vehicles, vessels and structures for the purpose of avoiding collisions; the person in charge of a SUA must not fly the aircraft for the purposes of aerial work except in accordance with a permission granted by the CAA.

### **Legal regulation - covert deployment**

If the PSNI uses SUAs covertly, that use is governed by the Regulation of Investigatory Powers Act 2000, Part II, (RIPA). The following provides an overview of the framework with an important caveat. RIPA is complex and incomplete. It has been described as “particularly puzzling” by the English Court of Appeal<sup>237</sup> and as “difficult to construe with confidence by Lord Bingham.”<sup>238</sup> RIPA applies to all surveillance which is defined as “directed” or “intrusive”.<sup>239</sup> Surveillance is the monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications; the recording of anything monitored, observed or listened to in the course of surveillance; and the surveillance by or with the assistance of a surveillance device.<sup>240</sup> Under RIPA, surveillance may be categorised as “directed” and/or “intrusive”.

Surveillance is “directed” if it is covert but not intrusive and is undertaken: (a) for the purposes of a specific investigation or a specific operation; (b) in such a manner as is likely to result in the obtaining of private information about a person (whether or not one specifically identified for the purposes of the investigation or operation); and, (c) otherwise than by way of an immediate response to events or circumstances the nature of which is such that it would not be reasonably practicable for an authorisation to be sought for the carrying out of the surveillance. Directed surveillance includes for example the filming and covert monitoring of specific people in public places. An authorisation for directed surveillance may be given if: it is considered

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<sup>237</sup> In *R v W* [2003] EWCA Crim. 1632.

<sup>238</sup> In *Attorney's General's Reference* [2004] UKHL 40.

<sup>239</sup> By virtue of section 26 of RIPA.

<sup>240</sup> Section 48(2) of RIPA.



necessary in the interests of national security; it is for the purpose of preventing or detecting crime (which is not limited to serious crime) or of preventing disorder; or, it is in the interests of the economic well-being of the United Kingdom.

Surveillance is “intrusive” if it is covert surveillance that: (a) is carried out in relation to anything taking place on any residential premises or in any private vehicle; and, (b) involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device. However, surveillance is not defined as intrusive if it is carried out by means only of a surveillance device designed or adapted principally for the purpose of providing information about the location of a vehicle. Surveillance which is carried out by means of a surveillance device in relation to anything taking place on any residential premises or in any private vehicle, but which is carried out without that device being present on the premises or in the vehicle, is not defined as intrusive unless the device is such that it consistently provides information of the same quality and detail as might be expected to be obtained from a device actually present on the premises or in the vehicle. Therefore, the recording, videoing or photographing of a targeted individual using a long range device may provide private information albeit not of the same level of detail as a ‘bug’ or camera in the premises and would not be classified as intrusive surveillance.

Surveillance is intrusive if, for example, it involves the placing of ‘bugs’ in or filming of private homes and vehicles. An authorisation for intrusive surveillance may be given if: it is considered necessary in the interests of national security; it is for the purpose of preventing or detecting serious crime (this does not include preventing disorder); or, it is in the interests of the economic well-being of the UK.<sup>241</sup> In non-urgent cases, a request for intrusive (but not directed) surveillance must be authorised by the Surveillance Commissioner but in urgent cases the PSNI may ‘self-authorise’ for up to 72

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<sup>241</sup> “Serious crime” is defined as an offence that involves violence or results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose or is an offence for which a person could be reasonably expected to be imprisoned for 3 years or more.

hours. The Code of Practice provides that a case is urgent if to wait would be “likely to jeopardise the investigation or operation in question”.

The authorisation *process* for both intrusive and directed surveillance has been reviewed by the Policing Board’s Human Rights Advisor and by the Office of the Surveillance Commissioners (OSC). RIPA provides a framework for the *review* of surveillance activities by the OSC and the Intelligence Services Commissioner. A complainant may bring a complaint to the Commissioners or to the Investigatory Powers Tribunal (and may in limited circumstances have a claim which can be brought before a domestic court) but it can be noted that the right to a remedy for breach of an infringement depends upon the person affected by it knowing of the infringement. By the very nature of covert surveillance that is rarely the case.

The European Court of Human Rights (ECtHR) has reiterated that “subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively.”<sup>242</sup> In practice, subsequent notification is likely to be confined to notification post the investigation and clearance of a subject. While the ECtHR determined in one case,<sup>243</sup> which concerned the interception of communications, that the right to complain to the Tribunal in respect of such interception meant that there was no infringement of Article 8(1) ECHR (the right to a private and family life) or of Article 6 ECHR (the right to a fair trial). It distinguished between the interception of communications and other covert surveillance. The issue therefore remains open in respect of directed and intrusive surveillance.

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<sup>242</sup> *Weber & Saravia v Germany* (2008) 46 EHRR.

<sup>243</sup> *Kennedy v UK* (2010).

RIPA<sup>244</sup> renders lawful all covert surveillance (both intrusive and directed) which is carried out pursuant to and in accordance with an authorisation granted under RIPA. All authorisations should consider the risk of collateral intrusion for example the risk of infringing the Article 8(1) ECHR right of friends and family. In the case of SUAs, the risk of collateral intrusion might be exacerbated given their range.

### **Legal regulation - overt deployment**

The overt deployment of SUAs, for example hovering over a public order incident, is not governed by RIPA. The use of such systems, however, to overtly capture images is similar to the use of CCTV. The use and regulation of CCTV “and other surveillance camera technology” is governed by the Protection of Freedoms Act 2012, Chapter 1. “Camera surveillance technology” includes (a) closed circuit television or automatic number plate recognition systems, (b) any other systems for recording or viewing visual images for surveillance purposes, (c) any systems for storing, receiving, transmitting, processing or checking images or information obtained by systems within paragraph (a) or (b), or (d) any other systems associated with, or otherwise connected with, systems falling within paragraph (a), (b) or (c).<sup>245</sup>

The 2012 Act has established the role of Surveillance Camera Commissioner and a new code of practice for such use was issued in June 2013. On 1 June 2015, the Commissioner launched a survey to review the impact and effectiveness of the code and on 24 December 2015 a survey to review the information requirements for CCTV. The Information Commissioner’s Office also issued a code of practice on the handling of information.<sup>246</sup> The Committee considers that the PSNI should, to ensure compliance with the Human Rights Act 1998, comply (as a minimum) with the principles enshrined in those Codes when using SUAs overtly. The Human Rights Advisor reported

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<sup>244</sup> At section 27.

<sup>245</sup> By section 29(6) of the 2012 Act.

<sup>246</sup> In the picture: A Data Protection Code of Practice for Surveillance Cameras and Personal Information, ICO, 21 May 2015.

to the Committee that the PSNI did apply the principles contained within the Code but those principles are not formally adopted by PSNI policy or Guidance.

### **Recommendation 7**

**The PSNI should in respect of its use of SUAs overtly, while awaiting dedicated policy guidance, adopt formally and issue to officers the Surveillance Camera Code of Practice (June 2013) and the Information Commissioner’s Code of Practice (May 2015).**

The Human Rights Act 1998 applies to the use of SUAs including the covert use of SUAs for intrusive and directed surveillance. Article 8 ECHR<sup>247</sup> (the right to respect for private life, home and correspondence) is engaged in every use of an SUA. Importantly, Article 2 ECHR<sup>248</sup> (the right to life) may also be engaged in an operation involving surveillance. All actions will be judged, whether authorised under RIPA or otherwise, according to the principles applicable under the Human Rights Act 1998 taking into account the jurisprudence of the UK Courts and the Strasbourg Court. The grounds contained within RIPA (set out above) for authorising the use of covert surveillance correspond closely with those contained within Article 8(2) ECHR which may justify an infringement of the Article 8(1) right. However, the PSNI must always consider the legality, necessity and proportionality of each authorisation: the greater the intrusion the greater the risk of, and therefore justification required, for interference. The PSNI’s does carry out such an assessment.

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<sup>247</sup> Which provides “1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>248</sup> Which provides “1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.

The legal regulation of the overt use of SUAs is, perhaps surprisingly, even more complicated and convoluted than covert surveillance; there being no regime devised specifically for their regulation. That is exacerbated by the fact that SUAs deployed overtly may nonetheless not be seen by or known to the target(s) as a result of cloud cover or other obstruction. Furthermore, the overt deployment of an SUA which is deployed primarily to carry out surveillance of a public space may, as a result of the range of the system, inadvertently capture images from a private place. While Article 8(1) ECHR provides the basis for a general right to respect for privacy and family life, there is no accepted legal definition of 'privacy'. Privacy is difficult to define, and both the ECtHR and the UK courts have declined to offer a conclusive definition, preferring to judge the extent of the right on a case by case basis.

What is clear is that a public body including the police that is engaged in any form of interference with an individual's Article 8(1) ECHR right must be able to demonstrate that the surveillance in question is: authorised by law; proportionate to the purpose in question; necessary; and conducted in accordance with one of the legitimate aims set out in Article 8(2) of the ECHR. The right does not extend to purely public activity therefore the overt use of SUAs (if there is no question but that their use is overt) does not fall to be considered under Article 8. However, the overt use of SUAs is capable of interfering with the reasonable expectation of privacy in public if the monitoring of a person's activity in public is recorded systematically or stored permanently. In one case, the ECtHR held that monitoring an individual in public but not recording his or her activity did not infringe Article 8.<sup>249</sup> In another case, the ECtHR held that "private life" includes for example a person's physical and psychological integrity and affords a "zone of interaction of a person with others, even in a public context".<sup>250</sup> In other words, the right to privacy can be said to vest in people rather than places and is capable of being exercised in public spaces.

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<sup>249</sup> *Peck v UK* (2003).

<sup>250</sup> *Von Hannover v Germany* (2005).

It is very unlikely that the right will be held to be infringed simply by the use of overt surveillance but entirely possible that the systematic recording and storage of the material will constitute interference. The English Court of Appeal has found, for example, that the taking and *retention* of photographs of protesters in public was disproportionate as per Article 8.<sup>251</sup> The UK Supreme Court has also recently held that the state's systematic collection and storage in retrievable form even of public information about an individual is clearly an interference with private life under Article 8(1) ECHR.<sup>252</sup>

Assuming overt deployment is *capable* of infringing the Article 8(1) right, the pertinent issue is whether the PSNI's use of the material is for a specified purpose which is in pursuit of a legitimate aim and necessary to meet an identified pressing need i.e. is lawful, necessary and proportionate. Furthermore, no more images and information should be stored than that which is strictly required for the stated purpose of a surveillance camera system, and such images and information should be deleted once their purposes have been discharged. The disclosure of images and information should only take place when it is necessary for such a legitimate purpose. The Human Rights Advisor has reported to the Committee that the PSNI has carefully considered and applied those principles in practice to its overt deployment of SUAs.

### **Recommendation 8**

**To enable the Performance Committee of the Policing Board to monitor effectively the use of SUAs the PSNI should provide to the Committee every 6 months a report on the nature and extent of Small Unmanned Aircraft use.**

### **Transparency**

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<sup>251</sup> In *Wood v Commissioner for Police of the Metropolis* [2009].

<sup>252</sup> *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9.

On a final note it has been recorded elsewhere but merits repetition here, it is a requirement of Article 8 for an interference to be in accordance with the law that: it has a basis in domestic law; the law is sufficiently accessible with rules that are reasonably easy to obtain and understand; and, the manner in which the law will operate or be applied must be sufficiently foreseeable. Those requirements are not always easy to reconcile with the secret nature of covert operations and surveillance. A balance must be found between retaining the secrecy of operational capabilities and methods with having a law that is sufficiently clear in its terms to give an adequate indication as to the circumstances in which and the conditions on which the police will intrude upon their privacy.

The Performance Committee wishes to echo the observation of the Independent Reviewer of Terrorism Legislation, David Anderson Q.C, that “Whilst the operation of covert powers is and must remain secret, public authorities [including the police] should be as open as possible in their work. Intrusive capabilities should be avowed. Public authorities should consider how they can better inform Parliament and the public about why they need their powers, how they interpret those powers, the broad way in which those powers are used and why additional capabilities may be required”.<sup>253</sup> The Performance Committee has continued to develop that approach with the PSNI and their partners.

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<sup>253</sup> *A Question of Trust - Report of the Investigatory Powers Review, David Anderson Q.C. Independent Reviewer of Terrorism Legislation, June 2015, paragraph 34*

## 9. VICTIMS

Article 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) requires every Member State to secure the ECHR rights and freedoms for every individual within the State's jurisdiction. It is unlawful for a public authority (which includes the police) to act in a way which is incompatible with an ECHR right.<sup>254</sup> In certain circumstances, the police may have a positive obligation to intervene to protect an individual's rights. That is most relevant when the police are dealing with victims of criminality. After a criminal offence has been committed, a victim's first contact with the criminal justice system is often with the police. The police response to the report of a criminal offence will therefore have a direct and often decisive impact on a victim's attitude to the criminal justice system. It may impact upon his or her willingness to support a prosecution and to report, and encourage others to report, future criminality. It is critical that the police treat all victims with compassion and respect for their dignity.<sup>255</sup> They must ensure that the victim feels that the offence is being considered properly and is being taken seriously.

The Committee was delighted to note the report, in March 2015, of the Criminal Justice Inspection Northern Ireland (CJINI) which commended the very good progress made by local criminal justice agencies in meeting the needs of victims and witnesses following its review of progress on the implementation of recommendations from two reviews of the care and treatment of victims and witnesses and the use of special measures.<sup>256</sup> In the 2015 report, Inspectors found that considerable progress had been made with 27 of the 28 recommendations implemented either in full or in part. The report, however, also recognised that "sizeable proportions of victims remain

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<sup>254</sup> By section 6(1) of the Human Rights Act 1998.

<sup>255</sup> Article 2.3 of the PSNI Code of Ethics includes a duty to "treat all victims of crime and disorder with sensitivity and respect their dignity" and requires police officers to consider the special needs, vulnerabilities and concerns victims have. It requires police officers to keep victims updated on the progress of any relevant investigations. 'Victims' is defined in Article 2.3 of the Code as including within its meaning the relatives of a deceased person where the circumstances of the death are being investigated by the police.

<sup>256</sup> Published in 2011 and 2012 respectively.



dissatisfied with the criminal justice system” and highlighted that delay remains a significant concern for many victims and witnesses. The Chief Inspector reminded everyone that “there is no room for complacency”. The Chief Inspector concluded “The commitment of various leaders across the criminal justice system and the clear political support, together with the personal interest of the Minister of Justice have been central to the good progress made to date”. The Performance Committee agrees respectfully with the Chief Inspector that progress must be maintained but takes this opportunity to commend the Chief Constable for the role he has played in achieving success against the recommendations. The Committee will continue to address those issues of particular concern to victims’ groups.

During 2015, there have been a number of developments at a governmental level which are aimed at protecting victims of crime and improving the service and support received from statutory agencies. For example, the Human Trafficking and Exploitation (Further Provisions and Support for Victims) (Northern Ireland) Act received Royal Assent on 13 January 2015. The Act makes provision for the specific offences of human trafficking and exploitation, introduces measures to prevent and combat human trafficking and slavery and support for human trafficking victims.

The Justice (Northern Ireland) Act 2015 (discussed in Chapter 3 of this Human Rights Annual report) came into force, largely, on 25 July 2015. The Act contains provisions aimed at improving services and facilities for victims by creating a new statutory Victim Charter, by introducing a legal entitlement to make a victim statement (to be known as a victim personal statement) and by extending the power to use video link between courts and a number of new locations.

## **SAFEGUARDING VULNERABLE ADULTS**

The Department of Justice (DOJ) has also, in conjunction with the Department of Health, Social Services and Public Safety, issued its new Adult

Safeguarding Policy<sup>257</sup> with the stated intention “To improve safeguarding arrangements for adults who are at risk of harm from abuse, exploitation or neglect, thereby reducing the prevalence of harm and providing adults at risk of harm with effective support and, where necessary, protective responses, including access to justice. It aims to raise awareness of harm to adults at risk, defines harm, illustrates how harm manifests itself and identifies who can assist to combat it and how that can be done. [This] promotes zero-tolerance of harm to adults and emphasises that everyone can play a role to prevent it. It identifies the need for safer communities and safer organisations across all sectors, and sets out clear and proportionate safeguarding expectations across the full range of relevant organisations”.<sup>258</sup>

PSNI has adopted a number of policy and guidance documents such as the Association of Chief Police Officers (ACPO)<sup>259</sup> guidance *Safeguarding and Investigating the Abuse of Vulnerable Adults 2012*; *Safeguarding Vulnerable Adults (Regional Adult Protection Policy and Procedural Guidance) 2006* and, the *Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults’ 2009*. PSNI’s Public Protection Branch (PPB) is responsible for triaging reports under Joint Protocol arrangements and if a case is passed to another branch of PSNI, the PPB retains oversight and ensures ongoing engagement and communication with other partners under the Joint Protocol.

The PSNI is planning to gather User Satisfaction information for adult safeguarding activity, which is welcomed by the Committee.

## **SAFEGUARDING CHILDREN**

In respect of the safeguarding of children there was significant concern in 2014 following an announcement from PSNI regarding an investigation into

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<sup>257</sup> *Adult Safeguarding: Prevention and Protection in Partnership*, DOJ/DHSSPS, 10 July 2015.

<sup>258</sup> <http://www.dhsspsni.gov.uk/showconsultations?txtid=74705>

<sup>259</sup> Now the National Police Chiefs Council.

Child Sexual Exploitation (known as Operation Owl).<sup>260</sup> Operation Owl was instigated following an internal review by PSNI of its public protection arrangements. During that review the PSNI identified that a number of children had been reported as having gone missing on several occasions. The PSNI examined those cases in more detail and identified links between a group of children and a group of known offenders. The PSNI review highlighted the need to strengthen relationships with partner agencies and others involved in the care of children and to enhance information sharing protocols with statutory agencies. The PSNI also identified a need to better understand the nature and extent of the risk posed to children across Northern Ireland.

The Health Minister thereafter directed the Safeguarding Board for Northern Ireland (SBNI) to undertake a thematic review of those cases that had triggered the Operation Owl investigation. The Minister also initiated an inquiry into child sexual exploitation in Northern Ireland, the terms of reference for which included establishing the nature and extent of exploitation and examining the effectiveness of safeguarding and protection measures. Kathleen Marshall conducted the inquiry and published her report in November 2014.<sup>261</sup> The report made one key recommendation and five supporting recommendations for the PSNI. The key recommendation encouraged PSNI to pursue its commitment to strengthening relationships with communities and with young people as a priority in the context of the current climate of austerity.<sup>262</sup> The strengthening of relationships with communities, particularly young people, has remained a focus of the Policing Board in 2015.

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<sup>260</sup> In September 2013 the PSNI announced that it had undertaken a major investigation into the sexual exploitation of children and young people who have gone missing in care in Northern Ireland. This followed on from an earlier internal review of public protection arrangements. The investigation, known as 'Operation Owl', identified twenty-two young people aged between 13 – 18 who had gone missing a total of 437 times from care homes in the preceding eighteen months and may be at risk of further abuse.

<sup>261</sup> *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry*, Kathleen Marshall, November 2014. The Inquiry did not focus on the circumstances and responses to the 22 children who were part of Operation Owl, which will be the focus of a separate Thematic Review being undertaken by the Safeguarding Board Northern Ireland.

<sup>262</sup> Key recommendation 2 *Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry*, Kathleen Marshall, November 2014.

In the Human Rights Annual Report 2014, a recommendation was made that the PSNI should within three months of the publication of this Human Rights Annual Report provide to the Performance Committee a report on progress made to implement the recommendations directed at the PSNI in the Report of the Independent Inquiry into Child Sexual Exploitation in Northern Ireland. It was recommended that the report should include the lessons learned by the PSNI from its own internal review of Operation Owl.<sup>263</sup>

The PSNI provided a comprehensive written report and attended the Committee to provide a further oral briefing on the progress of the investigation and steps taken to implement the recommendations. Some of those steps are summarised below.

In respect of strengthening relationships the PSNI has been particularly productive. In April 2015, a restructure of public protection arrangements was undertaken. Public Protection Units (PPUs) are working increasingly closely with partner agencies such as Health and Social Care Trusts and the Probation Board on cases involving domestic abuse, child abuse, missing persons and vulnerable adults. The PPU's, being specialist units, share information and expertise and focus on links between incidents. Furthermore, the PSNI through its membership of the Safeguarding Board continues to develop cross-agency guidelines on CSE. The PSNI attends a Youth Advisory Panel, hosted by the Policing Board, on which are represented key partners and the third sector. The PSNI hosts a Youth Champions' Forum which considers closely operational and policy matters affecting children including CSE.

The Sexual Assault Referral Centre,<sup>264</sup> known as the Rowan, is an excellent facility which brings together in one location all relevant professionals and

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<sup>263</sup> Recommendation 4 of the Human Rights Annual Report 2014.

<sup>264</sup> The Rowan is located on the Antrim Area Hospital Site. It is funded by the PSNI and the DHSSPS. Within the Rowan there is professional and highly trained team deliver a range of support and services 24 hours a day, 365 days a year to children, young people, women and

agencies. The Rowan has been developing its website to provide video/podcasts to explain to those who may wish to contact the Rowan the nature of the services and encourage victims to contact them. The PSNI has worked hard to raise awareness of the issues and continues to reach out to victims to ensure that CSE can be prevented and responded to appropriately when it does occur. The website provides a number of information sheets including information specifically for children at risk of or subjected to abuse including CSE. It contains information and signposts to other partners and support groups who may also provide assistance.

The PSNI has published a leaflet to inform both children and adults on the legal protections in place including an explanation of what is meant by consent, issues concerning the processing or taking of abusive and indecent images, the legal age of consent, relevant contact details of and procedure for contacting a range of partners if a person is concerned about behaviours. The leaflets are published in six languages, are available on the PSNI website and are shared with a range of organisations.<sup>265</sup> The PSNI website contains additional information on reporting sexual violence or abuse, what happens if a report is made and the criminal proceedings that may follow. A person accessing that information via the PSNI website is advised that their welfare will always come first.

The PSNI has provided support to Barnardos, as part of the CSE Knowledge Transfer Partnership NI, in developing a DVD and resource pack to improve awareness of CSE.<sup>266</sup> The PSNI also hosted an event for PSNI officers and partner agencies to learn from an expert speaker on the subject of childhood development and implications for the criminal and civil law.

In respect of Kathleen Marshall's supporting recommendations the PSNI has also undertake considerable work and implemented a number of initiatives to

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men who have been sexually abused, assaulted or raped. **Freephone Helpline 0800 389 4424.**

<sup>265</sup> The leaflets can be accessed via:

[http://www.psni.police.uk/index/advice-and-legislation/the\\_law\\_on\\_sex\\_in\\_ni.htm](http://www.psni.police.uk/index/advice-and-legislation/the_law_on_sex_in_ni.htm)

<sup>266</sup> *False Freedom* can be accessed at:

[http://www.barnardos.org.uk/ff\\_resource\\_pack\\_ni.pdf](http://www.barnardos.org.uk/ff_resource_pack_ni.pdf)

address both the objectives of those recommendations. The first supporting recommendation was for the PSNI to strengthen its enforcement of licensing laws especially those concerning the supply of alcohol to children. It was suggested that Police and Community Safety Partnerships (PCSPs) should lead on localised approaches to that issue. PSNI are considering the best approach for the longer term but immediately considered through District Policing Command what steps were necessary to enforce licensing laws locally. The Performance Committee agrees that the unlawful sale of alcohol to children is a cause of concern that must be tackled it has raised a number of concerns should the PSNI decide to tackle that by the widespread use of test purchasing powers. That is considered elsewhere in this Human Rights Annual Report.

The second supporting recommendation was that PCSPs should seek to add value to the policing of communities by creating innovative mechanisms to hear and reflect issues of local concern particularly issues affecting children and young people. That recommendation has been accepted by the Policing Board which has overall responsibility for PCSPs. When PCSPs were reconstituted as part of the reform of local government in Northern Ireland they were encouraged to develop those mechanisms with input from the Safeguarding Board Northern Ireland. Progress on developing those mechanisms will be monitored and reported upon in due course.

The third supporting recommendation that PSNI should review its processes to ensure that in each and every case of a child going missing information is recorded and transmitted appropriately within PSNI and to partner agencies has been implemented. PSNI protocols, policy and guidance on responding to missing persons have all been reviewed. The PSNI Service Procedure *Police Action in Respect of Missing Persons* and protocol *Runaway and Missing from Home and Care Regional Guidance* have been reviewed.

The fourth supporting recommendation, that the PSNI should conduct a review of resources and operational delivery in respect of digital evidence

examination to ensure that any evidence of CSE is provided to investigators in a timely manner and to avoid delay in the courts, is currently taking place.

The fifth and final supporting recommendation, that the PSNI in its review and development of Public Protection Units should develop perpetrator profiling and increase its focus on perpetrators, was implemented as part of the restructuring of PPU's mentioned above. PPU's have been realigned to sit alongside the five Health and Social Care Trusts under a single command structure, known as Public Protection Branch, as part of Crime Operations. The new Public Protection Branch is led by a team of one Detective Chief Superintendent, two Detective Superintendents and five Detective Chief Inspectors. Within the branch there are additionally a number of dedicated teams dealing with child internet protection, rape crime and public protection arrangements for Northern Ireland (PPANI). The renewed focus on investigative techniques should ensure a practical, efficient and effective response.

To align that investigative focus with improvements to policy and practice there are policy leads within that command structure. Importantly, a regional Central Referral Unit (CRU) has also been established to provide a consistent approach to the management of referrals and information sharing.

The Committee is satisfied that considerable attention has been focused on addressing the issues which includes the better profiling of perpetrators and the risk assessment of children. It welcomes in principle the restructure of public protection branch.

On the basis of all of the above the Committee is pleased to record that recommendation 4 of the Human Rights Annual Report 2014 has been implemented.

It can also be reported that the PSNI's use of Harbourers' Warning Notices now referred to as Child Abduction Warning Notices has increased significantly during 2014 and 2015. Behaviour which alerts the PSNI to the

risk of CSE can include where children are allowed to associate with adults for example where the adult arranges for the child to be transported to the adult's home or elsewhere without informing the child's parent, guardian or carer. That adult may also encourage the child to go missing. Warning Notices can be effective in disrupting that activity by severing contact between the child and the adult referred to as a harbourer.

Notices should always be issued in consultation with other safeguarding agencies who can offer the appropriate support to the child. PSNI considers that they may also assist evidentially in a future prosecution of the adult. PSNI policy dictates that warnings should never be issued by PSNI as an alternative to prosecution if prosecution is an achievable and more desirable outcome.<sup>267</sup> That policy also provides "The United Nations Convention on the Rights of the Child (UNCRC) 1989 sets out a range of rights and obligations in relation to children. Art 3 of the UNCRC requires that a primary consideration of all actions in relation to children should be the best interests of the child. Article 11 requires that measures be taken to combat the illicit transfer and non-return of children abroad. Articles 19 and 34 require that all appropriate, including protective, measures are taken to protect children from physical or mental violence, abuse, maltreatment or exploitation, including sexual abuse, while in the care of parents or whoever has care of the child. These measures should include preventative, investigative and other measures as appropriate".<sup>268</sup>

In a linked document it is stated that "It is important that Child Protection is not seen solely as the role of Public Protection Units (PPU), but that all police officers and Police Service Staff understand that it is a fundamental part of their duties. In all aspects of police duty, Police Officers/Staff may come across situations where child protection must be considered. When attending incidents of violence, especially those involving domestic abuse or bullying, all

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<sup>267</sup> *Police Response to Child Abduction (Harbouring) Service Procedure 27/2010*, which was amended to take account of ACPO guidance and judicial comments.

<sup>268</sup> *Ibid.*



should be aware of the effect of such violence on children and the duty they have towards such children".<sup>269</sup>

The extent to which those changes result in better protection for vulnerable people will be tested in due course and reported upon by way of a dedicated thematic review of CSE which will be conducted on behalf of the Performance Committee throughout 2016.

## **DOMESTIC VIOLENCE AND ABUSE**

### **Police response to domestic violence and abuse**

Between 1 April 2014 and 31 March 2015, the PSNI recorded 28,287 reports of domestic abuse incidents, an average of one incident every 19 minutes.<sup>270</sup> That represents the highest number of incidents recorded since data collection began in 2004.<sup>271</sup> PSNI recorded 13,426 domestic abuse crimes which is also the highest number recorded by PSNI since 2004.<sup>272</sup> There were 449 sexual offences recorded with a domestic abuse motivation, including 172 offences of rape. In 2014/15 there were 9,504 offences of violence against the person with a domestic motivation.<sup>273</sup> Of all violence against the person offences recorded 27.7% of them had a domestic abuse motivation. That included 6 homicides<sup>274</sup> with a known domestic motivation, which accounts for 25% of all homicides recorded by PSNI during 2014/2015.<sup>275</sup>

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<sup>269</sup> *Child Protection Procedures Service Procedure 5/2013.*

<sup>270</sup> The NI 24 Hour Domestic & Sexual Violence Helpline is open to all women and men affected by domestic and sexual violence and abuse - Freephone **0808 802 1414**. In an emergency a person should call **999**.

<sup>271</sup> There has been an increase in recorded crimes of 39% since 2004. The increase in crimes can be seen across almost all offence types.

<sup>272</sup> There has been an increase in reports of 35% since 2004.

<sup>273</sup> That represents a 6% increase from 2013/14.

<sup>274</sup> "Homicide" includes murder, manslaughter, corporate manslaughter and infanticide. All 6 homicides with a domestic abuse motivation were murders.

<sup>275</sup> *Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2014/15*, PSNI, August 2015. The report, and accompanying spreadsheets containing more detailed data, are available through the statistics section of the PSNI website: [www.psni.police.uk](http://www.psni.police.uk)

The PSNI now compiles very detailed statistics which include a breakdown of domestic abuse crimes according to gender, age and ethnicity. That enables a very close scrutiny of the nature and extent of domestic abuse offences and informs the targeting of police response and corresponding resources. Of the 12,367 crimes recorded in 2014/15 where the age and gender details were known 13% were under the age of 18 years. 62% were female aged over 18 years and 25% were male aged over 18 years. Of the 6 homicides recorded in 2014/15 with a domestic abuse motivation, 5 were female and 3 involved the partner or former partner of the victim.<sup>276</sup> The PSNI also analyses the statistics according to policing district and area.

### **Outcome rates**

In respect of outcome rates<sup>277</sup> for crimes with a domestic abuse motivation recorded in 2014/15 the outcome rate was 31.3%, which represents a 0.5% decrease in outcomes rates from the previous year.<sup>278</sup> Outcome rates, when broken down into offence type, show a marked decrease in outcome rates for homicides (20.8%) and sexual offences (9%) from 2013/14 to 2014/15. While the outcome rate for domestic abuse crimes is higher when taken across all domestically motivated offence types than for all crimes where there is no domestic abuse motivation, the outcome rates for sexual offences and violence against the person tend to be similar to or lower than all crime in general.

As the PSNI recognises, in crimes with a domestic abuse motivation the perpetrator is more readily identifiable so one might expect to see that

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<sup>276</sup> One female victim of a homicide recorded in 2014/15 died the previous year but the death was not established as murder until 2014/15.

<sup>277</sup> Outcome rates refer to the number of outcomes recorded in a given year expressed as a percentage of the total number of crimes recorded in the same period. According to PSNI "This is not a clear-cut measure of police investigative performance and needs to be interpreted with care. For example, some of the offences with the highest outcome rates are the offences most influenced, in terms of their recorded numbers, by proactive policing to apprehend offenders (e.g. drug offences and many of the offences in the 'other offences' category": *Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2014/15*, PSNI, August 2015.

<sup>278</sup> The outcome rate has fallen each year since 2010/2011: *Trends in Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2014/15*, PSNI, August 2015.

reflected in the outcome rates. It is recognised and appreciated by the Performance Committee that the reasons for a low outcome rate in domestic abuse can be many and varied but the Committee is concerned that the many initiatives undertaken by the PSNI have not been reflected in increased outcome rates. The Committee has paid particularly close attention to domestic abuse for many years and proposes to publish a further update to its thematic review on domestic abuse policing which will consider specifically outcome rates.<sup>279</sup> To enable the Committee to monitor that closely the Committee would be assisted by the PSNI further breaking down its outcome rates according to type of outcome. For example, it is not possible to discern the number of convictions as opposed to the range of other outcomes. Therefore, at least for a period of 12 months the Committee wishes to analyse the outcome rates according to type of disposal.

### **Recommendation 9**

**The PSNI should forthwith and for a period of 12 months disaggregate further the statistics on outcome rates for domestic motivated crime according to each disposal type including conviction in a form which can be easily accessed and understood. The PSNI should at the end of the 12 months period report to the Performance Committee with the empirical evidence distilled from the statistics.**

### **Discretionary disposals**

In 2015, the PSNI advised the Performance Committee of its intention to include within its re-launch of discretionary disposals to be renamed 'Community resolution,' the use of discretionary disposals for some domestic motivated crime. The Committee was concerned at the potential for use of discretion in domestic motivated crime, which must be considered as one of the most insidious and pervading of all crime. The Committee sought clarification from the PSNI that: relevant stakeholders had been consulted; that stakeholders views had been taken into account; that discretion would not

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<sup>279</sup> Published in March 2009 with a further report published in May 2011. Since then, progress has been monitored continuously by the Committee.

be used for any offence where a continuing risk was identified; and there were no child protection issues. The PSNI confirmed in December 2015 that the Women's Aid Federation had been consulted and had agreed that the disposal might be appropriate for some domestic motivated crime so long as: the parties were not and never had been in an intimate relationship; the Domestic Abuse Stalking and Harassment Risk Assessment was not high; and, that there were no child protection issues. The PSNI confirmed that in those circumstances discretion would not be used.

The Performance Committee is content on that basis but will seek assurance from the PSNI and stakeholders that the disposals are used appropriately. In particular, the Committee will consider the training and support available to officers who might use discretion and the policy, practice and empirical evidence available on the use of discretion after 12 months. This will be reported upon in the update report on the human rights thematic review of domestic abuse.

### **Non-criminal justice outcomes**

Criminal justice outcomes cannot be considered alone. In addition to criminal justice outcomes, the PSNI together with partner agencies, have brought thousands of adults and children within the protective scope of a Multi-Agency Risk Assessment Conference (MARAC). Since January 2010,<sup>280</sup> 8,363 MARACs have been discussed. Of those MARACs 7,955 concerned female victims and there were 10,856 children living in the households.<sup>281</sup> Furthermore, PSNI have contributed to the public protection arrangements through which violent offenders are managed.<sup>282</sup> PSNI is a key agency on the Northern Ireland Regional Strategy Group on Domestic and Sexual Violence and Abuse and has assisted with the development of the Department of

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<sup>280</sup> Cumulative until 31 March 2015.

<sup>281</sup> PSNI MARAC Steering Group Update – March 2015.

<sup>282</sup> The Public Protection Arrangements Northern Ireland (PPANI) manages sex offenders and violent offenders. Approximately 80% of the violent offenders managed by PPANI are perpetrators of domestic abuse.

Health Social Services and Public Safety (DHSSPS) and the Department of Justice's draft Domestic and Sexual Violence and Abuse Strategy 2013-2020.

### **Service of non-molestation orders**

A specific issue of concern to the Performance Committee has been the delayed and failed service of ex-parte non-molestation orders and occupation orders. In 2014, the Committee was concerned to learn that of approximately 4,000 orders served by PSNI, only one third were served within 24 hours, one third within 72 hours and the remaining one third served up to three months later. Although PSNI explained that the delay was often due to difficulties in locating respondents, the Performance Committee believed that more needed to and could be done to ensure that the orders were served expeditiously. In particular, the Committee wished to see oversight mechanisms put in place to alert police supervisors to any orders that had not been served within 48 hours. Furthermore, the Committee was keen to ensure better communication with victims.

The Committee recommended that the PSNI "should provide the Performance Committee, within 6 months of the publication of this Human Rights Annual Report, with an evaluation of its internal review on the service of ex-parte non-molestation orders and occupation orders. That evaluation should consider whether there has been any improvement in the length of time taken to serve orders, whether checks and balances put in place to oversee service of orders have been effective, how the PSNI will ensure that victims are kept informed as to progress or delay in serving the orders".<sup>283</sup> The PSNI accepted that recommendation and carried out an evaluation supported by partner agencies.<sup>284</sup> Recommendation 5 of the Human Rights Annual Report has therefore been implemented.

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<sup>283</sup> Recommendation 5 of the Human Rights Annual Report 2014.

<sup>284</sup> Women's Aid Federation of Northern Ireland, Women's Aid Antrim, Ballymena, Carrickfergus, Larne and Newtownabbey, Men's Advisory Project and Footprints. The Independent Advisory Group on Domestic Abuse also provided its input to the evaluation. The IAG includes in addition to the Women's Aid Federation, the NI Courts and Tribunals Service, the Public Prosecution Service, the Northern Ireland Council on Ethnic Minorities, the

Following that evaluation, a number of initiatives have either been commenced or where already commenced have been brought forward with a greater degree of urgency. For example, the PSNI worked with various stakeholders including importantly the Northern Ireland Courts and Tribunal Service which led to the introduction of a new Service Level Agreement in January 2015. There is now a central point of contact within PSNI for the receipt of and administration of orders. There has been introduced a new schedule of timescales for action and a mechanism for recording all actions and updates electronically on NICHE. On a daily basis Area Commanders are notified of progress on the service of orders. In August 2015, the PSNI carried out a dip sample analysis of non-molestation orders to test whether the revised arrangements and procedures had been effective.

The results are encouraging. Of 1,241 non-molestation orders received in the relevant period 59% (732) were assessed according to specific criteria including the time taken to serve the order. In 654 cases sampled 89% of the orders were served within 72 hours. 51% were served within 24 hours, 10% within 48 hours, 6% within 72 hours, 21% after 72 hours and 11% were not served. Of the orders not served, the most common reason for failure in service included the respondent living outside the jurisdiction, incorrect details on the order requiring a return to the court service for re-issue and expiry of the order following repeated, but unsuccessful, attempts to serve. An analysis was also carried out of the checks and balances that were put in place to monitor the service of orders. Of all non-molestation orders sampled, 97% of them had recorded on NICHE the attempts at service, of those successfully served 95% had the particulars of service recorded on NICHE and following service 95% had recorded an update sent to the Courts and Tribunal Service. Officers undertaking service of orders have been provided with specific instructions in respect of notification to those for whose benefit the order was made and their solicitor. Efforts to contact the applicant and solicitor are

recorded on NICHE but the dip sample of orders served showed that in only 27% of cases was an update recorded on NICHE, which is disappointing.

There is clearly a marked improvement on previous statistics, which is also reflected in feedback received from partners via questionnaires and workshops in particular from the Northern Ireland Courts and Tribunals Service. The Committee recognises the significant efforts of both the PSNI and the Northern Ireland Courts and Tribunals Service and the commitment to improving the process further but cannot overlook the fact that there remain an unacceptably high number of cases in which orders are not served. Given the potential risk to the victim of domestic abuse from the failure to serve the orders Committee intends to keep this under review and will continue to seek updates from PSNI. Therefore the Committee wishes to receive a further report from PSNI within 12 months of the publication of this Human Rights Annual Report.

#### **Recommendation 10**

**The PSNI should continue to monitor the service of non-molestation orders and provide the Performance Committee, within 12 months of the publication of this Human Rights Annual Report, with an analysis of the length of time taken to serve orders, an analysis of the checks and balances put in place to oversee the service of orders and the extent to which applicants and their legal representatives are kept informed of the service of orders.**

#### **Body worn video<sup>285</sup>**

The Performance Committee was and remains convinced that the use of Body Worn Video will contribute to an increase in the outcome rate for domestic motivated crime. In 2009, the Performance Committee made a recommendation to that effect in its Human Rights Thematic Review of Domestic Abuse. In 2010, CJINI echoed that recommendation PSNI

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<sup>285</sup> This is discussed further above at page 37.

commenced a pilot of Body Worn Video in G District (Foyle, Limavady, Magherafelt and Strabane) in June 2014. The pilot assessed whether the technology is of benefit in: the policing of domestic abuse in particular by providing supporting evidence to assist in prosecutions; reducing allegations of oppressive behaviour by police officers; enhancing officer confidence and protection; and improving officer availability and visibility by permitting officers to spend more time on patrol because evidence has been captured more efficiently. At an early stage, the PSNI reported significant success from use of the technology with a number of guilty pleas being entered at an earlier stage as a direct result of the perpetrator being confronted with the evidence.

The Performance Committee met with Temporary Assistant Chief Constable Service Improvement, in March 2015, to discuss initial findings of the pilot. During the meeting police officers gave Members a demonstration of the equipment. The Committee was advised that there has been a high level of positive feedback in relation to the G District pilot, including from officers using the technology and also Criminal Justice partners in relation to the quality of footage gathered. There has been reported a positive impact on the cases going forward for prosecution Those cases have been for a range of offences, including domestic abuse and public order. The equipment was also reported to have diffused confrontations between police officers and members of the public. PSNI advised that there have been some technical challenges during the pilot, for example, that there needs to be a significant investment in the PSNI's computer network before rolling out Body Worn Video.

The Committee awaits the final analysis of the pilot, which the PSNI has undertaken to provide in April 2016.

### **Domestic Abuse Independent Advisory Group (IAG)**

In 2015, the PSNI established a Domestic Abuse IAG which comprises relevant PSNI personnel and stakeholders, including from Women's Aid, Men's Advisory Project, the Rainbow Project, National Society for the Prevention of Cruelty to Children, the Northern Ireland Council on Ethnic



Minorities, the Public Prosecution Service, the Court Service and Victim Support. A Board official has also been invited to sit on the IAG in an observer capacity. The aim of the IAG is to work in partnership with the PSNI to: Increase trust and confidence in policing domestic abuse and to provide constructive advice to the PSNI in improving the quality of service delivery for victims of domestic abuse, stalking and harassment and honour based violence, across all communities. The agreed purposes of the IAG are to: make observations about the PSNI and the role it plays in the wider community; to instil just and fair relations between the PSNI and the communities it serves as well as between communities; to critically evaluate organisational policies, practices and procedures relating to domestic abuse, stalking and harassment, and honour based violence; to make significant contributions to both strategic and tactical considerations, particularly with reference to critical incidents if required; to assist PSNI with progressing the Policing Plan 2015/2016 target, which requires that, by 31 March 2016, there will be established an Independent Advisory Group which will produce a report on police response to domestic incidents and, by 31 March 2017, PSNI will have implemented 90% of recommendations identified in the 2015-16 report.

The IAG is expected to report in early 2016. It is anticipated that report will make recommendations for the PSNI to consider. The Committee looks forward to receiving a copy of that report and working with the PSNI to consider any recommendations made.

The Chief Constable has assured the Committee that PSNI is committed to tackling domestic abuse in conjunction with criminal justice and partner agencies and that it remains a strategic priority for PSNI. The Committee is satisfied that the Chief Constable has demonstrated that commitment and looks forward to working with and supporting him to improve service delivery across Northern Ireland.

## **HATE CRIME**

Hate incidents and crimes can take many forms but the most common are violence against the person, criminal damage and anti-social behaviour.<sup>286</sup> A hate incident is any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by prejudice or hate (National Police Chiefs' Council Definition<sup>287</sup>). This includes incidents, which the police have no statutory power to deal with however other agencies may have (for example the Equality Commission). A Hate Crime is any hate incident, which constitutes a criminal offence, perceived by the victim or any other person as being motivated by prejudice or hate. A Hate Crime requires a full and comprehensive investigation with a view to maintaining the confidence of the victim and detecting and prosecuting the offender. Examples of any other person may include the victim's neighbour, a family member, an elected representative, a support organisation, a passerby or any police officer or member of staff. While not all hate incidents will include crimes, the recording, monitoring and support to victims outlined in PSNI Service Procedure should apply equally to hate incidents whether it constitutes a criminal offence or not.<sup>288</sup>

Hate incidents and crimes are particularly hurtful to victims who are targeted because of their faith, racial or ethnic origin, sexual orientation, gender identity or because they have a disability.<sup>289</sup> The impact varies from victim to victim but it leaves many feeling permanently unsafe. As well as having a physical impact on victims, hate crime can lead to poor mental health and increase the risk of suicide. The impact of the incident or crime is also likely to resonate throughout the wider community.

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<sup>286</sup> PSNI hate crime problem profile, January 2016.

<sup>287</sup> Formerly ACPO.

<sup>288</sup> *Hate Crime/ Incidents PSNI Service Procedure 01/2016*

<sup>289</sup> For research into the impact of hate crime on victims, see for example *Equality Groups Perceptions and Experiences of Crime*, S. Botcherby, F. Glenn, P. Iganski, K. Jochelsen and S. Lagou for the Equality and Human Rights Commission and University of Lancaster, 2011, which considers findings from the British Crime Survey, including the emotional reaction to crime of victims who perceived the crime to have been an identity based crime.

PSNI records and publishes data on hate incidents and hate crimes on a quarterly basis. Table 7 below shows the number of hate incidents and crimes recorded by the police since 2012/13.<sup>290</sup>

**Table 7: Number of hate incidents and hate crimes recorded by PSNI and detection rate, by type of hate motivation, 1 April 2012 to 31 March 2015<sup>291</sup>**

Hate Crime	Incidents Recorded			Crimes Recorded			Crime Outcomes		
	12/13	13/14	14/15	12/13	13/14	14/15	12/13	13/14	14/15
<b>Racist</b>	750	982	1,356	470	691	921	89 19%	119 17%	130 14%
<b>Homophobic</b>	246	280	334	149	179	209	30 20%	31 17%	44 21%
<b>Sectarian</b>	1,372	1,284	1,517	889	961	1,043	146 16%	148 15%	151 14.5%
<b>Faith/Religion</b>	22	24	53	14	13	27	5 14%	3 23%	3 11.1%
<b>Disability</b>	74	107	138	35	70	76	4 11%	3 4%	9 11.8%
<b>Transphobic</b>	15	23	21	6	8	8	0 0%	2 25%	1 12.5%

As illustrated by Table 7, the number of recorded incidents and crimes with a hate motivation increased in 2014/2015 across all categories, save for Transphobic Hate Crime, compared to previous years.<sup>292</sup> Hate crime is known to be under-reported so the fact that more reports are being made does not necessarily mean that there are more hate incidents and crimes; it may indicate that more victims are reporting to the police. It does however signal a potential increase in offending that must be considered. The Policing Board has therefore established a Race Hate Crime Group and initiated a dedicated thematic review, details of which are provided below.

<sup>290</sup> 'Outcome' is defined in footnote 277 above.

<sup>291</sup> *Trends in Hate Motivated Incidents and Crime Recorded by the Police in Northern Ireland* PSNI, August 2015, *Trends in Hate Motivated Incidents and Crime Recorded by the Police in Northern Ireland 2004/05 to 2012/13*, PSNI, July 2013 and *Trends in Hate Motivated Incidents and Crime Recorded by the Police in Northern Ireland 2004/05 to 2011/12*, PSNI, July 2012.

<sup>292</sup> The PSNI quarterly bulletin covering the period up to 30 September 2015 indicates that the number of incidents and crimes reported has begun to decrease in some categories.

Of particular concern to the Performance Committee in 2014 was the fact that the number of disability hate crimes recorded by the PSNI had doubled between 2012/2013 and 2013/2014 from 35 to 70 with a decrease in outcome rate to 4%. The Committee therefore recommended that the PSNI should as a matter of urgency review its training, policy and practice for responding to disability hate crime with a particular focus on the outcome rate for disability hate crime. Further, that the PSNI should report to the Performance Committee on the outcome of that review within 3 months of the publication of the Human Rights Annual Report 2014.<sup>293</sup> The PSNI accepted that recommendation and provided a report outlining the steps taken, which are summarised below. While the report was not provided within three months, it has now been provided and refers to extensive work undertaken in the ensuing period. Recommendation 6 of the Human Rights Annual Report 2014 has therefore been implemented.

In November 2014, District Policing Command established a new command structure for training, with designated officers assigned to particular areas. The structure mirrors the Gold, Silver, Bronze command structure familiar in operational policing. In response to Recommendation 6 a Bronze lead was identified with suitable expertise. The Bronze lead for training reviewed the police response to hate crime and developed the Hate and Signal Crime Training Strategy to ensure that training is appropriate and sufficient to improve that response across the PSNI.

In essence, training encompasses three main areas: (i) the Student Officer Training Programme (SOTP) is the initial training provided to all new officers at Police College; (ii) Crime Training is specialist training for officers dealing with more serious crimes or dealing with vulnerable victims. All Hate and Signal Crime Officers receive Crime Training; (iii) District Training is the training delivered to officers of all ranks within District according to training needs identified by that District.

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<sup>293</sup> Recommendation 6 of the Human Rights Annual Report 2014.

In respect of disability hate crime, a half day lesson is delivered as part of SOTP at Police College. That lesson includes the definition of disability hate crime and hate incident, identification of hate crimes and incidents, recording of hate crimes and incidents, police procedures and police response. There are discussion forums during which attitudes can be challenged and practical exercises which test understanding and decision-making. In particular, trainers address the inhibiting factors in reporting hate crime and the impact of hate crime upon local communities. Trainers are also conscious of and instil in students the importance of engaging sensitively with victims so as to overcome any difficulties experienced as a result of a disability. The Human Rights Act 1998 is covered throughout the lesson in a way that makes it practical and a tool for problem-solving. In the work in respect of training that will be undertaken in the next 12 months, the Policing Board's Human Rights Advisor will consider the extent to which other treaties and instruments obligations are included such as the United Nations Convention on the Rights of Persons with Disabilities (UNRPD).

Probationary Officers receive additional training prior to confirmation in rank, which includes a Hydra Exercise on hate crime.<sup>294</sup> Within Crime training there is specialist training which focuses on victims and suspects who have a disability. In addition, the PSNI intranet *PoliceNet* has an information section on disability hate crime with links to for example the current Service Procedure,<sup>295</sup> guidance on procedural requirements and information provided by external partners and the third sector. There are video presentations on all hate crimes which are developed with the assistance of external partners and input from victims of hate crime. Operational officers will be required to demonstrate that they have viewed the videos. Revised training has also been delivered to or in the process of being delivered to all Call Management Centres and Station Enquiry Assistants. Operational officers have received hate crime training within District.

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<sup>294</sup> The Hydra System is a training method that monitors leadership and decision making within real-time incidents. Students are observed during the training exercise following which there is a plenary session. Students are expected to deal with sensitive human rights issues which they must resolve while explaining their rationale for their decisions.

<sup>295</sup> *Hate Crime/ Incidents PSNI Service Procedure 01/2016.*

The Service Procedure *Hate Crime/Incidents*<sup>296</sup> underwent a fundamental review to take account of developments in practice, to consider recommendations from reviews and audits (including from the Performance Committee) and the new operating model of police delivery of Local Policing Teams. To tie in with the above, the Bronze Lead for Criminal Justice developed minimum standards for investigations including for disability hate crime investigations, which aims to improve investigative outcomes. The Performance Committee has heard from a number of stakeholders that they have been frustrated by officers seeming to query whether there was a hate motivation and raised that with the PSNI. The PSNI has taken that criticism on board. The Service Procedure deals with that and provides “Evidence is NOT the test when reporting a hate incident; When an incident or crime has been reported to police by the victim or by any other person and they perceive it as being motivated by prejudice or hate, it will be recorded and investigated as a hate incident or crime. The perception of the victim or any other person is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. Perception-based recording refers to the perception of the victim, or any other person. It would not be appropriate to record a crime or incident as a hate crime or hate incident if it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive. The other person could, however, be one of a number of people, including: police officers or staff; witnesses; family members; civil society organisations who know details of the victim, the crime or hate crimes in the locality, such as a third-party reporting charity; a carer or other professional who supports the victim; someone who has knowledge of hate crime in the area – this could include many professionals and experts such as the manager of an education centre used by people with learning disabilities who regularly receives reports of abuse from students; a person from within the group targeted with the hostility, for example, a Traveller who witnessed racist damage in a local park.

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<sup>296</sup> *Ibid.*

When an incident or crime has been reported to police by the victim or by any other person and they perceive it as being motivated by prejudice or hate, it will be recorded and investigated as a hate incident or crime... PSNI will accept without challenge the view of a victim or any other person that the crime was motivated by hate on one of the defined grounds”.

The revised Service Procedure certainly provides very tight and comprehensive procedures that should improve upon the investigation of hate crime but it contains fewer context notes within the body of the Procedure than the previous Service Procedure. For example, the previous Service Procedure explained to officers the devastating impact that hate crime can have on a victim and the effect it can also have on the wider community. It reminds officers that hate crime must be dealt with sensitively and knowledgeably. It provided “The impact of hate and signal crime can be long lasting and far reaching going beyond the victim’s own experience to change the behaviour and increase fear in the victim’s wider family/group/community. It can also increase fear and change behaviour of individuals/families and groups around the local and regional areas once knowledge spreads of hate incidents. (b) Hate crime differs from other crime. Victims of racism for example cannot change their nationality; ethnicity or the colour of their skin therefore the impact of hate on signal crime has a fundamental impact on their essence of being. (c) Victims can often be repeat victims and this compounds the impact and effects of prejudice/hate incidents.(d) It is recognised that low level hate incidents can lead to more serious type of incidents occurring and therefore victims of low level incidents should be encouraged to report and be treated as seriously as other incidents. (e) Where the victim may have difficulties with either written or spoken English (e.g. crimes based on race or disability); those dealing with and recording the incident will be sensitive and responsive to these issues, and alternative formats will be made available as necessary. (f) For all these reasons prejudice/hate crime/incidents need to be handled sensitively and well at first contact point with the victim”.<sup>297</sup>

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<sup>297</sup> *Police Response to Hate Incidents SP 16/2012.*

That guidance, provided as it was within the Service Procedure, presented a valuable opportunity to remind officers of the context within hate crime must be dealt with and to challenge cultural attitudes to hate crime. As the Performance Committee is currently undertaking a thematic review on race hate crime, this will be considered further within that report.

### **New hate crime investigatory and risk assessment process**

PSNI has introduced a new Hate Crime Investigatory and Risk Assessment Process which, In essence, requires all officers to follow two concurrent processes when responding to all hate incidents and crimes: (i) an investigation process; and (ii) a risk assessment process. The addition of a risk assessment process has been welcomed by stakeholders because its central focus is on the victim. The process can be summarised as follows.

#### *(i) Investigation process*

The officer attending the scene (the Attending Officer or IO) will carry out the initial investigation and is responsible for ensuring the incident or crime is properly recorded and marked as being hate motivated. If lines of enquiry such as CCTV, forensics, door to door reveal no investigative lead, that must be reviewed by a Sergeant before the file can be closed. If, upon the initial investigation, it is determined that further investigation is required, the AO will usually assume the role of Investigating Officer (IO) unless certain risk factors are identified or the victim is a repeat victim. Then, the IO role may be transferred to, for example, a Lead Hate and Signal Crime Officer (LHSCO) or to another unit such as a Public Protection Unit. In Belfast Area, the AO will never be the IO as all cases will be transferred to the Case Progression Team (CPT) to investigate. That is limited to Belfast because there are no CPTs outside of Belfast.

The IO's investigation is supervised by a Sergeant. Only that Sergeant can decide that there is to be no further police action and the file closed. A



percentage of all investigation files will be dip-sampled by PSNI.<sup>298</sup> Furthermore, PSNI also dip-samples files that have been sent to the PPS but which the PPS have not progressed because they have not met the evidential test. As with all victims of crime, victims of hate crime will be given a 10 day update in respect of progress on their case.

*(ii) Risk assessment process*

The Attending Officer (AO) must complete a Vulnerability Risk Assessment Matrix (VRAM) if they respond to any hate crime. The VRAM is based upon the Threats to Life Risk Assessment tool. The VRAM will give a risk score which will fall into one of three categories: low, medium or high risk. Regardless of risk score, the AO must carry out the role of the Hate and Signal Crime Officer (HSCO), *i.e.* there will not be a dedicated HSCO as is current practice and instead all AOs will be considered responsible for carrying out the HSCO role and looking after the needs and wellbeing of hate crime victims. There are however at least two Lead HSCOs (LHSCOs) in each District and if a victim is deemed high risk, the AO must notify a LHSCO. In all cases, whether low, medium or high risk, the AO must also link in with their District Electoral Area (DEA) officers. This means that the DEA officers will be aware of the hate crime victims in their areas and can if required take steps to prevent further crimes occurring and/or to reassure the victim by increased patrolling in a particular area.

The risk scoring and any proposed action plan is reviewed by a Sergeant where the score is low risk and an Inspector where the score is medium or high risk. Where the case is high risk, the action plan is reviewed at Daily Management Meetings and a lead Senior Risk Officer (SRO) is appointed. It is anticipated that the SRO will often be the District Lead Chief Inspector for hate crime. Where the risk on a case is to be closed off (*i.e.* no further police action is required), closure can only be made by a Sergeant for low risk cases, Inspector for medium risk cases, and the SRO for high risk cases. Closing the risk on a file does not necessarily mean that the *investigation* is

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<sup>298</sup> The percentage of files to be dip-sampled has not yet been agreed.

closed. The investigation may well continue but the risk to the victim will be recorded as no longer existing or having been sufficiently mitigated.

While the current Service Procedure will continue to undergo review, which will provide an opportunity for practical and effective changes to be made, it is reassuring that it already provides unambiguous guidance for officers in respect of the impact of hate crime and on the perception test.

The Committee appreciates that PSNI cannot tackle all of the issues alone and that it works alongside partner agencies, for example the Department of Justice has a Hate Crime Delivery Group, to consider the overall criminal justice approach to tackling hate crime. Individual agencies are also considering and refreshing their approach. The Policing Board, through its Performance Committee and Partnership Committee, will continue to monitor and liaise with interested parties in relation to the police response to hate crime. In 2014,2015, the Policing Board was represented on various forums on which police and other agencies/stakeholders sit, including the Department of Justice Hate Crime Delivery Group, a Disability Hate Crime Steering Group, a Trans Forum, a LGB&T Consultative Forum and a PSNI/Policing Board Strategic Consultation Group.<sup>299</sup> The Human Rights Advisor to the Policing Board has also attended a number of those meetings.

### **Islamophobia and the police response**

The Committee has been concerned at the potential for a rise in 'Islamophobia' in Northern Ireland<sup>300</sup> and sought assurances from the Chief Constable that the PSNI would take steps to ensure that the Muslim community in Northern Ireland will be respect and protected by the PSNI. The

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<sup>299</sup> The Policing Board / PSNI Strategic Consultation Group consists of representatives from the disability, youth, older persons, Lesbian Gay Bisexual, Transgender, minority ethnic and women's sectors. The Group was established in 2013 to assist the Policing Board and the police in achieving a better policing experience for all, including by identifying and providing advice and expertise at a strategic level on cross cutting issues of interest to the diverse communities the various members represent.

<sup>300</sup> The term 'Islamophobia' was defined, in a 1991 Runnymede Trust Report, as "unfounded hostility towards Muslims, and therefore fear or dislike of all or most Muslims".

Committee was reassured that the Chief Constable not only recognised the potential for attacks on the Muslim community and on people who are perceived to be Muslim, to increase following recent events but had taken steps to prepare for the possibility. The Chief Constable has already issued instructions to police officers that they must actively seek to reassure people that hate crime will not be tolerated. Furthermore, wherever possible the police will seek to deter such crimes from occurring and if they do use their best endeavours to respond effectively. By way of example, the PSNI have reviewed their information on the location of potential targets and the need to respond quickly and robustly, the PSNI have reached out to community leaders and have offered advice on crime protection.

The Committee wishes to join with the Chief Constable in condemning totally Islamophobia and any abuse of or attack on a person because he or she is or is perceived to be Muslim. There can be no justification for and will not be tolerated. The Muslim community within Northern Ireland are welcome citizens who have and will continue to contribute positively to society. The Committee will continue to monitor the issue and will be including this in the forthcoming thematic review of race hate crime.

## **Policing with and for Lesbian, Gay, Bisexual People**

### **Policing with and for Transgender People**

In March 2012, the Performance Committee published a thematic review of policing with and for Lesbian, Gay, Bisexual and Transgender People.<sup>301</sup> The report made 18 recommendations. In April 2015, the Committee published two reports on progress made by PSNI in implementing the

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<sup>301</sup> *Human Rights Thematic Review: Policing with and for Lesbian, Gay, Bisexual and Transgender Individuals*, March 2012, NI Policing Board. Throughout the thematic review the Committee was particularly mindful to consider and report upon LGB issues under separate headings from transgender issues, albeit within the body of one report. The thematic review considered the way in which PSNI engaged with LGB individuals across a range of circumstances: as members of the public generally; as victims of crime, including hate crime, domestic abuse and sexual violence; as suspects, including when in custody or when being stopped and searched; and as employees or potential employees. Update reports have been provided since under separate headings and will continue to be.

recommendations.<sup>302</sup> Those reports, which are not repeated here, consider in detail the PSNI's response which will be the subject of further written review in 2016. In summary, PSNI progress has been mixed.

### **Hate Crime Advocates**

PSNI has funded a number of specialist Hate Crime Advocates who provide considerable assistance and expertise to victims of hate crime. That funding has been confirmed for a further 12 months, which is welcomed. There is underway an analysis of the use of the advocacy service, which will be reported upon in the forthcoming thematic review.

### **Registered Intermediaries**

It is recognised in the criminal justice system that that certain witnesses who are vulnerable may require access to special measures to assist them in giving evidence in court. For example, evidence may be given by live video link and a witness may be screened from the alleged perpetrator.<sup>303</sup> A more recent development in Northern Ireland has been provision for the examination of witnesses in court through a Registered Intermediary.<sup>304</sup> Registered intermediaries<sup>305</sup> have been used in England and Wales since 2003 but not introduced in Northern Ireland until 2013, when a pilot scheme was commenced for cases where the alleged perpetrator was suspected of an indictable offence, i.e. it was used for more serious offences tried in the Crown Court. The Justice Minister announced, in March 2015, his intention to extend the pilot scheme to extend to all cases that might be heard in the

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<sup>302</sup> The thematic report can be accessed at :  
[http://www.nipolicingboard.org.uk/lgb\\_t\\_thematic\\_review\\_overview.pdf](http://www.nipolicingboard.org.uk/lgb_t_thematic_review_overview.pdf). The update reports can be accessed at:

[http://www.nipolicingboard.org.uk/thematic\\_review\\_update\\_report\\_policing\\_with\\_and\\_for\\_lgb\\_individuals\\_final\\_draft\\_.pdf](http://www.nipolicingboard.org.uk/thematic_review_update_report_policing_with_and_for_lgb_individuals_final_draft_.pdf)

[http://www.nipolicingboard.org.uk/thematic\\_review\\_update\\_report\\_policing\\_with\\_and\\_for\\_transgender\\_individuals\\_final\\_draft\\_.pdf](http://www.nipolicingboard.org.uk/thematic_review_update_report_policing_with_and_for_transgender_individuals_final_draft_.pdf)

<sup>303</sup> By the Youth Justice and Criminal Evidence Act 1999.

<sup>304</sup> Articles 17 and 21BA of the Criminal Evidence (Northern Ireland) Order 1999, as amended by the Justice Act (NI) 2011.

<sup>305</sup> Registered Intermediaries are generally speech and language experts who assist people with communication difficulties.

Crown Court and to “assist those with difficulties to give evidence during a police interview and at trial”.<sup>306</sup> A review of the pilot suggests that police officers found Registered Intermediaries to be helpful in obtaining a statement from vulnerable witnesses and enables vulnerable suspects to be interviewed more effectively. During the pilot, the majority of requests came from the PSNI in respect of victims. The largest category of vulnerability was learning disability, followed by young age and autistic spectrum disorder. Uniquely, in Northern Ireland Registered Intermediaries are available to suspects/defendants and to victims and witnesses. In England and Wales, they are available only to victims and witnesses.

The Performance Committee welcomes the extension of the pilot but is also aware of the safeguards that must be in place and will monitor the use of Registered Intermediaries by the PSNI and report in due course.

### **Race hate incidents and crimes**

The Performance Committee is currently undertaking a human rights thematic review on the PSNI response to race hate crime which, will be published in 2016.

### **CYBER ENABLED CRIME**

The Policing Board has kept apprised of the PSNI’s response to cyber enabled crime during 2015.<sup>307</sup> The Performance Committee receives an annual statistical report on cyber enabled crime and more recently is briefed on the PSNI’s approach to key findings made by Her Majesty’s Inspectorate of Constabulary (HMIC) following an inspection of police response to online Child Sexual Exploitation in England and Wales.<sup>308</sup> The PSNI’s response to child sexual exploitation is being considered in 2016 by a dedicated human

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<sup>306</sup> Press Statement, Justice Minister, 5 March 2015.

<sup>307</sup> Cyber enabled crimes are traditional crimes which can be increased in their scale or reach by use of computers, computer networks or other forms of information communications technology (ICT). Unlike cyber dependent crimes they can be committed without the use of ICT.

<sup>308</sup> *Online and on the Edge: Real Risks in a Virtual World*, HMIC, July 2015.

rights thematic review. For present purposes, it can be recorded that the PSNI has briefed the Committee on a number of occasions on its efforts to improve its response to cyber enabled crime and considering the failings identified in England and Wales to better inform the PSNI's approach to tackling cyber enabled crime including revised training, sharing information and expertise and review of policy.

## **PARAMILITARY STYLE ATTACKS**

Paramilitary style attacks infringe, amongst other things, a victim's Article 3 ECHR right (not to be subjected to torture or inhuman or degrading treatment or punishment) and the Article 2 ECHR right (the right to life). The fear that is created within communities can have wider implications for the enjoyment of rights, for example, enjoyment of the Article 11 ECHR right (to freedom of assembly and association), the Article 10 right (to freedom of expression) and the Article 8 ECHR right (to respect for private and family life).

Between 1 January 2015 and 31 December 2015, the PSNI recorded 26 casualties of paramilitary style shootings and 59 casualties of paramilitary style assaults.<sup>309</sup> PSNI undertook an analysis of statistics between April 1998 and June 2015 which showed that in the relevant period there were 2732 casualties as a result of paramilitary style attacks. Of those, 89 were suffered by children aged 16 years or under; 1297 were suffered by young people aged between 16 and 24 years, 1346 were against adults aged over 24 years.<sup>310</sup> The current PSNI crime recording system came into operation in April 2008. But from that date, it can be seen that of the 590 incidents which have occurred between 1 April 2008 and 30 June 2015 a total of 20 resulted in prosecution<sup>311</sup> with 5 resulting in a successful conviction. Furthermore,

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<sup>309</sup> *Police Recorded Security Situation Statistics Monthly Update 1 January 2015 to 31 December 2015*, 8 January 2016. Note, however, if the most recent data is analysed (on a rolling year January 2015 to February 2016) there has been an increase of 1 assault on the previous rolling year. Of particular note, in that rolling year there has been a significant reduction in the number of shootings from 34 to 24.

<sup>310</sup> Answer to Freedom of Information Act Request 2015/02350.

<sup>311</sup> This does not include those who may have been dealt with via other methods such as prosecutorial warnings, caution etc.

between April 1998 and 2015 the Chief Constable issued 1,262 certificates in respect of persons intimidated from their own homes.<sup>312</sup>

Outcome rates remain very low indeed. PSNI has advised the Committee that outcome rates remain low for a variety of reasons including the limited cooperation of victims and witnesses and limited opportunities for intervention, intelligence gathering and evidence collection. For a number of years the Policing Board has raised concerns with PSNI about the number of incidences of paramilitary style attacks and the fact that only a very small proportion of perpetrators are brought to justice. For example, a recommendation was made in the Policing Board's Human Rights Annual Report 2011 that the PSNI should review the data and consider what steps should be taken to reduce the incidence of paramilitary style attacks and increase their outcome rates.<sup>313</sup> PSNI accepted that recommendation and subsequently reported to the Board. In 2012, PSNI launched a geographically and demographically targeted Facebook campaign *Not the Face of Justice*, which appealed for public information about paramilitary style attacks, particularly from young people. The PSNI has this year consulted more extensively with the Policing Board and with partner agencies to establish a core steering group to address the issues. That work will continue in the coming year and the Performance Committee hopes the renewed focus of the PSNI will result in a decrease in attacks and an increase in outcome rates.

Investigations into paramilitary style attacks are led by District CID with specialist investigative support provided by Serious Crime Branch. In 2014, PSNI advised that it was undertaking a review of all punishment attacks since 2009 to ensure that all investigative and forensic opportunities had been taken. The PSNI has also advised that it proactively pursues evidence to bring charges for associated offences (e.g. possession of a firearm, membership of a proscribed organisation etc.) where evidence may not be available for the

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<sup>312</sup> That does not include persons renting their accommodation.

<sup>313</sup> Recommendation 16 of the Human Rights Annual Report 2011, Northern Ireland Policing Board, February 2012.

assault itself. For example 4 men were arrested and charged in June 2014 for a range of offences connected to punishment attacks in North Belfast.

The PSNI provides to the Policing Board every six months a report on performance against Policing Plan targets, which includes a report on paramilitary style attacks.

The PSNI's current strategy which is subject to constant review involves five key strands: investigations including a review of forensics potential; victims including initial response and information/intelligence gathering; research looking at what works elsewhere; engagement; and, media messaging.

## **QUALITY AND TIMELINESS OF CASE FILES**

The Committee has been monitoring PSNI performance in respect of the submission of case files to the Public Prosecution Service recognising that there is little that is more effective at protecting victims of crime than the successful prosecution of offenders. It was therefore disappointed to note the recent report of Northern Ireland's Chief Inspector of Criminal Justice which called for greater collaboration between the PSNI and the Public Prosecution Service for Northern Ireland (PPS), to address significant failings in the preparation of case files and the standards applied around disclosure.<sup>314</sup> During the inspection, 67% of files were assessed as either satisfactory or good but approximately 33% were assessed as either unsatisfactory or poor. The report also found weaknesses in respect of disclosure, which was considered to have been dealt with satisfactorily in only 23% of the Crown Court cases reviewed. Six strategic recommendations were made.

One recommendation was for the PSNI and PPS to immediately establish a Joint Prosecution Team to address poor practice and deliver change. The report stated "This inspection found one third of case files were either of an

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<sup>314</sup> The Criminal Justice Inspection Northern Ireland (CJINI) recently completed an inspection of police case files: *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland*, CJINI, 26 November 2015.



unsatisfactory or poor standard. We recommend a Prosecution Team, made up of representatives from both organisations, should deal with issues such as investigative standards, bail management and forensic strategy, case management and disclosure".

As the Chief Inspector highlighted, such an approach should clarify for police officers what information and evidence should be included in a case file and help set clear standards around file quality. It will also assist prosecutors to develop a consistent, proportional approach around the level of detail required to decide whether or not a case should be taken forward for prosecution. The inspection identified weaknesses in the supervision of case files within the PSNI and problems in sending electronic case files from the PSNI to the PPS. The Chief Inspector said "Responsibility for quality assuring case files rests primarily with operational Sergeants working in local policing Districts. These officers need to be given the necessary time and support to give this task the attention it deserves... Similarly, it is vitally important that information sent electronically by police Occurrence Case Management Teams to the PPS, is successfully transmitted and the frustration created for both police officers and prosecutors when information is lost from a file, the document is corrupted or becomes confusing as a result of this process, is brought to an end...These technical problems must be tackled to address unnecessary delays, inefficiency and increased costs".

Inspectors also identified serious concerns around disclosure processes where information is shared with defence legal teams. A file review carried out as part of this inspection revealed that disclosure was dealt with satisfactorily by police in only 23% of Crown Court cases, which was described as unacceptable. The Chief Inspector rightly added that "Disclosure is an integral part of the criminal justice process and when statutory obligations are not met, it can lead to a number of potentially damaging outcomes including abuse of process arguments at trial and the acquittal of an accused person. Information provided by police officers to prosecutors around the unused material available must be clear and sufficiently detailed, so that a decision can be made by the prosecution about whether or not the information should be

disclosed". It was recommended that, to tackle current problems and raise disclosure standards, a new central Disclosure Unit should be created within the PSNI to improve oversight and address knowledge gaps around disclosure by enhancing the skills of police officers.

While the report revealed issues of concern for the Committee it was pleased to also note that the PSNI and PPS accepted all of the recommendations and had already begun to implement them. The Committee will monitor the PSNI's implementation of the recommendations and will look forward to hearing from the Chief Inspector on his assessment of progress.

### **Recommendation 11**

**The PSNI should, within six months of the publication of this Human Rights Annual Report, report to the Performance Committee on progress made against the recommendations contained within the CJINI report, *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland, 26 November 2015***

The Committee has also made a recommendation in respect of training, in Chapter 2 of this Human Rights Annual Report.

### **'LEGACY' CASES**

In Northern Ireland the 'legacy of the past', with 3,268 deaths attributable to the security situation in Northern Ireland between 1968 and 1998, has had a profound impact on community confidence in the PSNI. That is particularly the case (although it is by no means confined to those cases) where it is alleged that state actors have been involved. Jurisprudence from the European Court of Human Rights has established that the right to life guaranteed by Article 2 ECHR includes a procedural obligation to investigate the death. If it is alleged or suspected that a state agent may bear some responsibility for the death, whether directly or indirectly, the State must carry out an effective official

investigation.<sup>315</sup> The State's discharge of its procedural obligation has received attention and criticism from many commentators including the courts and the Senior Coroner. The Committee continues to monitor the PSNI's response to those criticisms. To put that in context, the following encapsulates the Committee's understanding of the legal standards against which the State must be judged.

The procedural obligation pursuant to Article 2 ECHR means that an inquiry must follow a suspicious death. That inquiry must be designed to lead to criminal proceedings, where appropriate. The ECtHR has applied a fact specific test to individual cases: Article 2 requires a full inquiry into a death where that death occurred in a situation which raises issues of public concern whether or not there was direct or indirect state involvement.<sup>316</sup> There has been some attempt in the UK courts to distinguish, in the context of the standards of investigation to be applied, between cases in which there is alleged direct or indirect state involvement in the death and those cases which involve for example a failure of care in hospital which results in death. The ECtHR has not, however, distinguished cases in the same way. Despite the debate at a judicial level both the ECtHR and the UK Supreme Court are clear that if state forces *may* bear some responsibility for a death, directly or indirectly, there must be a full Article 2 compliant investigation.

The ECtHR has interpreted the procedural obligation as imposing on States an obligation to "initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the substantive obligations (i.e. to take life or to fail to protect life) has been or may have been violated and it appears that agents of the state are or may be in some way implicated."<sup>317</sup> The purpose of such an investigation is to ensure that the "full facts are brought to life; that culpable

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<sup>315</sup> See for example, *McCann and Others v UK* ECHR (1995).

<sup>316</sup> For example, in *Menson and Others v UK* (2003) 37 EHRR CD 220 the ECtHR held that article 2 applied to the killing of a black man during a racist attack in the absence of any direct State responsibility for the death. That was followed, in 2007, in *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7. See also *Šilih v Slovenia* (2009) 49 EHRR 37, a decision of the Grand Chamber, in April 2009.

<sup>317</sup> *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”<sup>318</sup>

There is no single prescribed model of investigation. The ECtHR (and the UK Supreme Court) recognises that some flexibility is required as to form and procedure to be adopted.<sup>319</sup> However, the cornerstone of the requirement for the investigation is that it must comply with certain minimum requirements.

Those minimum requirements are:<sup>320</sup>

- (i) The authorities must act of their own motion and not wait for the matter to be referred;
- (ii) The investigation must be independent;
- (iii) The investigation must be effective;
- (iv) The investigation must be reasonably prompt;
- (v) There must be sufficient public scrutiny of the investigation;
- (vi) The next of kin of the deceased must be involved in the investigation to the appropriate extent.

### **Investigation to be of the State’s own motion**

Article 2 requires the State (by its authorities) to conduct an investigation of its own motion once the matter has come to its attention. The State may not wait until a case has been referred or a formal complaint has been made.<sup>321</sup> Any civil or other remedy that may be available to the next of kin must therefore be left out of account when assessing the extent of the State’s obligations. A civil action may provide a judicial fact finding forum and the opportunity to get a finding of unlawfulness but it does not involve the punishment of the alleged

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<sup>318</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

<sup>319</sup> See for example *Al-Skeini and Others v UK* (2011) EHRR 18.

<sup>320</sup> As per for example *Edwards v UK* [2002] 35 EHRR 19; *Jordan v UK* [2003] EHRR 2.

<sup>321</sup> *Jordan v The United Kingdom* (2003) 37 EHRR 2.

perpetrator.<sup>322</sup> In other words, a fact-finding mechanism which is incapable of holding the perpetrator to account will not in itself satisfy Article 2. It is also clear that the obligation cannot be ‘waived’ by the next of kin, or indeed anyone else. Once the matter has come to the attention of the State it must comply with its obligations. Where a number of allegations have been made of State involvement in deaths where there may be systemic issues arising from the allegations there is a further obligation to investigate those systemic issues.<sup>323</sup>

## Independence

The ECtHR has held that “it may generally regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of institutional connection but also a practical independence”.<sup>324</sup> Therefore, independence must be demonstrated as a matter of institutional, hierarchical *and* practical independence. If the investigation appears to be institutionally and hierarchically independent but is not, in fact, independent there is likely be a violation of Article 2. The purposes of the investigation were described by Lord Bingham “... to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their loved ones may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others”.<sup>325</sup> Importantly, the requirements of independence apply whether the inquiry subject to scrutiny is investigative only or has additional functions such as deciding on prosecution or making recommendations.<sup>326</sup> In other words, because another

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<sup>322</sup> *Jordan ibid; Edwards v UK* (2002) 35 EHRR 19.

<sup>323</sup> In *Ali Zaka Mousa v Secretary of State for Defence* [2011] EWCA Civ 133 the Court of Appeal proceeded on the basis that the IHAT must be capable of investigating independently the systemic issues that arose.

<sup>324</sup> *Jordan v UK* (2003) 37 EHRR 2.

<sup>325</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.

<sup>326</sup> *Ali Zaki Mousa and Others v Secretary of State (No.2)* [2013] EWHC 1412 Admin, Divisional Court.

independent body is ultimately responsible for deciding on whether to prosecute in an individual case does not absolve the investigation of its obligation to demonstrate the requisite independence.

Independence, in the context of PSNI investigations into alleged RUC misconduct, was considered specifically by the ECtHR in 2007. One case (the *Brecknell* case) considered the investigation into the attack on Donnelly's bar in Armagh, in which the initial investigation had been undertaken by the RUC but taken over by the PSNI in 2004. The ECtHR held, on the question of independence, that "the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources. It observes that the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the SCRT Serious Crime Review Team) and the HET (Historical Enquiries Team). However this does not in the circumstances detract from the fact that for a considerable period the case lay under the responsibility and control of the RUC. In this respect, therefore, there has been a failure to comply with the requirements of Article 2".<sup>327</sup> Furthermore, it was noted that the PSNI did not itself *investigate* the RUC. That responsibility falls upon the Office of the Police Ombudsman (OPONI), which is independent. However, it must be noted that in a large number of historical cases the reference to OPONI for investigation came from, or as a direct result of, Historical Enquiry Team (HET) inquiries. In other words, HET was the first and only point of entry into the investigative process for a number of cases.

On the facts as presented in the *Brecknell* case, the ECtHR was content that the PSNI (through the SCRT and HET) was capable of demonstrating the necessary independence from the RUC for the purposes of an Article 2 compliant investigation. Importantly, however, that finding was made in the absence of any doubts expressed about the independence of the investigative teams that took over from the RUC. That means that while the PSNI is not

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<sup>327</sup> *Brecknell v UK* Application nos. 32457/04, 34575/04, 34622/04, 34640/04, 34651/04, November 2007. Importantly, the ECtHR was considering the arrangements as they existed before changes were revealed by the HMIC report.

*incapable* of investigating the RUC, because it is institutionally independent, the other elements of independence must also be demonstrated in the circumstances of an individual case: hierarchical and practical independence. Had the next of kin expressed doubts about the independence of the teams that carried out the investigation in 2004 the ECtHR would have had to go on to consider those elements expressly.

More recently, in connected English cases, the extent of the requirement for independence in State involvement cases was reconsidered. Furthermore, the High Court in Belfast has considered specifically the issue of independence in the context of former RUC officers' involvement in the disclosure process for an inquest. Those cases are referred to below. Given the extensive recent analysis it is important to set out that analysis in some detail.

The Iraq Historic Allegations Team (the IHAT) was set up by the Secretary of State to investigate and prosecute alleged ill-treatment of detainees by members of the British armed forces in Iraq. The IHAT was held by the English Court of Appeal not to be sufficiently independent to satisfy the requirements of Article 2.<sup>328</sup> The problem with the IHAT was that it included persons who were members of groups which may have been called to account and therefore could not demonstrate practical independence. The Court stated “it seems to us that the central concern in this case is not related to the formal chain of command or to the niceties of the hierarchical or institutional military arrangements. It is to do with the reality of the situation on the ground in Iraq and the extent to which that may impact on the practical independence of the IHAT in view of the involvement of the Provost Branch”<sup>329</sup> Importantly, that finding was despite the fact that there was no evidence that any individual member of the Provost Branch was involved in any reprehensible conduct in Iraq and “no reason to believe that IHAT will

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<sup>328</sup> *Ali Zaki Mousa and Others v Secretary of State for Defence* [2011] EWCA Civ 133; *Ali Zaki Mousa and Others v Secretary of State for Defence (No.2)* [2013] EWHC 1412 Admin, Divisional Court The *Mousa* case considered Articles 2 and 3 ECHR and proceeded on the basis that the same principles apply to both.

<sup>329</sup> Referring to Provost Branch (Army), at paragraph 34.

investigate the allegations any less thoroughly”.<sup>330</sup> Furthermore, the Court of Appeal stressed that it was not for any person challenging the independence of the IHAT to prove that some element or person in IHAT actually lacked impartiality. As the court made clear “One of the essential functions of independence is to ensure public confidence and, in this context, perception is important”.<sup>331</sup> The Court of Appeal referred with approval to the opinion of Lord Steyn, albeit in a different context, that “public perception of the possibility of unconscious bias is the key”.<sup>332</sup>

It can be noted that the IHAT had a *civilian* head who reported to the Provost Marshall (Army), the head of the Royal Military Police (RMP).<sup>333</sup> All elements of the IHAT reported directly to the civilian head: the Provost Marshall was responsible for the effective and efficient running of the IHAT and the achievement of its objectives. He also received all reports for agreement with the civilian head. Underneath the civilian head were a number of Provost Branch members together with a number of civilian investigators participating in the investigation of the allegations. The fact that there was a civilian head of IHAT did not assuage concerns. The Court of Appeal found “the problem is that the Provost Branch members of IHAT are participating in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and surety for detention operations. If the allegations or significant parts of them are true, obvious questions would arise about their discharge of those responsibilities”.<sup>334</sup> The court went on “Provost Branch members are investigating allegations which necessarily include the

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<sup>330</sup> This was accepted by the Divisional Court and not disapproved of by the Court of Appeal.

<sup>331</sup> *Ali Zaki Mousa & Others v Secretary of State for Defence* [2011] EWCA Civ 1334, at paragraph 35.

<sup>332</sup> In *Lawal v Northern Spirit Ltd* [2003] ICR 856 which was subsequently confirmed and adopted by Lord Justice Laws in *R (JL) v Secretary of State for Justice* [2009] EWHC 2416 (Admin).

<sup>333</sup> At paragraph 36.

<sup>334</sup> The Royal Military Police (RMP) are the Army's specialists in Investigations and Policing and is responsible for policing the military community. The Military Provost Staff are the Army's specialists in Custody and Detention, providing advice inspection and surety.



possibility of culpable acts or omissions on the part of Provost Branch members”<sup>335</sup>.

The Secretary of State argued that because the chain of command was such that the Royal Military Police were under the command not of the Provost Marshall but of the Officer Commanding, who was not of Provost Branch, the independence was assured, but that argument was rejected. The Court of Appeal also considered whether practical independence could be underwritten by IHAT’s recusal arrangements but held that recusal arrangements were not a satisfactory answer to the concerns about independence.<sup>336</sup> The Court of Appeal stated “we do not consider this to be a marginal case. On the contrary, we are of the view that the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised”.<sup>337</sup>

The Secretary of State had also set up a separate panel, the Iraq Historic Allegations Panel (IHAP) to consider the results of IHAT's investigations and identify any wider issues to be brought to the attention of the Ministry of Defence or of Ministers personally. The IHAP relied upon the IHAT to provide the raw material for consideration by the IHAP. Given the lack of independence of the IHAT, the Court of Appeal held that that necessarily compromised the IHAP’s independence as “we have considered whether the existence of IHAP dilutes or mitigates our concerns about IHAT. It does not... If, as we have found, IHAT suffers from a lack of practical independence and the raw material destined for consideration by IHAP is the product of IHAT, IHAP’s independence is itself compromised”.<sup>338</sup> That highlights the importance of individual participants being able to demonstrate practical and hierarchical independence. It also makes it clear that an individual or group of individuals, if involved only at an early stage in the review of a case or in the

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<sup>335</sup> *Ali Zaki Mousa & Others v Secretary of State for Defence* [2011] EWCA Civ 1334, at paragraph 37.

<sup>336</sup> *Ibid*, at paragraph 37. In other words, the arrangements in place for a person to withdraw due to a conflict were not sufficient.

<sup>337</sup> *Ibid*, at paragraph 38.

<sup>338</sup> *Ibid*, at paragraph 39.

collection and dissemination of information for a subsequent investigation, may taint the entire process.<sup>339</sup>

Subsequently, the Secretary of State reformed and reconstituted the IHAT in an attempt to meet the criticism of the Court of Appeal. The new IHAT had removed all RMP personnel, who were replaced by Royal Navy Police (RNP). The Provost Marshall (Army) was replaced by the Provost Marshal (Navy). Civilian employees were recruited externally, comprising primarily retired police officers.<sup>340</sup> There was also a lawyer and a small number of civil servants. The IHAT was headed by a retired Detective Chief Superintendent of police. The IHAP was disbanded. The IHAT now reports on wider systemic issues to the Provost Marshal (Navy) and the reports are also provided in an un-redacted format to the Directorate of Judicial Engagement Policy. The restructured IHAT was challenged by a number of victims of alleged mistreatment and by relatives of those alleged to have been murdered by State forces.<sup>341</sup> Amongst other things, they alleged that the IHAT was still not sufficiently independent for the purposes of Articles 2 and 3 ECHR. As a result of the restructuring of the IHAT the Divisional Court held that it was now capable of carrying out its investigative and prosecutorial functions independently but that reconsideration was necessary of the way in which the duty to assess the systemic issues and to take account of lessons learned is discharged in a way that provides greater transparency and public accountability.

In respect of the independence of the RNP the court, having examined carefully the role played by the RNP in Iraq, concluded that it had no involvement in army investigations and that it was not involved in the formulation of detention and interrogation policy or other relevant training. The court stressed that the RNP must be able to, and did, make decisions on whether to pursue investigations and whether to prosecute “entirely

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<sup>339</sup> This is particularly relevant to the comments below about the HET Intelligence Unit.

<sup>340</sup> Of the full complement of 110 persons, 94 were intended to be recruited externally. The balance was to be made up of 5 RNP, 1 lawyer and 10 civil servants.

<sup>341</sup> *Ali Zaki Mousa and Others v Secretary of State for Defence* (No.2) [2013] EWHC 1412 Admin, Divisional Court.

independently of the Secretary of State for Defence, any civil servant and, even more importantly, of anyone in the hierarchy of the armed forces”.<sup>342</sup> An issue arose as to the potential for one person (in the RNP) who was responsible for decisions on prosecutions to be influenced in any of those decisions. Having examined the issue carefully, the court was satisfied that he had “complete institutional independence... and was not subject to any interference on an individual basis with that independence by the hierarchy of the armed forces”. In other words, the court considered whether in reality another force may seek to influence but concluded that it could not. The court held ultimately that the RNP was a separate service police force from the RMP with independent command and independent working and that it was independent of both the events *and* the personnel being investigated – both being essential elements of independence. Despite the finding of institutional independence, the court still considered it appropriate to examine whether there was any senior RNP officer involved in, for example, policy formulation on detention and interrogation or training. The court analysed whether, despite institutional independence, any individuals were as a matter of fact potentially involved in events in Iraq.

The court was not satisfied that the Directorate of Judicial Engagement Policy could be described as independent despite its conscientious work because it reported to the Secretary of State and was an integral part of the defence and military hierarchy. Therefore, the arrangements in place for the discharge of the function in relation to the wider issues and the lessons learned from systemic issues were inadequate and required further consideration. In conclusion, the court held that the IHAT and the arrangements associated with it were not sufficient to discharge the Article 2 obligation. In particular, the court was critical of: the degree of accessibility to the public, the accessibility to the families of the deceased and the examination of systemic abuse and training.

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<sup>342</sup> *Ibid*, at paragraph 74.

In 2013/14, the High Court in Belfast considered a number of issues arising from the inquest into the death of Mr Patrick Pearse Jordan.<sup>343</sup> The relevant challenge in this context was to the involvement of former RUC Special Branch Officers and a former RUC Intelligence Officer (in the Legacy Support Unit) in the process of complying with the Chief Constable's obligations to disclose material to the Coroner. It was alleged that their involvement in the disclosure process compromised the independence of that process and meant that the inquest was not compliant with Article 2. The officers about whom the challenge was made were described as support staff under the direction of PSNI Legal Services Branch. They were not involved in any investigative capacity but were solely involved in collating and preparing materials for appropriate public interest immunity (PII) certification and onward disclosure to the next of kin.

To determine that issue, Mr Justice Stephens examined the function performed by those officers. The evidence provided by PSNI was that: the officers were subject to close internal and external scrutiny; where former RUC officers are employed to examine archived material they do so under the supervision of PSNI Legal Services Branch; where there was a PII process the materials are examined by independent counsel, the Chief Constable, the Secretary of State or Minister of State prior to any PII certification; the processes are under the supervision of the Coroner who ultimately has access to all disclosure materials including un-redacted materials.<sup>344</sup> PSNI also relied upon the additional fact that those officers had no delegated responsibility for the disclosure process which remained with the Chief Constable. Furthermore, the Coroner and the Coroner's counsel had un-redacted access to all Stalker/Sampson material and to all documents involved in the Stevens Inquiry. The Coroner and his counsel could instruct that any document was relevant and should be disclosed. In other words, there was independent oversight of the disclosure process. Stephens J described the legal safeguards in place as sufficient to ensure that the

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<sup>343</sup> *Jordan's Applications* [2014] NIQB 11, judgment of Stephens J delivered on 31 January 2014.

<sup>344</sup> *Ibid*, at paragraph 323.

independence of the PII and Article 2 redactions was not compromised. However, importantly, it was because the officers were not involved in the investigatory process but had limited duties that the independence of the investigation itself was not compromised.<sup>345</sup> Had the officers been involved in the investigatory process it seems likely, by implication, that Stephens J. would have reached a different view.

## Effectiveness

The requirement that an investigation is effective means that the procedure in question must be *able* to reach a determination of State responsibility. It must be, for example, capable of reaching a determination as to whether the force used was or was not justified and as to the identification and prosecution of those responsible “Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard”.<sup>346</sup> The requirement of effectiveness includes a requirement that the authorities take reasonable steps to secure relevant evidence such as eye-witness and forensic evidence. Otherwise, the investigation is unlikely to be capable of identifying and punishing those responsible. Therefore, failure to follow an obvious line of enquiry (and the failure to keep an open mind about lines of enquiry) may result in a violation of Article 2.<sup>347</sup> If an investigator pre-determines the outcome of an investigation without first undertaking the preliminary investigative steps and, for that reason, does not follow a procedure which is capable of resulting in a prosecution, the investigation is likely to be incapable of identifying the perpetrator *and* holding him responsible. It would therefore fall foul of Article 2. For example, *if* an investigation of a suspect is commenced by interviewing without caution and therefore in circumstances in which the answers cannot be used against the suspect in a subsequent prosecution,<sup>348</sup> that investigation

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<sup>345</sup> *Ibid*, at paragraphs 333 to 340.

<sup>346</sup> *Ibid*.

<sup>347</sup> See e.g. *Kolevi v Bulgaria* Application no 1108/02; *Jordan v UK* (2003) 37 EHRR 2.

<sup>348</sup> In such a case, the information obtained from the interview could not be used against the interviewee at trial.

will likely fall foul of Article 2 unless it is abundantly clear, on an objective analysis, that there is no realistic prospect of a prosecution.<sup>349</sup>

While there must be a system which is designed to ensure that persons against whom there is sufficient evidence are prosecuted, Article 2 probably does not extend to require that a prosecution *must* follow.<sup>350</sup> For example, the Public Prosecution Service can decide that despite the evidential test being satisfied a prosecution would not be in the public interest. However, if there is sufficient evidence to mount a prosecution any decision not to prosecute must be supported by reasons which meet the reasonable expectations of interested parties that a prosecution would follow.<sup>351</sup>

Where the death occurred as a result of the use of lethal force by police, the investigation must be able to scrutinise the legal framework within which the operation was conducted, including the planning and control of the operation. There must be an adequate and effective framework (of law, policy and practice) to safeguard against arbitrariness. Police policy will be considered. In particular, it must be able to consider whether there were clear and robust guidelines on the use of force and the planning and control of the operation which had as an objective the minimising of the risk of loss of life.<sup>352</sup> The ECtHR will not construe the positive obligation to protect life or to investigate a death so as to impose an impossible or disproportionate burden on the State but will have regard to policy and resource considerations, among other things.<sup>353</sup> Not, however, so as to absolve the State from conducting an Article 2 investigation. Rather, the means of conducting the investigation may differ.

## Promptness

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<sup>349</sup> The report, in July 2013, of Her Majesty's Inspectorate of Constabulary following an inspection of the HET raised this as one element of non-compliance with Article 2 ECHR.

<sup>350</sup> This is also the position in England and Wales.

<sup>351</sup> *R v DPP ex parte Manning & Melbourne* [2001] QB 330 DC; *R (Denis) v DPP* [2006] EWHC 3211; *R (Armani de Silva) v DPP* [2006] EWCA Civ 3204.

<sup>352</sup> *Nachova v Bulgaria*, judgment of 5 July 2005.

<sup>353</sup> See e.g. *Osman v UK* [1998] ECHR 101.

The investigation must be prompt. The requirement of promptness and reasonable expedition is an important element of the Article 2 obligation. It is also considered to be essential to maintaining public confidence in the State's "adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."<sup>354</sup> In July 2013, the ECtHR considered the investigation into the killing of Mr McCaughey and Mr Grew by the British security forces in Northern Ireland in 1990. That decision was concerned only with delay.<sup>355</sup> The ECtHR restated the importance of investigations being instigated promptly and being proceeded with reasonable expedition. The ECtHR criticised the inquest process and said that delay in carrying out inquests, in cases of killings by security forces in Northern Ireland, was an endemic problem and emphasised the urgency of reforms to "involve the state taking, as a matter of some priority, all necessary and appropriate measures to ensure...that the procedural requirements of Article 2 are complied with expeditiously." The ECtHR held that the excessive investigative delay of itself meant the investigation was ineffective for the purposes of Article 2.

### **Public scrutiny**

The investigation must be transparent in the sense that it must permit public scrutiny of the investigation and its results, "to secure accountability in practice as well as in theory." The requirement of public scrutiny is additional to and separate from the requirement to involve the relatives of the deceased in the procedure to the extent necessary to safeguard the legitimate interests.<sup>356</sup> That means that both the process and the result must be subject to effective scrutiny. As set out above, public confidence in investigations is a fundamental aspect of Article 2.

The ECtHR (Grand Chamber) has emphasised that in addition to the obligation to have an effective official investigation, the investigation must be public and must be accessible to the victim's family. That includes an

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<sup>354</sup> *Jordan v UK* (2003) 37 EHRR 2.

<sup>355</sup> There being domestic remedies still to be exhausted. The matter may therefore return to the ECtHR on the substantive allegations of breach.

<sup>356</sup> *Jordan v UK* (2003) 37 EHRR 2.

“independent examination, accessible to the victim’s family and to the public, of the broader issues of State responsibility, for the death, including the instructions, training and supervision given...”<sup>357</sup> Furthermore, the investigation must encompass broader issues such as planning. Although the essential purpose of an Article 2 investigation is to ensure accountability of State agents or institutions for deaths occurring under their responsibility the investigation should be “broad enough to permit the investigating authorities to take into consideration not only the actions of State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life”.<sup>358</sup> The investigation must also include lessons learned following the identification of wider systemic issues.<sup>359</sup>

The Divisional Court in England considered the arrangements necessary to ensure sufficient public scrutiny in the IHAT case.<sup>360</sup> In that case, the Secretary of State, following the judgment of the Court of Appeal,<sup>361</sup> agreed to: establish a website to keep the public informed of its work in a manner which did not compromise investigations or prosecutions and publish information about progress of the IHAT’s work; keep the complainants informed of progress and decisions made on each case; and publish annually information about systemic issues identified and steps taken to address them. The court drew attention to the absence of any mechanism within the IHAT to consider with appropriate detail the instructions, training etc. of actions taken in Iraq, which the court felt would entail obtaining evidence from soldiers and those responsible for devising and organising the training together with effective checking of its reliability. The absence of that capability was deemed to be particularly significant where there is “an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to

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<sup>357</sup> *Al-Skeini and Others v UK* (2011) EHRR 18.

<sup>358</sup> *Ibid* at paragraph 163.

<sup>359</sup> *Ali Zaki Mousa (No 2) v Secretary of State for Defence* [2013] EWHC 1412 Admin. The court made clear that those principles while stated in a case concerning death in custody applied equally to other deaths under Article 2.

<sup>360</sup> *Ali Zaki Mousa (No. 2) ibid.*

<sup>361</sup> In *Ali Zaki Mousa and others v Secretary of State for Defence* [2011] EWCA Civ 133,



amount not merely to isolated incidents or exceptions but a pattern or system.” The court was not formulating a new test but referring to an early decision of the ECtHR.<sup>362</sup> The court was not content that the examination of the wider or systemic issues was sufficiently public or subject to independent scrutiny but noted the steps to be taken by the Secretary of State.

### **Involvement of the next of kin**

Article 2 requires that the next of kin must be involved in the procedure to “the extent necessary to safeguard his or her legitimate interests.”<sup>363</sup> Whether that requires disclosure of witness statements and other materials is fact-specific. For example, in an Article 2 compliant inquest next of kin are entitled to discovery of all relevant material unless a decision is made by the Coroner on grounds of public interest immunity to restrict discovery. In an investigation by the Independent Police Complaints Commission<sup>364</sup> however it has been held that discovery of witness statements is not required.<sup>365</sup>

It is necessary to consider whether a prosecution *can* be brought before a decision can be made on *how* and *when* the State must comply with its Article 2 obligations but, importantly, not on whether there is an obligation to comply. The choice of the most appropriate *means* by which to comply may be affected by the reality of potential prosecution but an obligation *to comply* remains. It has been accepted that a properly conducted independent criminal process could be the most effective way of discharging the State’s investigative duty.<sup>366</sup> If prosecution is a realistic possibility, then account must be taken of the risk of the fairness of a subsequent criminal trial being

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<sup>362</sup> *Ireland v UK* (1979-1980) 2 EHRR 25, at paragraph 159.

<sup>363</sup> *Jordan v UK* (2003) 37 EHRR 2.

<sup>364</sup> The Independent Police Complaints Commission (IPCC) oversees the police complaints system in England and Wales. It is independent of the police and government.

<sup>365</sup> *Green v UK* Admissibility Decision, 27 July 2005. It does not require the next of kin to have access to police files or copies of all documents during an ongoing inquiry but that may depend upon the extent to which the next of kin have been kept informed by liaison with the police: *Brecknell v UK* Application no. 32457/04, November 2007.

<sup>366</sup> *McKerr v UK* (2002) 24 EHRR 20, at paragraph 134. Importantly, this presupposes that the criminal investigation is independent see comments re IHAT in *Ali Zaki Mousa*.

prejudiced by disclosures during an Article 2-compliant investigation.<sup>367</sup> In many cases that will mean delaying the public part of the investigation until it has been determined properly whether prosecution is a realistic possibility. In other words, an Article 2-compliant inquiry might have to await the outcome of a prosecution or a decision not to prosecute.

The Divisional Court in England (in the IHAT case) considered that very situation and analysed it according to category of case. It divided the cases into three categories: (i) cases in which there had been no IHAT investigation and therefore no realistic prospect of further prosecution; (ii) cases in which there had been a previous prosecution and IHAT is now investigating or about to investigate with a view to deciding whether to prosecute; and (iii) cases where there was no previous prosecution and IHAT is investigating or about to investigate whether to prosecute.<sup>368</sup>

In respect of category (i) cases, the court held that there could be no impediment to further investigations as part of an Article 2-compliant inquiry. An example of such a case was that of a soldier who shot an escaping suspect. A charge of murder was dismissed by his commanding officer and therefore the soldier was not susceptible to Court Martial. The case was then referred to the Crown Prosecution Service. After review by the Metropolitan Police Service the CPS proceeded on a charge of murder. Thereafter, however, the CPS decided there was no realistic prospect of conviction and offered no evidence. In another example, seven soldiers were investigated following the death in custody of a detainee. Following an investigation and Court Martial the soldiers were acquitted and it was decided that no further investigation would be pursued as a basis for any prosecution. In both these examples, the Divisional Court held that there had been no Article 2-compliant

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<sup>367</sup> For example, the prospect of prosecution may mean that relevant witnesses will refuse to give evidence because of the privilege against self-incrimination.

<sup>368</sup> *Ali Zaki Mousa (No. 2) v Secretary of State for Defence* [2013] EWHC 1412 (Admin).

inquiry and that the Article 2 duties had not been complied with and should proceed.<sup>369</sup>

In respect of category (ii) cases, the court held that there could be an impediment to conducting an Article 2-compliant inquiry because the IHAT was continuing to investigate and may decide to prosecute. An example of such a case was that of a detainee alleged to have been drowned by four British army soldiers. Following a Court Martial at which all four soldiers were acquitted, the IHAT continued to review the case. The court was concerned at the delay in reaching a decision on whether to prosecute and ordered the Secretary of State to report within six weeks on progress made in investigating the death and when a decision was to be reached as to whether to prosecute. If no prosecution was to follow then an Article 2-compliant investigation would have to be conducted as the court stressed “the delay in making decisions in respect of prosecutions concerning those responsible... is a source of increasing concern, because the Article 2 investigative duty requires speedy action”.<sup>370</sup>

In respect of category (iii) cases, the court held that where it is very unlikely that there will be a prosecution and there has been no previous criminal process and therefore no impediment to an Article 2-compliant inquiry such an inquiry should proceed. However, the court gave the Secretary of State, as with category (ii) cases, 6 weeks to report on progress made and when a decision would be made as to prosecution. One example of such a case was that of a detained person who was found shot dead after being transported by British army soldiers. The case was not investigated by RMP but was under review by the IHAT.

In cases where there will not be a prosecution, consideration has to be given as to how the Article 2 duty will be complied with. One means of complying

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<sup>369</sup> Because there had been no inquiry of the type identified as necessary i.e. public and accessible to the family which examined the broader systemic issues and the instructions, training etc. given to the soldiers as set out above.

<sup>370</sup> *Ali Zaki Mousa (No. 2) v Secretary of State for Defence* [2013] EWHC 1412 Admin, at paragraph 165.

with the duty is to have an Article 2 compliant inquest because the duties of the coroner have been extended to include the duty to determine how, by what means and in what circumstances the death occurred.<sup>371</sup> In the category (i) and (ii) cases referred to above, even though there was an investigation by the IHAT, it was not Article 2 compliant so the duty was not discharged. In that case, an inquest was not a possibility so the court went on to consider how the duty could be discharged. The court reiterated that the form of inquiry will depend on the circumstances of each case, that there should be some flexibility for the State to decide how to give effect to its obligations.<sup>372</sup> The Divisional Court went on to consider whether the State was discharging those duties. Despite the court's finding that the Secretary of State and his officials had "assiduously and conscientiously attempted to discharge the obligations" it held that "in the unprecedented circumstances of the invasion and occupation of Iraq over a period of six years... in relation to cases where deaths have occurred the establishment of IHAT and the arrangements associated with it are not sufficient to discharge the duty imposed on the State".<sup>373</sup>

The reasons for this conclusion were as follows. Firstly, given the priority to prosecute those who are criminally responsible the IHAT was not best structured to prosecute promptly and efficiently.<sup>374</sup> The court referred to one case where there was no evidence that anything had or was being actively pursued. Secondly, the IHAT was not structured so as to take decisions promptly and effectively as to whether there *may* be a realistic prospect of prosecution.<sup>375</sup> In those cases, the IHAT lacked "the necessary focus and

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<sup>371</sup> As per *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Ali Zaki Mousa (No. 2) ibid*, at paragraph 168.

<sup>372</sup> Recognising of course that Article 2 has certain basic requirements which must be met.

<sup>373</sup> *Ali Zaki Mousa (No. 2) Secretary of State for Defence* [2013] EWHC 1412 Admin, at paragraph 179. Note, the reformed IHAT was at that stage found to be sufficiently independent.

<sup>374</sup> Category (i) cases referred to above as those where there was no investigation into criminal responsibility for the death and therefore no current prospect of prosecution.

<sup>375</sup> Category (ii) cases where there has been a previous prosecution and IHAT is now investigating with a view to whether to prosecute and category (iii) cases where there has been no previous prosecution and IHAT is now investigating whether there should be a prosecution.

drive which this unprecedented situation requires.”<sup>376</sup> The court commented that there appeared to be no immediate prospects of any further prosecutions, even though the deaths occurred more than nine years ago. “The decision to continue investigations without the necessary expertise, focus and direction of the Director of Service Prosecutions as to whether prosecution was a realistic prospect, was a serious failure”.<sup>377</sup> Thirdly, “because of its focus on investigation for the purposes of prosecution, the IHAT inquiry, like a police inquiry, has not been an inquiry accessible to the public of the broader issues of State responsibility for the death, including the instruction, training and supervision given to soldiers undertaking such tasks”.<sup>378</sup> Because there were cases where there would be no prosecution, it was necessary now to conduct an inquiry that was accessible to the public – IHAT was neither structured nor staffed to do that. Fourthly, IHAT did not provide an inquiry which was sufficiently accessible to the victim’s family because in some cases contact had not been made with them. The court stressed again the importance of accessibility for the public and relatives to ensure the Article 2 procedural rights of relatives. Fifthly and lastly, there was no evidence that the IHAT inquiry had considered or would consider with the appropriate level of detail the instructions, training and supervision and therefore discharge the obligation to independently investigate the wider and systemic issues.<sup>379</sup>

In the Court’s view, once decisions had been made about prosecutions, “suitably adapted, a form of prosecutorial inquiry derived from the model used by coroners would have many advantages over an overarching public inquiry... the task being broken down into different inquiries conducted by differently appointed persons for different deaths... The decision [in a case where there may be a realistic prospect of prosecution] on whether to investigate, how to progress the investigation and whether a prosecution should be brought being made with the direct involvement of the Director of

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<sup>376</sup> *Ali Zaki Mousa (No. 2) Secretary of State for Defence* [2013] EWHC 1412 Admin, at paragraph 182.

<sup>377</sup> *Ibid*, at paragraph 184.

<sup>378</sup> *Ibid*, at paragraph 188.

<sup>379</sup> *Ibid*, at paragraphs 192 to 194.

Service Prosecutions.”<sup>380</sup> The court anticipated, once the decision had been taken as to the prospect of prosecution, that there would be an inquisitorial approach to each inquiry. While deciding against the necessity for a single overarching public inquiry the court did stress the importance of other factors to counterbalance the absence of such an inquiry. It suggested that though there would be “no independent person who could give the inquiries overarching direction or who could provide a comprehensive overview of the recommendations that should be made... as an additional guard against the risks of delay and a lack of direction and to deal with unresolved issues... the court would envisage appointing a designated judge. The judge would be provided with regular information as to progress of each inquisitorial inquiry”.<sup>381</sup> Furthermore, the court considered that a Parliamentary Committee could scrutinise the wider or systemic issues. The court concluded that as soon as decisions had been made as to whether to prosecute in each case, it would consider ordering Article 2 compliant inquiries along the coronial model.

## **Conclusion**

The Performance Committee has dedicated significant time and effort to considering the many and complex issues involved in legacy cases. In particular, the Committee has been concerned at the continuing delay and lack of progress in the PSNI’s completion of the disclosure process for a number of inquests. The Committee has restated the importance of adequate resources being made available to ensure that any further delay is avoided. The Committee will continue to tackle the issues in legacy cases and will, in recognition of the high level of public concern and its impact upon public confidence in policing, report separately in the coming months. The Committee believes a dedicated review and report is required to pay due regard to the myriad of complex factors.

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<sup>380</sup> *Ibid*, at paragraph 215. Note, in these cases a full inquest was not possible because the deaths occurred outside of the jurisdiction.

<sup>381</sup> *Ibid*, at paragraphs 222 to 223.

The Criminal Justice Inspection Northern Ireland has now been commissioned to carry out an inspection of the arrangements in place in the PSNI to manage and disclose information in support of the Coronial process in Northern Ireland. The inspection aims to complement the review undertaken by Lord Justice Weir in January 2016 to provide a fuller understanding of the issues involved. While not reviewing individual legacy cases the inspection will review the effectiveness and efficiency of the arrangements by: assessing current PSNI policy, practice and procedures with regard to disclosure of information in support of the Coroner in undertaking legacy inquests; examining the statutory obligations of the PSNI in disclosing information in support of the Coroner; evaluating whether current arrangements for managing and disclosing information are effective and efficient while fulfilling statutory obligations; and, providing comparative analysis with current, relevant best practice models. The Policing Board has been advocating for a comprehensive review for some time so it welcomes the forthcoming inspection and will consider its findings once complete.

The Policing Board has also expressed its support for the measures relating to dealing with the past which were included in the Stormont House Agreement of December 2014. It recognises that there are still differences among the political parties and British and Irish governments as to how exactly those measures should be implemented, but it urges everyone concerned to work assiduously towards arriving at an agreed approach. For its part the Board will continue to press for measures which, as far as the accountability of the PSNI is concerned, are fully consistent with the standards laid down by the European Court of Human Rights.

## 10. TREATMENT OF SUSPECTS

The treatment of suspects by the police inevitably engages a number of rights under the European Convention on Human Rights and Fundamental Freedoms (ECHR). For example, most criminal investigations engage a suspect's Article 8 ECHR right to privacy. The conduct of the investigation will always engage Article 6 ECHR (the right to a fair trial). That includes the requirement that a person under investigation is entitled to the presumption of innocence (until guilt is proved) and, if charged, the right to consult with a solicitor and to be told, in a language the suspect understands, the charges. Article 3 ECHR (the right not to be subjected to torture, inhuman or degrading treatment) will apply to the conditions of detention. Any conditions attached to the grant of bail will engage Article 11 ECHR (the right to freedom of assembly and association).

When the police detain a person they assume responsibility for the protection of the detainee's ECHR rights. Detention engages Article 5 ECHR (the right to liberty and security) and can only be justified if at least one of the Article 5 criteria has been met.<sup>382</sup> Both before and after charge the police must determine periodically whether continued detention is necessary or whether, for example, release with or without bail conditions is more appropriate.<sup>383</sup> Articles of the PSNI Code of Ethics, for example article 5, require police officers to ensure that all detained persons for whom they have responsibility are treated in a humane and dignified manner. It stipulates that arrest and detention must be carried out in accordance with relevant Codes of Practice<sup>384</sup> and in compliance with the ECHR. The Code of Ethics also requires police officers in their dealings with detainees to apply non-violent methods insofar as possible before resorting to any use of force, with any use

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<sup>382</sup> For example, the detention must be in accordance with a procedure prescribed by law and for the purpose of bringing the detainee before a court on reasonable suspicion of having committed an offence.

<sup>383</sup> Article 41 of the Police and Criminal Evidence (Northern Ireland) Order (PACE) 1989 sets out the requirements for reviews of detention. Further guidance is contained within Code C of the PACE Codes of Practice.

<sup>384</sup> Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) Code of Practice C governs the detention, treatment and questioning of persons by the police and Code of Practice H governs the same in respect of terrorism suspects.



of force being the minimum required in the circumstances. Police must take every reasonable step to protect the health and safety of detained persons and take immediate action to secure medical assistance where required.

Detainees within police custody are increasingly diverse and many have complex needs such as addictions, mental health issues and suicidal ideation. Custody Officers, who have to make decisions about the level of observation a detainee should be placed under during their time in custody, must assess the risk factors that are presented. It is essential that Custody Officers have the support they need of medical professionals whenever such assessments involve detainees with medical issues (whether physical or mental). The Committee is concerned that there is not adequate provision within custody suites for detainees with mental health issues and addictions, which is being addressed, but needs to be dealt with as a matter of urgency.<sup>385</sup>

Furthermore, police custody is still being used, in the opinion of the Committee, too frequently for children i.e. under the age of 18 years. During 2014/15, children represented approximately 10% of all detainees held in police custody. In the absence of adequate and suitable alternatives, the continued use of police custody for children particularly post-charge is unacceptable. That is not something the PSNI can address – responsibility rests with the statutory agencies and the legislature. This has been reported upon previously and will not be repeated here but suffice it to say that the Committee notes with disappointment the failure to implement recommendations made by the Criminal Justice Inspection Northern Ireland and encourages all those responsible to implement the recommendations without delay.

During 2014/2015, a total of 24,377 arrests were made under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE).<sup>386</sup> In 2015, the number of custody suites was reduced from 17 to 9. One of the reasons for

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<sup>385</sup> This is considered further below regarding the PSNI review of healthcare.

<sup>386</sup> Police and Criminal Evidence (PACE) Order Statistics 1 April 2014 – 31 March 2015, PSNI, June 2015. This does not include terrorism detainees who are discussed later in this report.

the reduction in the number of suites was the merger of Custody Healthcare and Reducing Offending in Partnership which informed PSNI that identifying the often complex needs of detainees (e.g. drug/alcohol addiction and mental ill health etc.) was linked to delivering appropriate interventions thereby reducing future offending. The PSNI also wished to modernise the custody estate and, in the PSNI's view, fewer custody suites mean that resources can be concentrated in fewer locations. It was hoped that the reduction of suites would result in greater accountability and consistency. It was appreciated that the reduction in the number of custody suites would certainly have an impact upon the treatment of suspects, which might be positive or negative. The Performance Committee therefore paid particular attention to the treatment of detainees during 2015.

## **INDEPENDENT CUSTODY VISITING SCHEME**

The Policing Board is obliged, by virtue of section 73 of the Police (Northern Ireland) Act 2000, to make and keep under review arrangements for designated places of detention to be visited by lay visitors.<sup>387</sup> That function is discharged by the Policing Board's Independent Custody Visiting Scheme.<sup>388</sup> Custody Visitors are volunteers from across the community who are unconnected with the police or the criminal justice system.<sup>389</sup> Custody Visitors make unannounced visits to designated police custody suites where they inspect the facilities and with consent speak to detainees and check custody records. They can also view, with consent, live interviews with detainees held under terrorism legislation by remote video link. Custody Visitors report to the

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<sup>387</sup> Article 36 of the Police and Criminal Evidence (NI) Order 1989 requires the Chief Constable to designate the police stations which are to be used for the purpose of detaining arrested persons.

<sup>388</sup> Custody visiting in the UK came about as a result of Lord Scarman's inquiry into the Brixton disorder in 1981. The Northern Ireland Independent Custody Visiting Scheme was first established in 1991 and was made statutory in 2001 under Section 73 of the Police (NI) Act 2000.

<sup>389</sup> At 31 March 2015, there were 41 Custody Visitors. 37% are female and 63% are male. The community background of visitors is known in 93% of case with 37% identifying as catholic and 56% as protestant. 1 visitor identifies as "black/black other" and 1 visitor identifies as having a disability. During 2014/2015 there were four Custody Visiting teams covering Northern Ireland. These were: Belfast/Antrim - responsible for 4 custody suites including the Antrim Serious Crime Suite (SCS); North West - responsible for 6 custody suites; Tyrone/Fermanagh - responsible for 4 custody suites; and Down/Armagh - responsible for 4 custody suites.

Policing Board and the PSNI on the welfare and treatment of persons detained in custody and the adequacy of facilities.<sup>390</sup> Reports on visits to terrorism detainees are also provided to the Independent Reviewer of Terrorism Legislation.<sup>391</sup>

The Policing Board's Performance Committee receives quarterly reports on the work of the Scheme which highlight any issues raised and the remedial actions taken by PSNI to address them. The reports cover 3 distinct areas: the rights of the detainee; the health and well-being of the detainee; and the conditions of detention. Custody Visitors discharge a critical function in ensuring the protection of the human rights of detained suspects and enable the Committee to monitor the treatment of detainees and the conditions of their detention. Any specific concerns identified by Custody Visitors are raised with PSNI.

### **Work of the Custody Visiting Teams 1 April 2014 to 30 September 2015**

Each year the Policing Board sets a guideline number of visits to be completed by Custody Visiting Teams.<sup>392</sup> During the 2014/2015 financial year, the guideline number of visits was set at 706. The actual number of visits carried out was 726. Of the 726 visits, 705 (95%) were deemed to be valid visits. The other 21 visits could not be completed due, for example, to the custody suite being closed (6), security issues (3), the custody suite being too busy (6) and the unavailability of a second Custody Visitor (6).<sup>393</sup> During 2014/2015 visits took place on all 7 days of the week and were conducted at all times of the day and night, with 85 (11%) being carried out on a Saturday,

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<sup>390</sup> The Policing Board publishes quarterly statistics and an annual report on the work of Custody Visitors, all of which are made available for public viewing through the Policing Board's website: [www.nipolicingboard.org.uk](http://www.nipolicingboard.org.uk)

<sup>391</sup> In England and Wales, reports of custody visits to terrorism detainees are provided to the Independent Reviewer on a statutory basis. In Northern Ireland no statutory provision has yet been made to require the Policing Board to provide the reports to the Reviewer - the reports are instead provided to the Reviewer on a voluntary basis pending legislative amendments to make this arrangement statutory.

<sup>392</sup> The guideline number of visits is set based upon a percentage of the throughput of detainees with the busier suites receiving several visits per month but with the caveat that each designated suite is visited at least once every month.

<sup>393</sup> Custody visits must be carried out in pairs,

88 (12%) being carried out on a Sunday and 83 (11%) being carried out between 9pm and 9am. The average time spent on a visit was 23 minutes. Custody Visitors record details of delays in gaining access to custody suites. There were 1,216 detainees held in custody at the time of the visits in 2014/2015, 540 of whom were spoken to by visitors.<sup>394</sup> A total of 65 detainees refused to be seen and 611 detainees were not seen for other reasons such as being asleep (274), being interviewed (154) or being with their solicitor/GP/appropriate adult (57). The overall refusal rate was 5%.

In the six months between 1 April 2015 and 30 September 2015, 240 visits were carried out, of which 234 (97%) were deemed valid. Visits took place on all 7 days of the week and were conducted at all times of the day and night. There were 424 detainees held in custody at the time of the visits, 214 of whom were spoken to by visitors.<sup>395</sup> A total of 22 detainees refused to be seen and 188 detainees were not seen for other reasons such as being asleep (106), being interviewed (39).

### ***Custody records***

A custody record must be opened as soon as practicable for every person who is brought to a police station to be detained. Custody Visitors are trained to check the custody records of any detainee who has consented to that inspection. If it is not possible to obtain consent, for example, because the detainee is asleep at the time of the visit, intoxicated or on drugs, Custody Visitors must be granted access to the custody record unless the detainee has previously refused consent. If access to the custody record is denied by custody staff, that is noted by the Custody Visitor and reported to the Policing Board. Custody Visitors check whether: detainees arrested under PACE have been afforded their rights and entitlements;<sup>396</sup> whether medication, injuries, medical examinations, meals and diet are recorded and if treatment was required whether it was given; whether the procedures to assess special risks

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<sup>394</sup> Custody Visitors require the consent of a detainee to talk to them or to see their custody record.

<sup>395</sup> Custody Visitors require the consent of a detainee to talk to them or to see their custody record.

<sup>396</sup> To have someone informed of their arrest, to consult with a solicitor, and to consult the PACE Codes of Practice.

or vulnerabilities have been properly recorded and implemented; whether rules concerning the timing and frequency of cell inspections, particularly inebriated or otherwise vulnerable detainees,<sup>397</sup> have been complied with; and, whether reviews of the continuing requirement for detention have been conducted.

In 2008/2009, 49% of custody records were checked; in 2009/2010 60% were checked; in 2010/2011 67% were checked; in 2011/2012 76% were checked; in 2012/2013 70% were checked; in 2013/2014 68% were checked; and in 2014/15 68% were checked. Given the central importance of checking custody records, it is hoped that the Custody Visitors will be able to maintain a high percentage of records that are checked and to increase further that number.

### ***Satisfactory/unsatisfactory visits***

Where reasons for concern are identified, they are raised by Custody Visitors with PSNI who must advise the Policing Board within 28 days of the action taken to remedy the concern. If the Policing Board is not advised within 28 days, the matter is referred for the urgent attention of the relevant District Commander.

During 2014/2015, of the 705 valid visits, 640 (91%) were found to be entirely satisfactory. Of the remaining 65 visits (9%), issues were identified which deemed these visits unsatisfactory. A total of 69 issues were recorded by Custody Visitors under headings as follows: 1 cleanliness; 1 heating; 2 checks on detainees; 3 being informed of rights; 7 adequate food and drink; 8 safety/security hazards; 8 lighting; 15 faulty equipment; 18 sanitation; and, 6 other. That is an increase from 2013/14 when 47 reasons for concern were noted by Custody Visitors.<sup>398</sup>

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<sup>397</sup> Detainees at risk should be checked every 15 minutes.

<sup>398</sup> The reasons for concern in 2013/2014 related to faulty equipment (21), lighting (10), sanitation (7), safety/security hazard (5), heating (2), cleanliness (1) and oxygen equipment (1).

Of the 234 valid visits carried out between April 2015 and September 2015, 213 (91%) were recorded as satisfactory. Of the remaining 21 visits issues were identified which deemed these visits unsatisfactory. The issues recorded by Custody Visitors during the six month period to September 2015 were similar to those recorded in the financial year to March 2015. However, during this period Custody Visitors raised a concern with the Custody Sergeant about a 'cell buzzer'<sup>399</sup> having been switched off within a cell. It was explained that while the buzzer had been switched off the detainee was being monitored via CCTV. The Committee will seek further clarification as to all those occasions when a cell buzzer was switched off, the criteria applied for such a decision and whether on each of those occasions the detainee was monitored continuously. The Committee notes that the ability of a detainee to alert custody staff to potential difficulties is critical. If the detainee is unable to do that and is not monitored continuously there is an obvious risk that a detainee could suffer harm undetected.

### **Recommendation 12**

**The PSNI should forthwith provide to the Performance Committee a report on the number of times and the reason(s) for a buzzer in a cell having been switched off between 1 January 2014 and 1 January 2016. The report should include reference to the relevant PSNI policy and the alternative arrangements that were or should be made to ensure the safety of the detainee.**

Another issue raised was the fact that in one suite exercise facilities were out of order. That is unacceptable, particularly if detainees might be held in custody for extended periods of time. The Committee will seek a further update from the PSNI that the situation has been remedied and will continue to monitor access to exercise facilities.

### **Recommendation 13**

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<sup>399</sup> To enable a detainee to alert custody staff to the cell.

**The PSNI should provide to the Performance Committee forthwith a report detailing the period during which exercise facilities were or are unavailable for use by detainees. If exercise facilities are unavailable to detainees held for extended periods, consideration should be given to moving that detainee to an alternative station.**

Custody Visitors record details of delays in gaining access to custody suites. Between 1 April 2014 and 31 March 2015, there were 17 occasions when Custody Visitors were delayed for more than ten minutes. There were 6 occasions, between April 2015 and September 2015, when custody visitors were delayed for more than ten minutes. The reason for delay is, generally, due to the Custody Staff being busy. While the Committee recognises that there may be occasions when custody staff are extremely busy, PSNI is reminded that Custody Visitors must not be delayed access save where it is genuinely unavoidable and for proper reasons.

### **Non-designated police cells**

In February 2013, the National Preventative Mechanism (NPM) annual report made a formal recommendation to the Minister of Justice for Northern Ireland to make legislative provision for bringing non-designated police cells in Northern Ireland within the remit of the Policing Board's Independent Custody Visiting Scheme.<sup>400</sup> It should only be in limited circumstances that a person is detained in a station that has not been designated and it is unlikely to be for longer than six hours,<sup>401</sup> but the current inability of custody visitors to visit non-designated cells means there is no monitoring of the treatment of those detainees or the condition of their detention. The NPM recommendation

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<sup>400</sup> Recommendation 7 of *Monitoring Places of Detention. Third Annual Report of the United Kingdom's National Preventive Mechanism, 2011 – 2012*, National Preventive Mechanism, February 2013. The statutory remit of the Policing Board's Independent Custody Visiting Scheme extends only to custody suites which have been designated by the Chief Constable under Article 36 of the Police and Criminal Evidence (Northern Ireland) Order 1989 for the purpose of detaining arrested persons.

<sup>401</sup> Article 32 of PACE. Detention in a non-designated station can only extend beyond 6 hours if it is authorised by an officer not below the rank of Superintendent and only if that officer is satisfied on reasonable grounds that it would expose the detainee and those accompanying him/her to unacceptable risk of injury if he/she were taken from the first police station and moved to a designated station.

mirrors concerns of the Performance Committee of the Policing Board in a number of Human Rights Annual Reports in which PSNI were encouraged to make arrangements (by permitting Custody Visitors to visit non-designated suites) in advance of legislative provision. The NPM recommendation was therefore endorsed by the Performance Committee in the Human Rights Annual Report 2014. The Department of Justice has indicated that it would implement the necessary legislative amendment required. Clause 41 of the draft Justice (No. 2) Bill, which passed its second reading on 8 September 2015, will<sup>402</sup> extend the remit of the Board's Custody Visiting Scheme to include non-designated police stations. The Committee welcomes this legislative development.

## **DETAINEES UNDER THE TERRORISM ACT 2000 (TACT)**

'Terrorism' is defined<sup>403</sup> as the use or threat of action if "(i) The action involves serious violence against a person; serious damage to property; endangers a person's life, other than that of the person committing the action; creates a serious risk to the health or safety of the public or a section of the public; or is designed seriously to interfere with or seriously to disrupt an electronic system; (ii) The use or threat of action is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public; and (iii) The use or threat of use is for the purpose of advancing a political, religious, racial or ideological cause." All three criteria must be satisfied unless the use or threat of action involves the use of firearms or explosives in which case the second criterion need not be satisfied.

Section 41 of TACT empowers a police officer to arrest without warrant a person whom he or she reasonably suspects to be a terrorist. A 'terrorist' is defined as a person who has committed specified terrorist offences or a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism". Therefore, suspicion of the commission of

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<sup>402</sup> By amending section 73 of the Police (NI) Act 2000.

<sup>403</sup> By section 1 of Terrorism Act 2000 (TACT).



relevant acts of terrorism need not be demonstrated at the time a section 41 arrest is made. Rather, what is required is a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. A person arrested under section 41, may be detained without charge for up to 48 hours without judicial intervention. If detention is to extend beyond 48 hours it must be extended by a Judge. The extension may be for up to but no more than a *total* of 14 days. Section 41 is different from other arrest powers, in particular because it permits arrest without suspicion of a particular offence a person may be detained without the possibility of bail, for periods in excess of four days.<sup>404</sup>

During 2014/2015, 227 persons were detained by PSNI following an arrest under section 41. Of those, 209 (92%) were held for 48 hours or less. 35 persons were subsequently charged, 19 of whom were detained for more than 48 hours. 192 persons were released without charge, 1 of whom was detained for more than 48 hours. The maximum number of days that any person was detained was 6-7 days.

A person detained in police custody under TACT is entitled to have a friend or relative informed of their detention. Requests to have someone informed must be complied with as soon as it is practicable and in any case within 48 hours. Delay in complying with the request can be authorised only in certain clearly defined circumstances.<sup>405</sup> There were 53 requests to have someone informed of detention, 51 of which were granted immediately. A person detained in police custody under TACT is also entitled to consult a solicitor privately. Such requests must be permitted as soon as is practicable and in any event within 48 hours. However, a delay in complying with such a request may be authorised, but only in the strict circumstances defined in the Act.<sup>406</sup> In

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<sup>404</sup> If a person has been arrested pursuant to a power under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) the maximum detention period of detention may never be extended beyond 96 hours.

<sup>405</sup> Section 41 and Schedule 8, paragraph 6 of TACT 2000.

<sup>406</sup> Section 41 and Schedule 8, paragraph 7 of TACT 2000.

2014/15, there were 220 requests for access, all of which were granted without any delay.<sup>407</sup>

A relatively small proportion of persons arrested under section 41 in Northern Ireland are subsequently charged and even fewer are charged with an offence under TACT. For two years there was an upward trend in the proportion of section 41 detainees charged increasing from 21% in 2010/2011 to 25% in 2011/2012 to 32% in 2012/2013. That trend reversed in 2013/2014 to 19% and has further reduced in 2014/15 to 15%.<sup>408</sup> It represents the fewest number of persons charged subsequent to a section 41 arrest in the last 11 years. The statistics now contain a breakdown of all charges that follow a section 41 arrest.

Further to a recommendation in the Human Rights Annual Report 2011, PSNI carried out a review to ensure that section 41 arrests were being carried out in appropriate circumstances.<sup>409</sup> The Assistant Chief Constable Crime Operations wrote to the Human Rights and Professional Standards Committee, in January 2013, to outline the findings of that review and to seek to assure the Committee that police officers did not use the TACT power of arrest in cases where it was reasonably anticipated that the suspect was more likely to be charged under non-terrorism legislation. In 2014, the Independent Reviewer of Terrorism Legislation, David Anderson QC, commented in his annual report, “The low charging rate during 2013/14 is, on the face of it, disappointing. I have previously emphasised the need for reasonable suspicion in relation to each person arrested under section 41”.<sup>410</sup>

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<sup>407</sup> *Northern Ireland Terrorism Legislation: Annual Statistics 2014/2015*, Northern Ireland Office, October 2015, which are available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/465088/Terrorism\\_Bulletin\\_2014-2015.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/465088/Terrorism_Bulletin_2014-2015.PDF)

<sup>408</sup> *Northern Ireland Terrorism Legislation: Annual Statistics 2014/2015*, Northern Ireland Office, October 2015.

<sup>409</sup> Recommendation 15 of the Human Rights Annual Report 2011, Northern Ireland Policing Board, February 2012. This recommendation has been implemented.

<sup>410</sup> *The Terrorism Acts in 2013. Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, David Anderson QC, July 2014, para. 8.12.

Given the disappointing reversal in 2014, a further recommendation was made. The Committee recommended that “PSNI should review its policy and practice in respect of arrests under section 41 of the Terrorism Act 2000 to ensure that police officers have not reverted to using section 41 Terrorism Act 2000 in cases in which it is anticipated that the suspect is more likely to be charged under other legislation. The review should be completed within 6 months of the publication of this Human Rights Annual Report. Within 1 month of the conclusion of the review PSNI should report to the Performance Committee on the findings of the review and if required the steps PSNI proposes to take”.<sup>411</sup> The PSNI accepted that recommendation.

The PSNI carried out a comprehensive and searching review of 168 section 41 arrests and analysed the reason(s) for those arrests. The analysis was recorded and presented to the Board’s Human Rights Advisor. In summary, the PSNI assessed that in all 168 cases the arrests arose from terrorism investigations with 74 arrests being made by Terrorist Investigation Unit, 58 by Major Investigation Team and 36 by District officers. Of the 32 persons charged, 14 were charged under TACT. Of the remaining 18 persons who were charged under PACE, they were charged with a range of terrorism related offences such as murder, possession of firearms, making an explosion, making an explosion and possession of explosives. A report will be presented to the Performance Committee in early 2016. Once the Committee has received a copy of the report it will be discussed and reported upon further. While the conclusion of the review implements recommendation 7 of the Human Rights Annual Report 2014, the matter will not rest there. The Policing Board’s Human Rights Advisor will undertake a close review of the cases and report to the Performance Committee on her findings.

During 2014/15, Custody Visitors made 10 announced visits to Antrim Serious Crime Suite. There were 50 detainees held at the time of those visits, of which 7 were seen. 23 detainees refused to be seen and 20 detainees were not seen for other reasons. 8 detainees gave consent for their interview to be

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<sup>411</sup> Recommendation 7 of the Human Rights Annual Report 2014.

observed either in person or via the completion of a CV3 form. None were observed. The Committee is disappointed that no interviews were observed despite consent being given. Custody Visitors are encouraged to observe interviews when consent is given.

## **CUSTODY HEALTHCARE**

Persons held in police custody often have very complex health needs. Many detainees are deemed to be at risk of suicide and self-harm and many exhibit signs of drug and/or alcohol addiction. Article 5 of the PSNI Code of Ethics requires police officers to “ensure that all detained persons for whom they have responsibility are treated in a humane and dignified manner” and to “take every reasonable step to protect the health and safety of detained persons”.

The Association of Chief Police Officers (ACPO)<sup>412</sup> *Guidance Safer Detention and Handling of Persons in Police Custody* recognised that police custody often provides the ‘gateway’ to healthcare services for vulnerable people.<sup>413</sup> The PSNI adopted and applied that Guidance until July 2015. In July 2015, the National College of Policing issued its Authorised Professional Practice on Detention and Custody which contains the standards now in place for the PSNI.<sup>414</sup> The Guidance which is informed by medical advice is a comprehensive document which considers the legal framework applicable to custody and the measures required to ensure that standards of police custody are high.

In April 2014, the PSNI carried out a review of healthcare provision in police custody suites.<sup>415</sup> PSNI recognised, in that review, that custody healthcare

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<sup>412</sup> Now the National Police Chiefs Council.

<sup>413</sup> Guidance on the Safer Detention and Handling of Persons in Police Custody, National Policing Improvement Agency (NPIA) on behalf of the Association of Chief Police Officers (ACPO), 2012.

<sup>414</sup> That can be accessed at: <https://www.app.college.police.uk/app-content/detention-and-custody>.

<sup>415</sup> A written report to the Performance Committee, which discharged Recommendation 10 of the Human Rights Annual Report 2012, set out the findings of that review.

was about much more than safer detention (albeit that it is critical). Rather, the PSNI suggested that a more sophisticated approach which identifies and addresses complex needs would protect the detainee and break the cycle of offending. Ultimately, they suggested that would lead to safer communities. The Committee wholeheartedly agreed and welcomed the PSNI's approach. PSNI also recognised however that it was reliant on other partners, particularly healthcare professionals such as psychiatric nurses. PSNI also committed to making better use of available technology so that medical professionals could be provided with access to medical records when attending to detainees. In support of the PSNI's proposals and to ensure that momentum was not lost the Committee recommended that "the PSNI should report to the Performance Committee within 6 months of the publication of this Human Rights Annual Report on the progress or otherwise of its review of healthcare within custody suites including the extent to which it has secured the necessary input of healthcare professionals".<sup>416</sup>

The PSNI reported to the Performance Committee, in December 2015, on the progress made in the reform of healthcare and Members were afforded access to the detention facilities at Musgrave Street Police Station in Belfast for a visit. The work undertaken has been considerable and impressive. That work can be summarised as follows. The PSNI has been able to secure, at least for the period April 2015 and April 2017, the engagement of 60 Forensic Medical Officers which will ensure appropriate and timely medical assistance can be provided to detainees. Furthermore, the PSNI is working with DHSSPS to develop a new model of healthcare which will improve upon information sharing protocols and greater use of referrals to appropriate partners. The PSNI has also reviewed and revised all custody policies and procedures to ensure consistency across all custody suites. Refresher training is continuing for all custody officers.

The PSNI is participating in a healthcare working group comprising representatives from a range of stakeholders and healthcare professionals

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<sup>416</sup> Recommendation 8 of the Human Rights Annual Report 2014.

and has established a Custody Operational Group which will meet bi-monthly with, amongst others, the Policing Board's Custody Visitors and Appropriate Adults. Within that, the PSNI is working with police services in England to identify best practice in the delivery of healthcare in custody. Another positive development is the monthly analysis of trends and patterns in custody so that empirical evidence can be collated to better inform resources required and a sustainable approach to providing excellence in custody healthcare provision.

The Committee commends the PSNI for the work undertaken to date and will support the PSNI in its future endeavours. The Committee however is concerned that progress on securing appropriate support from healthcare partners is not proceeding as quickly as necessary. The Committee therefore encourages partners to pursue with the PSNI the implementation of the review without any delay. In the meantime, it is essential that Custody Officers are equipped with the training necessary to discharge their obligations.

#### **Recommendation 14**

**The PSNI should carry out a training needs analysis for all Custody Staff and ensure that all staff receive sufficient training on the identification of and appropriate response to: detainees presenting with physical or mental health issues and/or addictions; and on child protection issues. The PSNI should present its findings to the Performance Committee within 6 months of the publication of this Human Rights Annual Report.**

The Performance Committee understands that the Criminal Justice Inspection Northern Ireland is due to be publish a report on some of these issues and looks forward to considering any findings that relate to the PSNI.

## 11. POLICING WITH THE COMMUNITY & HUMAN RIGHTS AWARENESS

Police officers are required not only to comply with the Human Rights Act 1998 when carrying out their duties,<sup>417</sup> they must also aim (i) to secure the support of the local community; and (ii) act in co-operation with the local community.<sup>418</sup> Those functions complement each other. A human rights based approach to policing has been shown to enhance public confidence and integrate the police into the community. With the co-operation and knowledge of the community which it serves, the police are better equipped to protect the rights of all members of society, including the most vulnerable.

The Chief Constable agrees and takes every opportunity to speak publically to emphasise his commitment to the ethos. He has said for example “Policing with the community is based on an understanding that it is not just what we do that matters; but how we do it. For PSNI, keeping people safe is what we do; Policing with the Community is how we do it. I believe that human rights are a core element of Policing with the Community and act as an enabler for the delivery of effective policing and community confidence. Human rights are prioritised throughout the organisation. When considering the use of force, or when deliberating over budget cuts, our organisation will always first look to our obligation and commitment to uphold the fundamental rights of the individuals and communities which we serve”.<sup>419</sup>

Everything the PSNI does and everything monitored by the Policing Board will impact upon either positively or negatively on the relationship between the police and the public and either makes the ultimate aim of policing by consent with the active participation and support of the community a reality or unhelpful rhetoric. The same can be said for a human rights culture within the PSNI, which has been previously monitored by the Policing Board in

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<sup>417</sup> As per section 32 of the Police (NI) Act 2000, PSNI’s main duties are to protect life and property, preserve order, prevent the commission of offences and, where an offence has been committed, take measures to bring the offender to justice. In carrying out these duties, they must comply with the Human Rights Act 1998.

<sup>418</sup> Section 31(A)(1) of the Police (NI) Act 2000.

<sup>419</sup> Chief Constable’s speech from Children’s Law Centre and Save the Children NI event, November 2014.

successive Human Rights Annual Reports. However in practice in the Committee's assessment of the PSNI's compliance with the Human Rights Act 1998 across all areas the ethos of policing with the community and human rights awareness are the threads running through all of the Board's work. To use the words of previous reports, directed at PSNI, policing with the community and human rights awareness should not stand alone but run seamlessly through everything the PSNI does. In recognition of the potential negative impact of diminishing resources, Policing with the Community and Human Rights Awareness in the PSNI will receive closer scrutiny in the coming 12 months and will be considered and reported upon in each chapter of future Human Rights Annual Reports. That will permit any adverse impact to be monitored within the context of different strategic and operational scenarios.



## 12. PRIVACY, DATA PROTECTION & FREEDOM OF INFORMATION

The PSNI holds a vast amount of personal data on individuals. Some of that information will have been provided to the police by the individuals themselves, some will have been obtained from partner organisations, some will have been obtained from other information sources during the course of investigations and some will have been gathered as intelligence through the use of covert policing techniques. All police officers and staff must exercise a great deal of care when obtaining, recording, using and disclosing any information that relates to a person's private life, regardless of whether it is secret or more routinely available information. Confidentiality of information will not always be guaranteed however as it may be subjected to onward disclosure in the performance of police duty, in compliance with data protection, freedom of information or other legislation or in connection with investigations or legal proceedings. If any police officer or member of the civilian staff receives information which suggests there may be a threat to life, the matter must be referred to a line manager immediately who will then deal with the threat in accordance with established protocols.<sup>420</sup>

A failure to handle personal data correctly constitutes misconduct and, in the case of police *officers*, a breach of Article 3 of the Code of Ethics.<sup>421</sup> All police officers and members of the police civilian staff are subject to the Data Protection Act 1998 which creates a number of criminal offences for the mishandling of personal data. Furthermore, inappropriate handling of information may put an individual's life in danger contrary to Article 2 ECHR (the right to life). Misuse of information may also infringe Article 8 ECHR (the right to respect for private and family life, the home and correspondence). Mishandling of information also has the capacity to damage public confidence

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<sup>420</sup> As set out in *Threat to Life, PSNI Service Procedure 15/2012*.

<sup>421</sup> Article 3 of the Code of Ethics relates to privacy and confidentiality. Sub-Article 3.1 states, "Police officers shall gather, retain, use and disclose information or data in accordance with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights and shall comply with all relevant legislation and Police Service policy and procedure governing the gathering, retention, use and disclosure of information or data".

in the police. There is clearly therefore a number of important rights to be considered and balanced in respect of the handling of personal data.

PSNI's obligations, whether under the Data Protection Act 1998 or Article 8 ECHR, extend beyond the manner in which personal data is managed. For example, Article 8 ECHR will be engaged when police exercise powers such as stop and search, arrest, detention, surveillance, the taking and retaining of biometric materials and photographs and so on. Tactical decisions may engage the Article 8 rights, for example, of residents during outbreaks of public disorder in their locality. Article 8 is not however an absolute right; there may be a lawful interference with it provided that it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others and is proportionate. Any proposed interference with Article 8 or Article 5 must be capable of justification on grounds that the interference was in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society for one of the prescribed reasons.

### **Compliance with the Data Protection and Freedom of Information Acts**

The Performance Committee monitors PSNI compliance with the Data Protection Act 1998 and the Freedom of Information Act 2000. PSNI policy sets out the framework and contains guidance for officers and staff on data protection, freedom of information and records management.<sup>422</sup> The Data Protection Act 1998 provides individuals with an entitlement, subject to specified exemptions, to access personal information held about them by businesses and organisations in the private and public sectors. It also requires that personal information is fairly and lawfully processed, processed for specified and lawful purposes, adequate, relevant and not excessive,

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<sup>422</sup> *PSNI Data Protection Policy, PSNI Policy Directive 06/08; Freedom of Information, PSNI Service Procedure, 07/2013; and PSNI Records Management, PSNI Service Procedure 03/2012.*

accurate and up to date, not kept for longer than is necessary, processed in accordance with the rights of the data subject, secure, and not transferred to other countries without adequate protection.

All police officers and staff are required to undertake training in data protection, freedom of information, government protective markings and information security. The training is delivered by an e-learning module. Training should be refreshed every three years. The PSNI Data Protection Unit carried out an accuracy audit of key data protection systems and that function is currently under review in line with National Police Chiefs Council Guidance and advice from the Information Commissioner.

Where information comes to PSNI's attention that suggests a data protection breach, PSNI Discipline Branch will commence a preliminary enquiry, which may result in a criminal investigation. During 2012/2013 Discipline Branch opened 9 criminal investigation files in respect of police officer data protection breaches. In 2013/2014, 5 criminal investigation files were opened. In 2014/15, 16 files were opened.

### 13. CHILDREN AND YOUNG PEOPLE

Article 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) secures to everyone within its jurisdiction the rights and freedoms enshrined. That encompasses children who as human beings are entitled to the protections conferred by the ECHR despite the fact that the ECHR was not directed at protecting children *as a group*.<sup>423</sup> The ECHR rights were applied and made directly enforceable by the Human Rights Act 1998.<sup>424</sup> Other international treaties and instruments and domestic laws do confer protections for children *as a group* and that can create confusion as to the enforceability by children of their rights under the ECHR.<sup>425</sup> Furthermore, the European Court of Human Rights (ECtHR) considers it appropriate to interpret the ECHR as far as possible in harmony with other rules of international law including importantly the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC has therefore exerted a powerful influence on the developing law of our domestic courts.

The UNCRC, which was ratified by the UK Government on 16 December 1991, provides a framework for the implementation of key principles within the context of the rights of the child. The UNCRC is divided into four parts: the Preamble containing the principles underpinning the UNCRC; the substantive articles defining the rights of the child and the obligations on States; procedures for monitoring implementation; and, provisions for the entry into

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<sup>423</sup> The jurisprudence of the European Court of Human Rights has made clear that children are 'rights holders' under the ECHR despite the absence of any particular reference to them as a group.

<sup>424</sup> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights and it is unlawful for a public authority to act in a way which is incompatible with a Convention right: section 3(1) and 6(1) of the Human Rights Act 1998. The ECHR rights were not incorporated strictly into domestic law but create domestic rights in the same terms as those contained in the ECHR. Those rights are therefore domestic rights enforceable in domestic courts by domestic judges. Domestic courts must take account of the jurisprudence of the ECtHR, the opinions of the European Commission and decisions of the Committee of Ministers in determining any question that arises in connection with an ECHR right: section 2(1) of the 1998 Act. This does not create a regime of precedence in that those judgments, opinions and decisions are not binding in the strict sense but regard must be had to them.

<sup>425</sup> Prior to the implementation of the Human Rights Act 1998, the absence of a best interests of the child principle in the ECHR was a cause of concern for many but subsequent jurisprudence of the ECtHR assuaged many of those concerns: for example, *Johansen v Norway* (1996) 23 EHRR; *Kearns v France* Application No 35991/04 [2008] 2 FCR 10.

force of the UNCRC. Additionally, there are two optional protocols ratified by the UK Government in 2003.<sup>426</sup> The UNCRC and its optional protocols seek to balance a number of fundamental principles central to the lives of children. The rights contained within the UNCRC can be divided (albeit roughly and with some overlap) into guiding principles, survival and development rights, participation rights and protection rights.<sup>427</sup> Those most relevant to policing include: non-discrimination;<sup>428</sup> best interests of the child;<sup>429</sup> respect for views of the child;<sup>430</sup> access to information;<sup>431</sup> survival and development;<sup>432</sup> freedom of thought, expression, conscience and religion;<sup>433</sup> children with disabilities;<sup>434</sup> freedom of association;<sup>435</sup> privacy;<sup>436</sup> protection from all forms of violence;<sup>437</sup> protection from sexual and other forms of exploitation;<sup>438</sup> protection from abduction, sale and trafficking;<sup>439</sup> detention and punishment;<sup>440</sup> and, juvenile justice.<sup>441</sup> The UNCRC has not been incorporated by the UK Government into domestic law but as set out above that does not mean that it is unenforceable and of no practical effect.<sup>442</sup>

While the UNCRC is not technically part of domestic law the PSNI has adopted the UNCRC in the sense that it is written into all policy and should be a central factor of police decision-making. By incorporating the UNCRC within policy, which is thereafter the basis upon which police officers and police staff are trained, the PSNI have demonstrated an admirable commitment to placing the rights of children at the heart of the day to day application of operational

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<sup>426</sup> Sale of Children, Child Prostitution and Child Pornography and Involvement of Children in Armed Conflict.

<sup>427</sup> The subdivision has been adopted by UNICEF.

<sup>428</sup> Article 2 UNCRC.

<sup>429</sup> Article 3 UNCRC.

<sup>430</sup> Article 12 UNCRC.

<sup>431</sup> Article 17 UNCRC.

<sup>432</sup> Article 6 UNCRC.

<sup>433</sup> Articles 13 and 14 UNCRC.

<sup>434</sup> Article 23 UNCRC.

<sup>435</sup> Article 15 UNCRC.

<sup>436</sup> Article 16 UNCRC.

<sup>437</sup> Article 19 UNCRC.

<sup>438</sup> Articles 34 and 36.

<sup>439</sup> Article 35 UNCRC.

<sup>440</sup> Article 37 UNCRC.

<sup>441</sup> Article 40 UNCRC.

<sup>442</sup> There is no scope within the confines of this report for detail on the enforceability or practical use of the UNCRC but suffice to say the principles are relevant to and should be taken into account by the PSNI in developing policy and practice.

policing. It should be recognised that the PSNI can be placed in the difficult position of having to balance the special treatment children require as a result of their vulnerability with their capacity for autonomy and self-determination. The relationship between those two states and the measures taken to respond in any given situation will vary depending upon the age, understanding and development of the child and his or her particular needs. That is why having the UNCRC at the centre of police policy, training and practice is important and very effective: it sets out a framework for police decision-making which has practical benefits.

It can also be noted that under domestic legislation all persons and bodies exercising functions in relation to the youth justice system must “(a) have the best interests of children as a primary consideration; and 2(b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development”.<sup>443</sup>

The Policing Board, working closely with the PSNI and benefitting from the expert input from partners, has been focused on policing with children and young people for some years. For example, a dedicated human rights thematic review was published in January 2011 and an update on the thematic was published in February 2014. It has remained a key issue for the Policing Board throughout 2015. As referred to throughout this Human Rights Annual Report, the Performance Committee regularly considers specific training, policy and operational matters insofar as they affect children and young people such as: chapter 2 Training, chapter 3 Policy; chapter 5 Operations; and chapter 9 Victims. It is uncontroversial to recognise that children and young people will become future leaders (including future police officers) and also represent a group of people who come into contact with the

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<sup>443</sup> By s.53 of the Justice (NI) Act 2002 as amended by s.98 of the Justice Act (NI) 2015.

PSNI most frequently<sup>444</sup> so their relationship with the PSNI should not only influence current policing priorities it is fundamental to ensuring a peaceful and democratic society in the future. Police legitimacy and young people is considered further below.

That is particularly important given the recent observation that “Children consistently raise the issue of the negative treatment which they receive in society. A survey of 16 year olds highlighted the negative attitudes that children in NI face with 77% of respondents stating that the media portrays children mostly negatively... Children highlighted the impact of negative media representations on the treatment they receive, particularly from the police and paramilitaries”.<sup>445</sup>

While the PSNI undoubtedly has shown leadership in its approach the Committee considers that further work is required to ensure that children and young people are considered in a practical and effective way in the use of powers and in the planning of operations affecting children and young people. This is ongoing but the Committee has been very impressed by the willingness of the PSNI to collect and analyse statistics in respect of children and young people and to critically reflect on their decision-making. The efforts of the PSNI have also been recognised and are appreciated by non-governmental organisations. For example, in a submission to the UN Committee on the Rights of the Child it states “There are few structures in place for cooperation between Government and children’s sector organisations in NI. Government Departments and agencies have dedicated Children’s Champions but this mechanism has not delivered with the exception of the Police Service Northern Ireland (PSNI) which regularly meets with youth justice NGOs”.<sup>446</sup>

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<sup>444</sup> In research conducted in 2014 it was found that 80% of 14-16 year old children surveyed had some form of interaction with the PSNI: *The Dynamics of Police Legitimacy Among Young People*, L. Devaney, S.Pehrson, D. Bryan and D.Blalock, December 2014.

<sup>445</sup> Northern Ireland NGO Alternative Report: Submission to the United Nations Committee on the Rights of the Child Children’s Law Centre and Save the Children NI, June 2015.

<sup>446</sup> *Northern Ireland NGO Alternative Report: Submission to the United Nations Committee on the Rights of the Child* Children’s Law Centre and Save the Children NI, June 2015, which can be accessed: accessed at:

A range of statistical information which is provided to the Committee is broken down according to age profile, including persons against whom various types of force is used, use of stop and search powers; complaints to the Office of the Police Ombudsman; and, victims of crime. During 2014/2015, 9% (6,566) of victims of all types of crime recorded by the police were below the age of 18 years.<sup>447</sup> 66% of those victims who were under 18 years at the time the offence occurred were victims of violence against the person offences, 23% were victims of sexual offences, 10% were victims of theft offences including burglary and 1% were victims of robbery. Of all victims of sexual offences, 56% were under the age of 18. In respect of domestic abuse crimes recorded in 2014/15 there were 12,367 crimes for which the age of the victim was known. Of that total, 13% of victims were under 18 years old. 81% of those victims were victims of violence against the person offences, 25 % being victims of violence against the person with injury.

While the term 'policing with children and young people' often leads to discussion on how the police deal with children who are in *conflict* with the law, the Performance Committee is mindful that children are more likely to be a victim of a crime than an offender, and that child offenders have also often been victims of crime. That is also recognised by the PSNI. However, of the 7,756 persons who were stopped and searched or stopped and questioned during 2014/15 where the age was known 15% (1,142) were under the age of 18. The Committee accepts that broad numerical calculations do not reveal whether the use of powers are lawful, necessary or proportionate but can provide triggers for further consideration. The Committee therefore receives detailed breakdowns across all areas monitored according to age. In the dedicated thematic review of the use of powers to stop, search and question the Performance Committee also recognised, and made recommendations in respect of, the distress that can be experienced particularly by young children when their parents or guardians are stopped by the police.

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[http://www.childrenslawcentre.org.uk/images/NI\\_NGO\\_Alternative\\_Report\\_to\\_the\\_UN\\_Committee\\_on\\_the\\_Rights\\_of\\_the\\_Child\\_150615.pdf](http://www.childrenslawcentre.org.uk/images/NI_NGO_Alternative_Report_to_the_UN_Committee_on_the_Rights_of_the_Child_150615.pdf)

<sup>447</sup> *Trends in Police Recorded Crime in Northern Ireland 1998/99 to 2014/14*, Annual Bulletin published 6 August 2015, PSNI.



## **YOUTH ENGAGEMENT CLINICS**

Youth Engagement Clinics were initiated by the Department of Justice in 2012 in response to a recommendation of the *Youth Justice Review* and in conjunction with partner agencies as a means of tackling the causes of delay in youth cases and reducing re-offending by young people. The Clinics were piloted in A District (North and West Belfast), B District (East and South Belfast) and in part of D District (Carrickfergus and Newtownabbey).

Youth Engagement requires the PSNI, in conjunction with the PPS and Youth Justice Agency (YJA), to ensure that youth cases suitable for non-court diversionary disposal are identified and progressed as such at an initial stage rather than at the prosecution stage which seems to be happening in a large number of cases at present. The scheme involves young people, whose cases have been identified by the police and the PPS as being suitable for a diversionary disposal, attending a Youth Engagement Clinic whereby they will meet with a police Youth Diversion Officer and a YJA practitioner to discuss their options. Whilst a young person may be referred to a Clinic even if they have not admitted guilt, the diversionary disposal itself can only be delivered once the young person has admitted guilt. Diversionary disposals available following attendance at a Youth Engagement Clinic include an informed warning, restorative caution or a youth conference. If the case is to be contested in court, the case will be listed for an early hearing at the youth court. During 2014/15, of the 355 young people who attended a Clinic, 95% accepted a diversionary disposal, such as informed warnings or cautions. Provisional figures for the first six months of this year show around 540 children already engaged in this process. This is a clearly preferable path compared to court.

The aim of the Youth Engagement initiative is to divert young people who have committed low-level offences away from court and into a reparative process, with the option of support or intervention at an early stage. Youth Engagement Clinics were subject to consultation issued by the Department of

Justice in November 2013. The purpose of the consultation was to check that the Department had correctly analysed the equality impacts of the Youth Engagement approach. In responding to the consultation the Policing Board highlighted that monitoring mechanisms should be put in place to ensure that referrals to the Clinics and the manner in which they are operated was consistent across all police Districts. Further to the EQIA consultation, the Department of Justice indicated, in April 2014, that a decision had been taken to roll out the provision of Clinics across Northern Ireland. The PSNI has developed a training course for Response and Neighbourhood officers, which was delivered in each District prior to roll-out of the Clinics. Youth Diversion Officers were also trained.

To enable the Performance Committee to discharge its obligation to monitor the PSNI in the discharge of its functions, the Committee recommended that “PSNI should provide a report to the Performance Committee in September 2015 in which the operation of Youth Engagement Clinics is evaluated. That report should include detail on the number and nature of referrals made in each District. The report should also explain the monitoring mechanisms that are in place to ensure that practice is consistent across all police Districts. It should set out the measures that are in place to ensure that there are sufficient resources to ensure the Youth Engagement scheme is not affected by seasonal priorities”.<sup>448</sup> The PSNI accepted that recommendation. Due to commitments of the Performance Committee it was unable to receive an oral briefing in September 2015 but the PSNI was ready to deliver it. The briefing will be received in early 2016. The PSNI has however provided a draft written report, which is detailed, reflective and addresses the issues raised by the Committee. Recommendation 9 of the Human Rights Annual Report has therefore been implemented but the Committee will look forward to receiving a final report which will be reported upon in due course.

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<sup>448</sup> Recommendation 9 of the Human Rights Annual Report 2014.

## DISCLOSURE OF CRIMINAL RECORDS AND OTHER POLICE INFORMATION<sup>449</sup>

An issue which the Performance Committee considered in some detail during 2014 was the disclosure of criminal records and other police information on offending or alleged offending by a young person. ‘Vetting’ a person’s suitability for employment or volunteering is a well-established practice. It is compulsory if the position will involve working with children and vulnerable adults. Clearly, it is important that any relevant information which suggests a potential employee or volunteer may pose a threat to the well-being of any person is considered properly before that person is engaged.<sup>450</sup> Employers may obtain criminal record information on potential employees and volunteers through *AccessNI*.<sup>451</sup> There are 3 different types of vetting: basic, standard and enhanced.<sup>452</sup> The PSNI are involved in applications for enhanced disclosure only.<sup>453</sup>

In 2014, concern was expressed by some stakeholders that the disclosure of information relating to low level offending was damaging to young people’s development and might jeopardise their future employment prospects. The ECtHR has agreed and commented, in a recent judgment on disclosure, that “it is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close to a ‘killer blow’ to the hopes of a person who aspires to any post which falls within the scope disclosure

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<sup>449</sup> See further at page 85 above.

<sup>450</sup> As *per* Safeguarding Vulnerable Groups (NI) Order 2007.

<sup>451</sup> AccessNI is a Criminal History Disclosure Service within the Department of Justice in Northern Ireland. AccessNI commenced operations in April 2008 and operates under with Part V of the Police Act 1997.

<sup>452</sup> Basic - Criminal Conviction Certificate - All unspent criminal convictions held on the NI criminal history database and Police National Computer (PNC). Information about offences spent under the Rehabilitation of Offenders (NI) Order is not provided. Standard – Criminal Record Certificate - All convictions held on the NI criminal history database and all convictions, cautions, reprimands and warnings recorded on the PNC. Information about spent convictions is provided. Enhanced – Enhanced Criminal Record Certificate - A standard check plus any check of local police information that might be relevant to the post being considered and information from Independent Safeguarding Authority’s children and adults barred list and similar lists in Scotland.

<sup>453</sup> On 1 March 2016, however, standard disclosure certificates will move to the PSNI with the introduction of an amendment to the Justice Bill. There will also be a new role for an Independent Reviewer. The impact of the new arrangements will be considered in the coming 12 months.

requirements”.<sup>454</sup> An independent parliamentary inquiry into the operation and effectiveness of the youth court in England and Wales considered that very issue.<sup>455</sup> The inquiry recommended that children who committed non-serious and non-violent offences who had stopped offending should have their criminal record expunged when they reached 18 years.

In Northern Ireland, the Review of the Youth Justice System reported in 2011 and recommended that out of court diversionary disposals should not be subject to employer disclosure. The Justice Minister however did not accept that recommendation and opted instead for disclosure of diversionary disposals but only if the relevant offending was recent.<sup>456</sup> Thereafter, in April 2014, a filtering scheme was introduced in which certain old and minor convictions and other disposals, such as diversionary disposals, are filtered out of Standard and Enhanced certificates after a certain period of time has passed.

While they remain ‘live’, they may be disclosed where the matter is subject to a standard disclosure check (but not a basic check). That managed approach is likely to comply with the requirements of Article 8(1) as set out. The information however may be disclosed during an enhanced criminal record check even after the record has expired if the disclosure is considered by a Chief Officer Delegate (formerly undertaken by an Assistant Chief Constable) to be relevant and proportionate to the position applied for. Other police information may be disclosed as part of an enhanced check, including pending proceedings, unsuccessful prosecutions, intelligence and any other information that may present a relevant risk to a vulnerable group. The PSNI has briefed the Committee that such information will only be disclosed once PSNI has assessed the veracity of the information, its relevance and the proportionality of the disclosure.

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<sup>454</sup> *MM v UK* (Application no. 24029/07), judgment of 13 November 2012.

<sup>455</sup> *Independent Parliamentary Inquiry into the Operation and Effectiveness of the Youth Court*, chaired by Lord Carlile of Berriew CBE QC, June 2014.

<sup>456</sup> *A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland*, Sunita Mason (commissioned by the Department of Justice), 2011. The Justice Minister’s decision was reported upon in Youth Justice Review Implementation Plan, Department of Justice, January 2014.

The issue of disclosure by police under an enhanced criminal record check has been considered by the UK Supreme and the ECtHR. The UK Supreme Court considered a case in which a woman obtained a job as a playground assistant. In connection with her employment, the police were required to provide her with an enhanced criminal records certificate. The police disclosed to the school that she had been accused of neglecting her child and non-cooperation with social services, and her employment was terminated. She claimed that the police disclosure violated her right to respect for her private life under the Human Rights Act.<sup>457</sup> The Supreme Court held that, when determining whether to disclose non-criminal related information retained in police records in connection with an application to work with vulnerable persons, the police must give due weight to the applicant's right to respect for her private life. However, the facts narrated were true, the allegation was directly relevant to her employment and the school was entitled to be apprised of the information. Therefore, their Lordships observed that while the consequences for the appellant's private life are regrettable, disclosure could not in this case be said to be disproportionate to the public interest in protecting vulnerable people. In considering whether to disclose the Court held that the police must apply a two-stage analysis, so as to consider whether: (i) the information is reliable and relevant; and (ii) in light of the public interest and the likely impact on the applicant, it is proportionate to provide the information.<sup>458</sup>

The Court criticised the police's historic approach towards balancing the public interest in protecting vulnerable persons and respecting Article 8 rights as they applied a general presumption that in cases of conflict the public interest should generally prevail.<sup>459</sup> Article 8 however requires that neither consideration be afforded precedence over the other. Each interest should be given careful consideration in assessing the proportionality of the proposed

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<sup>457</sup> *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, on appeal from [2007] EWCA Civ168.

<sup>458</sup> *Ibid*, paragraphs 40 and 79.

<sup>459</sup> *Ibid*, paragraph 44.

disclosure.<sup>460</sup> The factors to be considered in assessing proportionality include: (i) the gravity of the relevant information; (ii) its reliability; (iii) its relevance; (iv) the existence of an opportunity to make representations; (v) the period that has elapsed since the relevant events; and (vi) the adverse effect of the disclosure.<sup>461</sup> In particular, if the information to be disclosed may be irrelevant, unreliable or out-of-date the applicant should be given the opportunity to make representations prior to the decision to disclose.<sup>462</sup>

The ECtHR also considered a case which concerned an applicant in Northern Ireland who argued that retention of caution data engaged her right to respect for her private life because it had affected her ability to secure employment in her chosen field. Although she accepted that she had disclosed the caution herself, she had done so because she was obliged to and she considered that it was simply not arguable that she could have simply concealed the fact of the caution.<sup>463</sup>

The ECtHR reiterated that both the storing of information relating to an individual's private life and the release of such information come within the scope of Article 8(1).<sup>464</sup> "Even public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. This is all the more true where the information concerns a person's distant past". The question therefore arose in this case in the context of data relating to a police caution stored in police records was data relating to private life and, if so, whether there had been an interference with the Article 8(1) right. The Court noted that the data in question constituted both 'personal data' and 'sensitive personal data' within the meaning of the Data Protection Act 1998. Personal data is a special category of data under the Council of Europe's Data Protection Convention." Although data contained in the criminal record are, in one sense, public information, their systematic storing in central

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<sup>460</sup> Paragraphs 45, 63 and 85.

<sup>461</sup> Paragraph 81. It can be noted that since 2015 the certificate is given to the applicant only.

<sup>462</sup> Paragraphs 46, 63 and 82. An applicant in Northern Ireland is already able to make representations.

<sup>463</sup> *MM v UK* Application no. 24029/07, judgment of 13 November 2012, which concerned the indefinite retention and disclosure of police caution data.

<sup>464</sup> Approving *S and Marper v UK*.

records means that they are available for disclosure long after the event when everyone other than the person concerned is likely to have forgotten about it, and all the more so where, as in the present case, the caution has occurred in private. Thus as the conviction or caution itself recedes into the past, it becomes a part of the person's private life which must be respected".<sup>465</sup>

The Court also commented that the fact that disclosure follows only upon a request by the data subject or with her consent is no answer to concerns regarding the compatibility of disclosure with Article 8 ECHR. Individuals have no real choice if an employer in their chosen profession insists, and is entitled to do so, on disclosure: as Lord Hope noted, consent to a request for criminal record data is conditional on the right to respect for private life being respected. The applicant's agreement to disclosure does not deprive her of the protection."<sup>466</sup> In this case the court found that the retention and disclosure of the caution constituted an interference with the Article 8 right. Whether the disclosure was justified under Article 8(2) stood to be judged according to whether it was lawful, pursued a legitimate aim and was necessary in a democratic society.

As to whether it was lawful, the Court emphasised the need for the retention and disclosure to have a basis in domestic law, which must be adequately accessible and foreseeable. Law is not adequately accessible and foreseeable if it is not "formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise".<sup>467</sup>

The Court went on to comment "The Court considers it essential, in the context of the recording and communication of criminal record data as in

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<sup>465</sup> Paragraph 188.

<sup>466</sup> Paragraph 189.

<sup>467</sup> Paragraph 193.

telephone tapping, secret surveillance and covert intelligence-gathering, to have clear, detailed rules governing the scope and application of measures; as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for their destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness”.<sup>468</sup> The ECtHR went on to observe and approve the UK Supreme Court’s finding that recognised the need for a right to review in respect of the lifelong notification requirements imposed pursuant to sex offenders’ legislation.<sup>469</sup> Lord Phillips had noted in that case that no evidence had been placed before the court that demonstrated that it was not possible to identify from among those convicted of serious offences, at any stage in their lives, some at least who posed no significant risk of reoffending. In light of the ensuing uncertainty, he considered that the imposition of notification requirements for life was not proportionate. The ECtHR found that similar considerations apply in the context of a system for retaining and disclosing criminal record information to prospective employers.

The ECtHR observed that the recording system in place in Northern Ireland covers not only convictions but includes non-conviction disposals such as cautions, warnings and reprimands. A significant amount of additional data recorded by police forces is also retained. It is clear from the available guidance that both the recording and, at least, the initial retention of all relevant data are intended to be automatic. It further appears from the policy documents provided that a general presumption in favour of retention applies, and that as regards data held in central records which have not been shown to be inaccurate, retention until the data subject has attained one hundred years of age is standard in all cases. There can therefore be no doubt that the scope and application of the system for retention and disclosure is extensive. The indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and

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<sup>468</sup> Paragraph 195.

<sup>469</sup> In *R (F) (a Child) v Secretary of State for Justice* [2010] UKSC 17.



setting out the rules governing, *inter alia*, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.

At the relevant time there was no statutory framework in place in Northern Ireland which governed the communication of such data by the police to prospective employers but noted that in respect of any possible future disclosure of the applicant's caution data, the Court observed that there is now a statutory framework in place for disclosure of criminal record information to prospective employers. Pursuant to the legislation now in place, caution data contained in central records, including where applicable information on spent cautions, must be disclosed in the context of a standard or enhanced criminal record check. No distinction is made based on the seriousness or the circumstances of the offence, the time which has elapsed since the offence was committed and whether the caution is spent. In short, there appears to be no scope for the exercise of any discretion in the disclosure exercise. Nor, as a consequence of the mandatory nature of the disclosure, is there any provision for the making of prior representations by the data subject to prevent the data being disclosed either generally or in a specific case. The applicable legislation does not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data held in central records to the employment sought, or of the extent to which the data subject may be perceived as continuing to pose a risk such that the disclosure of the data to the employer is justified.

The Court considered the new filtering arrangements in respect of disclosures made under the provisions of the 1997 Act but noted that as regards mandatory disclosure under section 113A, no distinction is made on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought. The cumulative effect of these shortcomings is that the Court is not satisfied that there were, and are, sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life have not been, and will not be, disclosed

in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly was regarded as being in accordance with the law.

In Northern Ireland, a Chief Officer Delegate is charged with exercising his or her professional judgement when determining what information to disclose. Exercising that judgement without written Guidance which sets out the factors to be considered and the weight to be given to them is very onerous on the officer. In 2015, the PSNI Assistant Chief Constable with responsibility for disclosure briefed the Performance Committee on the procedure adopted in reaching such a decision. It was clear to the Committee that the PSNI give careful thought to the disclosure and apply principles that would more likely be in harmony with Article 8 of the ECHR and Articles 3, 16, 19, 37 and 40 of the United Nations Convention on the Rights of the Child (UNCRC) however there remains a question whether the law is adequately accessible in accordance with the principles set out above.

Although the relevancy test has been tightened up by making it a statutory requirement that the senior authorising officer "reasonably believes the information to be relevant" before authorising its release, the Performance Committee suggested that the wording could go further to expressly require that any disclosure must be in pursuit of a legitimate aim (as set out in Article 8(2) ECHR), necessary and proportionate. The Performance Committee supports the introduction of a Code of Practice for police officers which will hopefully provide more detailed guidance for the senior officer required to make such judgement calls.<sup>470</sup> That Code and any related guidance should be accessible to the public.

## **POLICE LEGITIMACY AMONG YOUNG PEOPLE**

In December 2014, Queen's University Belfast published a report which suggested that young people's views on the PSNI were driven by feelings of

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<sup>470</sup> The Code of Practice was introduced in November 2015.

social inclusion and exclusion rather than traditional, sectarian loyalties.<sup>471</sup> Over 800 teenagers aged between 14 and 16 years from a range of geographical areas, economic, community and ethnic backgrounds were surveyed. Most young people strongly agreed (14%), agreed (38%), or neither agreed or disagreed (33%) that police do a good job as a whole, but a small minority disagreed (11%) or strongly disagreed (4%). Most respondents (80%) had previously had some form of interaction with the police. Most of these respondents reported that the encounters they had had were positive but negative experiences were also reported. Negative experiences occurred most frequently where the interaction involved the police asking the young person to 'move on' or in situations where the young person was in trouble, as opposed to interactions where, for example, the police were providing a talk at a school or youth club.

That report highlighted to the Performance Committee the importance of PSNI continuing to ensure that it creates opportunities for police officers to interact with young people in non-confrontational scenarios and in neutral environments. A recommendation to that effect was made by the Policing Board in 2011 in its children and young people human rights thematic review<sup>472</sup> and a recommendation was made by the Policing Board's Youth Advisory Panel in 2013 that consideration should be given as to how visits to schools and youth groups could incorporate TSG and Response officers.<sup>473</sup> The Performance Committee is pleased to report that the PSNI accepts as a priority the ongoing commitment to encourage police officers to use opportunities to interact positively with children and young people. For example, the PSNI's Citizenship and Safety Education (CASE) Programme was developed to establish links between the police and children within schools. Specially trained police officers go into schools to talk to pupils about

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<sup>471</sup> *The Dynamics of Police Legitimacy among Young People*, L. Devaney, S.Pehrson, D. Bryan and D.Blalock, December 2014. This research was carried out by academics from Queen's University Belfast and was funded by the Office of the First Minister and Deputy First Minister.

<sup>472</sup> Recommendation 29, Human Rights Thematic Review: Policing with Children and Young People, Northern Ireland Policing Board, January 2011.

<sup>473</sup> Recommendation 4 *Research of PSNI Officer's Perception of Young People in North Belfast*, Northern Ireland Policing Board, June 2013.

a wide range of issues such as fireworks, drugs, and alcohol and farm safety with the aim both of promoting the safety of young people, their families and communities and building positive relationships with them. Furthermore, twice a year, children and young people are invited to meet with student officers, which allow everyone to raise issues and voice concerns about their experiences. The PSNI has sought to increase the interaction between TSG and response officers by encouraging them to attend youth consultation events.

To better inform its ongoing strategy for policing with children and young people the PSNI conducted a review of children and young people's contact with police and produced a five year trend analysis.

## **CHILDREN AND YOUNG PEOPLE'S CONTACT WITH POLICE**

The trend analysis was conducted so that the PSNI might develop a more in-depth understanding of the nature and extent of their involvement with children. It was not limited to involvement in criminality. The analysis included the interrogation of the NICHE system<sup>474</sup> for all occurrences between police and a child aged between 10 and 17 years between 1 April 2009 and 31 December 2014. The arrest and custody data for the period March 2014 to February 2015 was analysed together with data from the Youth Diversion Register to assess the types of recommendations and disposals used in relation to young people.<sup>475</sup> The PSNI also undertook a review of Anti-Social Behaviour Orders (ASBOs). Lastly, the PSNI reviewed those occurrences when police initiated contact with children through CASE, youth consultation and community engagement. This information is additional to that provided routinely to the Committee.

In respect of contact with police recorded on NICHE as a suspect, arrested, referred for report or charged the analysis demonstrated that the number of children recorded decreased year on year. Between 2009/10 and 2013/14,

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<sup>474</sup> Niche is a computer based police records management system.

<sup>475</sup> That does not however include young people referred to a Youth Engagement Clinic.

there was a 31.5% reduction in the number of young people recorded on NICHE. During the five year period under analysis there were a total of 33,768 unique occurrences recorded. The number of unique occurrences has decreased year on year with a 24% reduction between 2009/10 and 2013/14. To types of occurrences that children were linked to was broken down and demonstrated that in the majority of crime types the number of occurrences had decreased with the exception of drugs related offences.

The total number of children recorded on NICHE in the relevant period is 19,107 with the majority of those being linked on only one occurrence. However, a third of those children were linked more than once. Two thirds of those children occurring more than once have occurred in more than one year. Over 75% of the children recorded on NICHE are male. The majority of children recorded on NICHE are between 14 and 16 years, which has remained consistent over the five year period. The analysis also revealed that a much higher than expected percentage of referrals to Youth Diversion Officers concerned 'looked after' children (children in care). In 2013/14 0.66% of children in Northern Ireland were looked after yet they accounted for 16.6% of referrals.

The PSNI also considered according to its own specially developed community prioritisation index tool, correlations between children's offending behaviour and community polarisation,<sup>476</sup> social stress and<sup>477</sup> disengagement.<sup>478</sup> There was a moderate correlation between crime and disorder and community polarisation. There was a strong correlation with social stress and disengagement. The *Northern Ireland Multiple Deprivation Measure 2010* (NIMDM) uses seven measures of deprivation. The PSNI's analysis according to the NIMDM showed that crime and disorder was strongly correlated with all seven measures. Of particular note is the strong correlation between education and environment in particular unauthorised

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<sup>476</sup> Community polarisation refers to a lack or absence of community cohesion where there is potential for community instability and/or tension with neighbouring areas.

<sup>477</sup> Social stress refers to deprivation in terms of enjoyment and income.

<sup>478</sup> Disengagement refers to disenfranchised communities who have few or no relations with the police and other social partners.

absence and the outdoor physical environment respectively. The analysis also showed that where there is a high rate of offending by adults the incidence of offending by children is also disproportionately high.

The PSNI analysed outcomes, *i.e.* recommendations and disposals, for children aged between 10 and 17 years between 1 March 2014 and 28 February 2015. During that period, 10% of all arrests by police were of children in that age bracket, which equates to 1.7% of the population of all children in that age bracket. A greater number of arrests occur in Urban Districts which is also linked to a higher percentage of crime and disorder linked to children in that age bracket. The most common reasons for arrest were violence against the person, theft and criminal damage. Approximately one fifth of all arrests for breach of bail conditions relate to children in that age bracket. 98% of all arrests result in detention and custody which equates with the rates of detention and custody for adults. 60% of all people arrested spend more than six hours in custody. The use of stop and search powers on children between 10 and 17 years has increased slightly between 2011/12 and 2012/13 compared to a decrease in the overall use of stop and search powers. In respect of the use of force, there was noted a decrease of 16% in the recorded uses of force involving a child in the age bracket in 2013/14. Figures available for 2014/15 and to date indicate that the downward trend is continuing.

An analysis of Youth Diversion Officers' recommendations demonstrates that for non-offence behaviour the most common recommendation was advice by the Investigating Officer. There has been an increase in 'other' recommendations such as referral to an external agency but a decrease in letters to a parent/guardian. For offence behaviour the most common recommendation is Prosecution/Court however there the trend shows a reduction with a correlating increase in recommendations for the use of discretion and youth conferencing. That trend has been seen across all

Districts save for B and F Districts<sup>479</sup> where the percentage of recommendations for Prosecution/Court showed a slight increase (of less than 5%).

The PSNI also analysed the decisions of the PPS in relation to offence behaviour. The percentage of 'no disposals' has increased from 2.7% in 2009/10 to 21.9% in 2013/14. In 60% of cases the decision of the PPS matched the recommendation of the Youth Diversion Officer. That varies however by recommendation type: on 95% of occasions when the YDO recommended 'no prosecution' the PPS agreed; on 73% of occasions when the YDO recommended 'informed warning' the PPS agreed; on 63% of occasions when the YDO recommended 'prosecution/court' the PPS agreed; and on 61% of occasions when the YDO recommended 'restorative caution' the PPS agreed. On approximately 20% of occasions when the YDO recommended 'prosecution/court' the PPS directed 'no prosecution'. In relation to anti-social behaviour orders (ASBOs) 69 ASBOs were granted between 2009/10 and 2013/14. 33% of all ASBOs issued relate to a child.

Finally, the PSNI analysed contact initiated by police outside of reports of criminality i.e. engagement with young people aimed at forging relationships. In the Citizenship and Education Programme (CASE) referenced above 273 (26%) schools received CASE between September 2013 and March 2015. Schools in the most vulnerable wards, according to the Multiple Deprivation Index are more likely to receive CASE but the PSNI concluded that the CASE delivery was not as well aligned to areas with a high rate of youth offending as intended. To analyse community engagement, the PSNI has been developing a community engagement tracker to capture engagement by officers with local communities. It has only recently been rolled out to District therefore the information is limited but early indications suggest that at least 25% of engagement activity is with schools and other youth based organisations.

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<sup>479</sup> Prior to 1 April 2015, B District was South and East Belfast and F District was Cookstown, Dungannon & South Tyrone, Fermanagh and Omagh. On 1 April 2015, the District boundaries changed.

The trend analysis provides an invaluable insight into contact between police and young people that will help the PSNI to better target resources to tackle offending but also to protect vulnerable children and engage positively with them. The PSNI is considering the results of the analysis and will provide further updates in 2016. The work that was involved is complicated and time consuming but extremely important. The Committee commends the PSNI on its efforts and will look forward to working with them to make the best use of the information.

One initiative which is aimed at engaging positively with young people and which will take account of the findings of the PSNI's analysis is the Youth Volunteer Academy (YVA), which commenced by way of three pilots between January 2015 and December 2015.<sup>480</sup> The YVA is an organised youth group financed and supported by the PSNI and the Northern Ireland Ambulance Service, which will meet once a week in local community and 'youth friendly' venues. The groups will be run by local youth workers supported by local police and ambulance officers and staff, all of whom. Young people attending will learn about a variety of police and ambulance service related topics, the criminal justice system other public services. The groups will focus on building skills for problem solving, team work and leadership. All young people will have the opportunity to complete a First Aid course and the possibility of affording access to qualifications is being considered. The PSNI consulted with 114 young people in the pilot areas. The overwhelming majority of those 114 young people welcomed the introduction of the YVA. The PSNI intends to assess the pilot after 12 months. The Committee looks forward to receiving that assessment.

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**ON BEHALF OF THE POLICING BOARD**

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<sup>480</sup> The feedback from such schemes in England and Wales has been extremely positive.



## APPENDIX 1

### RECOMMENDATIONS 2015

#### Recommendation 1

The PSNI should, without delay, recruit a Human Rights Training Advisor with sufficient expertise and experience to ensure that the highest level of human rights training is delivered within the PSNI. Progress in relation to that recruitment should be reported to the Performance Committee within 1 month of the publication of this Human Rights Annual Report.

#### Recommendation 2

The PSNI should complete its Working Together project on case file preparation and implement the recommendations and findings contained within the Criminal Justice Inspection Northern Ireland Report<sup>481</sup> within 9 months of the publication of this Human Rights Annual Report. Thereafter, the PSNI should provide to the Performance Committee a written briefing on the outcomes of the project and on the steps taken or to be taken. That written briefing should be provided within 12 months of the publication of this Human Rights Annual Report.

#### Recommendation 3

In the likely event that the PSNI will obtain the power to issue Domestic Violence Protection Notices and apply for Domestic Violence Protection Orders within the next 12 months it should provide to the Committee its draft written policy and guidance on the use of the powers and the proposed training plan for officers. In any event, training must be delivered prior to the introduction of the powers.

#### Recommendation 4

The PSNI, in co-operation with OPONI, should identify those complaints which relate specifically to the police response to reports of domestic abuse (within the more general complaint heading of domestic incident) and disaggregate those complaints in the presentation of its six-monthly reports.

#### Recommendation 5

The PSNI should include as part of the information provided for the Professional Standards Monitoring Framework trends and patterns identified in complaints and misconduct matters arising in respect of police civilian staff who are not designated officers within the remit of the Office of the Police Ombudsman.

#### Recommendation 6

The PSNI should forthwith amend its Youth Diversion Scheme to include clear guidance that a child must always be referred to the possibility of seeking legal advice when an Informed Warning is to be administered. Thereafter the PSNI should confirm in writing to the Performance Committee that the

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<sup>481</sup> *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland, CJINI, 26 November 2015.*

Scheme has been amended and that officers have received appropriate advice on the amendment.

#### Recommendation 7

The PSNI should in respect of its use of SUAs overtly, while awaiting dedicated policy guidance, adopt formally and issue to officers the Surveillance Camera Code of Practice (June 2013) and the Information Commissioner's Code of Practice (May 2015).

#### Recommendation 8

To enable the Performance Committee of the Policing Board to monitor effectively the use of SUAs the PSNI should provide to the Committee every 6 months a report on the nature and extent of Small Unmanned Aircraft use.

#### Recommendation 9

The PSNI should forthwith and for a period of 12 months disaggregate further the statistics on outcome rates for domestic motivated crime according to each disposal type including conviction in a form which can be easily accessed and understood. The PSNI should at the end of the 12 months period report to the Performance Committee with the empirical evidence distilled from the statistics.

#### Recommendation 10

The PSNI should continue to monitor the service of non-molestation orders and provide the Performance Committee, within 12 months of the publication of this Human Rights Annual Report, with an analysis of the length of time taken to serve orders, an analysis of the checks and balances put in place to oversee the service of orders and the extent to which applicants and their legal representatives are kept informed of the service of orders.

#### Recommendation 11

The PSNI should, within six months of the publication of this Human Rights Annual Report, report to the Performance Committee on progress made against the recommendations contained within the CJINI report, *An Inspection of the Quality and Timeliness of Police Files (Incorporating Disclosure) Submitted to the Public Prosecution Service for Northern Ireland*, 26 November 2015.

#### Recommendation 12

The PSNI should forthwith provide to the Performance Committee a report on the number of times and the reason(s) for a buzzer in a cell having been switched off between 1 January 2014 and 1 January 2016. The report should include reference to the relevant PSNI policy and the alternative arrangements that were or should be made to ensure the safety of the detainee.

#### Recommendation 13

The PSNI should provide to the Performance Committee forthwith a report detailing the period during which exercise facilities were or are unavailable for use by detainees. If exercise facilities are unavailable to detainees held for

extended periods, consideration should be given to moving that detainee to an alternative station.

#### Recommendation 14

The PSNI should carry out a training needs analysis for all Custody Staff and ensure that all staff receive sufficient training on the identification of and appropriate response to: detainees presenting with physical or mental health issues and/or addictions; and on child protection issues. The PSNI should present its findings to the Performance Committee within 6 months of the publication of this Human Rights Annual Report.

## APPENDIX 2

### IMPLEMENTATION OF RECOMMENDATIONS FROM 2014

#### Recommendation 1

PSNI should continue to participate in an annual District Training Presentation Day to the Police Learning Advisory Council (PLAC) District Training Sub Group. That presentation day should be attended by senior police personnel with responsibility for setting strategic priorities and for ensuring the delivery of effective training across the PSNI.

Status: Implemented

#### Recommendation 2

PSNI should publish all Policy Directives and Service Procedures that are currently in force on its website (subject to redaction of classified information). If any Policy Directive or Service Procedure is undergoing a review, this should be noted but the document should not be removed from the website until such time as it has been cancelled or an updated version issued. PSNI should provide the Performance Committee with a progress report in relation to the implementation of this recommendation within 3 months of the publication of this Human Rights Annual Report.

Status: Outstanding

#### Recommendation 3

PSNI should amend Service Procedure 4/2013 (Handling Public Complaints and the Role of the Police Ombudsman) to include a policy on counter-allegations. The Service Procedure should remind officers of their duty to report criminality and that if an allegation of criminality is raised for the first time as a counter-allegation it may be treated as a failure of duty. Prior to making any amendment to Service Procedure 4/2013 PSNI should first liaise with the Office of the Police Ombudsman.

Status: Implemented

#### Recommendation 4

The PSNI should within 3 months of the publication of this Human Rights Annual Report provide to the Performance Committee a report on progress made to implement the recommendations directed at the PSNI in the Report of the Independent Inquiry into Child Sexual Exploitation in Northern Ireland. That report should include the lessons learned by the PSNI from its own internal review of Operation Owl.

Status: Implemented

#### Recommendation 5

PSNI should provide the Performance Committee, within 6 months of the publication of this Human Rights Annual Report, with an evaluation of its internal review on the service of ex-parte non-molestation orders and

occupation orders. That evaluation should consider whether there has been any improvement in the length of time taken to serve orders, whether checks and balances put in place to oversee service of orders have been effective, and how the PSNI will ensure that victims are kept informed as to progress or delay in serving the orders.

Status: Implemented

#### Recommendation 6

PSNI should review its training, policy and practices for responding to disability hate crime with a particular focus on the outcome rate for disability hate crime. PSNI should report to the Performance Committee on the outcome of that review within 3 months of the publication of this Human Rights Annual Report.

Status: Implemented

#### Recommendation 7

PSNI should review its policy and practice in respect of arrests under section 41 of the Terrorism Act 2000 to ensure that police officers have not reverted to using section 41 Terrorism Act 2000 in cases in which it is anticipated that the suspect is more likely to be charged under other legislation. The review should be completed within 6 months of the publication of this Human Rights Annual Report. Within 1 month of the conclusion of the review PSNI should report to the Performance Committee on the findings of the review and if required the steps PSNI proposes to take.

Status: Implemented

#### Recommendation 8

PSNI should report to the Performance Committee within 6 months of the publication of this Human Rights Annual Report on the progress or otherwise of its review of healthcare within custody suites including the extent to which it has secured the necessary input of health care professionals.

Status: Implemented

#### Recommendation 9

PSNI should provide a report to the Performance Committee in September 2015 in which the operation of Youth Engagement Clinics is evaluated. That report should include detail on the number and nature of referrals made in each District. The report should also explain the monitoring mechanisms that are in place to ensure that practice is consistent across all police Districts. It should set out the measures that are in place to ensure that there are sufficient resources to ensure the Youth Engagement scheme is not affected by seasonal priorities.

Status: Implemented

