

# **HUMAN RIGHTS ANNUAL REPORT**

## **2021/22**

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

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# 1. FOREWORD

I am pleased to present the Northern Ireland Policing Board's (the Board's) 15<sup>th</sup> Human Rights Annual Report.

The implementation of human rights standards and principles are central to good policing and should be pivotal to everything that PSNI do. With the specialist advice of the Board's independent Human Rights Advisor, this Report highlights good policing practice and areas in which practice could be improved with specific recommendations. The Human Rights Annual Report 2021/22 contains eleven recommendations in areas such as; Policy; Biometric Retention, Social Media Use, Stop and Search, Covert Policing; and Treatment of Suspects.



The Board's Human Rights Annual Report provides an account of the performance of the PSNI in its compliance with the Human Rights Act 1998 and is a reflection of the work undertaken by the Policing Board, in holding PSNI to account. The Report is an open and public commentary on police performance and of the Policing Board's monitoring work carried out during the year. It helps maintain public confidence in the PSNI which is paramount in securing its legitimacy. This fundamental principle lies at the heart of the work which the Policing Board, assisted by the Human Rights Advisor, carries out on behalf of everyone in our community.

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 for PSNI. PSNI have now accepted over 250 recommendations made in the 14 previous Annual Reports relating to issues such as; domestic abuse, hate crime, covert policing, children and young people, public order, complaints and discipline, use of force, stop and search and most recently regarding the permanent introduction of spit and bite guards.

Over the years, while the PSNI has accepted many of the Board's recommendations, progress in implementing some recommendations has slowed. The Board has raised this with the senior team in PSNI and the Human Rights Advisor will focus on this over this coming year.

This Report has been drafted in line with the Board's Human Rights Monitoring Framework, which was reviewed and updated in 2021 and sets out the areas under scrutiny by the Advisor over the three-year period<sup>1</sup>.

A rights-based approach to policing protects the public and officers responsible for delivering the service. The Board's oversight regime has been recognised as good practice nationally and internationally. Having a positive human rights culture in our policing service and a willingness to be held to account to the community through the Policing Board is welcome.

In conclusion, I would like to thank our Human Rights Advisor, John Wadham, for his work in producing this Report.



**DEIRDRE TONER**

CHAIR | NORTHERN IRELAND POLICING BOARD

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<sup>1</sup> <https://www.nipolicingboard.org.uk/files/nipolicingboard/publications/human-rights-three-year-programme-of-work-2021-2024.pdf>

## 2. EXECUTIVE SUMMARY

The Board is under a duty to secure the maintenance of the police in Northern Ireland (s.3(1) of the Police (Northern Ireland) Act 2000) and to ensure that the police are efficient and effective (s.3(2)). In carrying out those functions, the Board has a further duty - to monitor the performance of the police in complying with the Human Rights Act 1998 (Police (Northern Ireland) Act, s.3(3) (b)(ii)). Section 57 (2)(a)(ii) of the 2000 Act also compels the Board to issue an annual report which should include the performance of the police in complying with the Human Rights Act 1998. This Human Rights Annual Report was prepared by the Policing Board's Human Rights Advisor, John Wadham and Board officials for the reporting period 2021/22.

John Wadham was appointed as the Board's Human Rights Advisor in June 2019 and took up the post on 24 July 2019. The Human Rights Advisor is appointed to provide the Board with independent advice and expertise on PSNI's compliance with the Human Rights Act 1998. The PSNI has provided access to all of its documents and materials and to observe any police procedures or actions the Advisor has requested. The Human Rights Advisor has Developed Vetted security clearance which enables him to delve more deeply into policing processes, particularly sensitive and covert processes that Members of the Board cannot review themselves. Through written reports, recommendations and in other ways, the Advisor reassures the full Board that all parts of the PSNI's operations are subject to the robust accountability required by the Police (Northern Ireland) Act 2000.

As to the level of scrutiny, the monitoring process keeps firmly in mind the key principle that emerges from human rights jurisprudence, namely that the protection of human rights must be 'practical and effective'. The monitoring process will therefore continue to examine the PSNI's compliance with its obligations under the Human Rights Act 1998 at all levels. This will include scrutiny of the mechanisms in place which are intended to ensure that policy (both at the drafting and the implementation stages), training (from preparation through to implementation, awareness and appraisal), investigations and operations (from planning through to implementation) are effective in ensuring human rights compliance. It will also attempt to assess the impact of human rights considerations on decision making on the ground, allowing an input from the communities that are policed by the PSNI.

In this year's Annual Report seven key areas of policing are examined for their Human Rights compliance with analysis and updates provided. These areas cover issues such as Training and PSNI Human Rights Awareness; Policy; Operations; Use of Force; National Security and Covert Policing; Vulnerable Victims of Crime; and lastly Treatment of Suspects. The Human Rights Advisor has made nine formal recommendations where it has been identified that PSNI action is necessary and two recommendations will be progressed by the Board. Provided below is each recommendation with an overview of its context.

Additionally, an overview of the implementation status of the outstanding recommendations from the previous two Annual Human Rights Reports and the Thematic Review of the Policing Response to Covid-19 is provided. Given that most restrictions around Covid-19 have been lifted, most of the recommendations have been closed. However, one of the recommendations is still outstanding. Most of the recommendations in the Human Rights Annual Report 2019/20 have been implemented and closed, however there are three recommendations that have been superseded by new recommendations in this year's report.<sup>2</sup>

An in-depth Human Rights Review of PSNI's Use of Force is being published, with a focus on PSNI's use of Conducted Energy Devices (CED).

## **REFORM OF THE HUMAN RIGHTS ACT 1998**

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As noted above, the Board is legislatively required to monitor how the PSNI meets its responsibilities under the 1998 Human Rights Act.

A review by Sir Peter Gross and an Independent Panel of experts reported on how the Act was working in December 2021 (The Independent Human Rights Act Review). The report was some 580 pages long and, overall, concluded that the Human Rights Act 1998 was working well and suggested a few, modest, changes. However, on the day that the Review was published, the then Secretary of State for Justice launched a consultation paper with much more radical proposals for reform (Human Rights Act Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998). Whilst there was considerable opposition by human rights organisations and academic experts, the Government then published the Bill of Rights Bill in June 2022.

Whilst many of the provisions in that Bill would have been significant it is important to note many of the principles of law that apply to policing would have remained in place. The Government remains, at least at present, committed to the European Convention on Human Rights and is subject to the jurisprudence of the European Court of Human Rights and therefore the substance of the current principles and jurisprudence from the ECtHR and UK courts will remain binding as a matter of law. The next Human Rights Annual Report will, however, outline any proposed changes that may affect policing and the PSNI.

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<sup>2</sup> For a status overview of all 2019/20 recommendations, see NIPB Human Rights Annual Report 2020/21, p. 167

# RECOMMENDATIONS

## RECOMMENDATION 1

**GO TO PAGE 18**

PSNI to report to the Policing Board within six months of the publication of this report with a plan of roll out of the internal human rights assessment form including training, guidance and publication.

Recommendations in previous Annual Reports have advised that the PSNI should develop and publish a plan and timetable to ensure that all of its policies are published and, where relevant, they set out the human rights issues involved in sufficient detail to allow a member of the public to be reassured that proper consideration has been given to them. The PSNI have suggested that the best way forward was to create a template/form along with some training material/guidance (i.e. Human Rights) for use by the authors. The human rights assessment form has been published as of September 27 2022.<sup>3</sup>

## RECOMMENDATION 2

**GO TO PAGE 19**

PSNI to obtain legal advice, which it should provide, in confidence, to the Policing Board's Human Rights Advisor so that it is able to re-write its Service Instruction relating to Biometric Retention, deletes the unlawfully retained material, and ensures that, as far as possible, it complies with the two ECtHR cases.

Previous Annual Reports have set out the current difficulties with biometric retention by the PSNI and the series of cases in the European Court of Human Rights (S and Marper and Gaughran). It is understood that provisions on a review mechanism regarding data retention will not be introduced in the Assembly until at least 2023 (the absence of a functioning Assembly contributing to this delay). Currently the PSNI are having to operate a system that is unlawful with all the risks of litigation that this involves, the only permanent solution is for the Assembly to change the law.

The PSNI should and can go further to ensure lawful retention and compliance with the ECHR. The current arrangements appear to be unlawful therefore and opens up the PSNI to expensive successful challenges and awards of compensation by, potentially, hundreds of people whose data continues to be held unlawfully.

<sup>3</sup> Human Rights Assessment Template <https://www.psni.police.uk/sites/default/files/2022-09/Human%20Rights%20Assessment%20Screening%20Checklist.pdf>



**RECOMMENDATION 3**

**GO TO PAGE 21**

In the event that the legacy snapshot is retained after the new Commission has been established, the PSNI should obtain independent legal advice about the lawfulness of retention, disclosure and remedies.

The Northern Ireland Troubles (Legacy and Reconciliation) Bill, published in May 2022, includes a provision that would give the Secretary of State the power to retain a data snapshot for purposes of investigations by the Independent Commission for Reconciliation and Information Recovery (ICRIR). The request to retain a similar “snapshot” was rejected in *Gaughran v UK*. The Court accepted that it was not for them to decide this point, but stressed that in the context of unlawful killings, the legitimate aim under which a snapshot would be taken was not proportional to the potential serious breaches to the rights and freedoms guaranteed under the Convention, such as the right to a private and family life.

**RECOMMENDATION 4**

**GO TO PAGE 22**

The PSNI should provide the Policing Board with a written update of its social media policy review by Spring 2023.

The last Human Rights Annual Report recommended that the PSNI publish its policy on its monitoring of social media for policing purposes and include in this its retention and access arrangements, and the Policing Board is currently waiting on an update to this.

**RECOMMENDATION 5**

**GO TO PAGE 29**

Given the history of the PSNI dealing with the difficult issue of policing all communities throughout Northern Ireland, the PSNI should engage an independent equality expert to assist with its analysis of the information and development of an action plan.

In the meantime, the PSNI should collect, collate, and compare the community background statistics of those arrested and charged with the figures of those subsequently prosecuted.

During the last year PSNI statistics have been published which raise some questions about fairness in policing of the two main communities of Northern Ireland. Despite these statistics being collected by PSNI for the last few years (and possible for longer), they were never published, and the Policing Board was apparently not aware of them.

It is important to investigate whether a disproportionate number of people from one religion, national or social origin, national minority or political group were subject to disproportionate action by police as this would be unlawful – unless that difference can be objectively justified, and this justification is a legitimate one. It is the responsibility of the police service to investigate this disproportionality and to justify it if the force is it to avoid the finding of a violation.

**RECOMMENDATION 6**

**GO TO PAGE 46**

The PSNI should report to the Policing Board on actions taken to ensure that applications for search warrants are now being made correctly.

This recommendation sits in the context of improperly made applications for search warrants. In February 2021 the PSNI initiated a lessons learned review by Senior Counsel regarding Operation Yurta and the Policing Board and Human Rights Advisor contributed to the terms of reference, which include issues of freedom of expression and the role of journalists.

**RECOMMENDATION 7**

**GO TO PAGE 56**

The scrutiny of Justice and Security Act authorisations remains important and the PSNI response regarding the enhanced consideration of the grounds to support authorisations is very welcome.

In addition and at a more technical level, the current procedures could be improved in the following ways:

- (i) The cover emails that are sent to the Northern Ireland Office with the applications themselves are designed to set out the context or explain a particular expression used in the application. This material should be contained within the application itself in order to enhance transparency. It is also important to ensure that the application contains all the information needed for the Secretary of State to make a decision;
- (ii) Page 1, Section 5 of the application appears to add to the statutory justifications for authorisation other factors not specifically in the legislation. This section should state the law clearly and should include relevant extracts from the Code of Practice;
- (iii) The legal advice section should set out in detail how the intelligence for any authorisation of the stop and search power is ‘necessary to prevent such danger’ (the danger indicated by the intelligence) [as set out in Sch. 3, 4A(1)(b)(i)].

Stop and search is an important tool for the PSNI and, if used properly, can reduce crime, keep people safe and identify offenders. With regards to the Justice and Security Act stop and search provision, this cannot apply without it being authorised by an Assistant Chief Constable of the PSNI, for a period of 48 hours, and only in relation to a defined geographical area. The geographical area and its duration must be no greater than is necessary. Despite these restrictions, the power has been authorised every two weeks and for every area of Northern Ireland at the time of writing, since this provision of the Act came into force in 2007. In viewing these authorisations, the Human Rights Advisor raised a number of concerns, set out in the Operations chapter 6.

**RECOMMENDATION 8**

**GO TO PAGE 78**

Considering Northern Ireland's high proportion of arrests under section 41 of the Terrorism Act rather than PACE and subsequent low charge rate compared to Police Services in Great Britain, Jonathan Hall KC recommends that PSNI not take account of public perception when deciding on the appropriate arrest power for terrorist related activity. The proposed PSNI stop and search working group is a positive development but Jonathan Hall's recommendation relating to the use of the Terrorism Act is also endorsed again by the Policing Board.

Jonathan Hall KC, the Independent Reviewer of Terrorism Legislation, highlighted in his Annual Report<sup>4</sup> that PSNI arrests people under TACT (Terrorism Act 2000) legislation more often than other police forces in UK, and consequently has a lower conviction rate. He has been informed by PSNI that a working group to consider the strategy regarding PACE and TACT arrest is being established.

**RECOMMENDATION 9**

**GO TO PAGE 79**

The regular reports by the NCA to the Policing Board should contain a section dealing with human rights compliance issues arising from its work in Northern Ireland, including any challenges and difficult issues.

The Policing Board was given responsibility for holding the National Crime Agency (NCA) to account when the NCA was established. The Board exercises its responsibilities by receiving regular written reports on the work of the NCA in Northern Ireland and inviting the Director General and other NCA officials to Board meetings for discussion and to address Members' questions, including holding a public session with the Chief Constable of the PSNI.

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1071570/IRTL\\_Report\\_Terrorism\\_Acts\\_in\\_2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1071570/IRTL_Report_Terrorism_Acts_in_2020) (independent.gov.uk)

**RECOMMENDATION 10**

**GO TO PAGE 87**

- (a) The PSNI should provide a detailed, but confidential, written report to the Policing Board's Human Rights Advisor on the operation of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 by the Spring of 2023 and, subsequently, a summary of that report to the Performance Committee in Spring 2023; and
- (b) The PSNI should invite the Human Rights Advisor to the briefing by the Investigatory Powers Commissioner's Office (IPCO) inspection team at the conclusion of their next inspection in 2023. The PSNI should consult IPCO in advance of this inspection, allowing the Human Rights Advisor to discuss this directly with IPCO if this is necessary.

The Government in Westminster brought forward a Bill which was enacted by Parliament – the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. Criminal Conduct Authorisations now allow MI5, police forces (including the PSNI), and a range of other public authorities to authorise their agents and informants (Covert Human Intelligence Sources or CHIS) to commit criminal offences, where it is necessary and give those people and those that made the authorisation complete immunity. In practice, the Act makes lawful an already widespread practice. The Human Rights Advisor attended a training seminar with the CCA (Criminal Conduct Authorisations) authorising officers and was able to ask questions and discuss the procedures and processes. In February 2022 he was shown the PSNI's internal draft guidance on CCAs and provided comments to try to strengthen the human rights principle that were set out. In September 2022 the Advisor was shown the final version.

**RECOMMENDATION 11**

**GO TO PAGE 99**

The Policing Board's Independent Custody Visitor Handbook para. 3.55, and the custody visitor report forms should be revised by the Board following consultation with the PSNI to make this confidentiality duty absolutely clear.

Concerns regarding confidentiality and the Independent Custody Visitors (ICVs) were discussed with PSNI by the Human Rights Advisor. The first issue concerns confidentiality and the importance of ICVs' private conversations with detained persons. The Human Rights Advisor requested that PSNI ensure, within custody suites, everyone complies with these arrangements (subject, of course, to any exceptional risks that particular detainees may pose). The second point regarding confidentiality is the PSNI's (relatively) new CCTV and recording system within custody suites, which cannot be switched off at this time, but which will pick up conversations held at the cell door. PSNI have advised that confidentiality is taken seriously, however the Human Rights Advisor recommends that the ICV Handbook is amended to reflect that.

## **3. TRAINING AND PSNI HUMAN RIGHTS AWARENESS**

Historically, training has been a principal component of human rights monitoring by the Policing Board and is recognised as one of the keys to instilling a human rights-based approach in new and existing officers. The Board has continued its engagement with the PSNI Human Rights Training Advisor in the Police College which has provided the Board with a level of oversight.

Their role within the College continues to provide quality assurance support and subject matter guidance to PSNI trainers working across the various specialisms under the Police College umbrella. The purpose of this support is to ensure that human rights processes and compliance outcomes are identified and delivered in an understandable way to assist learners to integrate human rights considerations within their decision-making and to contribute to organisational and operational performance. The College advisor ensures adherence to PSNI's human rights obligations by emphasising that the training environment emphasis should be in line with the following criteria:

- 1.** The specific legislative requirements under which the training topic is regulated (legal compliance);
- 2.** The guidance contained within any relevant Code of Practice attached to the use of force/command decisions, etc. (policy compliance);
- 3.** The fundamental rights of the individual (human rights compliance) and;
- 4.** That every use of policing powers are capable of justification, are objective, fair and non-discriminatory, and, that staff secure their object by the least intrusive methods possible (legal/ethical compliance)

Furthermore, the Advisor to the College makes sure that course documentation is in line with the required standards governed by national human rights law, the human rights treaties and mechanisms of the Council of Europe, in particular the European Convention on Human Rights (ECHR) and its protocols, the European Convention on the Prevention of Torture and Degrading Treatment, and other applicable international instruments.

During 2021/22 the College Training Advisor carried out several human rights audits in the following areas: Student Officer Development Programme and Probationary Officer Development Programme (SODP/PODP) and Custody Training. A review on the PODP Domestic Violence, Vulnerability and Mental Health modules was carried out in order to ensure that these lessons are up to date with recent legislative developments. Furthermore, the human rights content for trainers at the College was updated. Additionally, the Human Rights Advisor to the Policing Board visited a number of PSNI training sessions at Police college sites in 2021/22.

Details of the human rights findings are set out below.

## **STUDENT OFFICER AND PROBATIONARY OFFICER DEVELOPMENT PROGRAMME**

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The Student Officer Development Programme (SODP) prepares student officers for entry as police officers through a 21-week training programme. The programme now offers a pathway to a degree through the Probationary Officer Development Programme in conjunction with the University of Ulster. Learning within the SODP is focused upon the application of police powers in accordance with relevant legislation, codes of practice and multi-agency operating procedures. Student Officers are trained on subjects ranging from powers of arrest, entry and search; understanding of criminal offences; the management of those offences and incidents which cause harm and impact on the most vulnerable in society and the application of use of force including firearms and Personal Safety Programme (PSP). Consequently, human rights considerations are required to be understood and applied as a crucial aspect of officer decision-making throughout the SODP/PODP to prepare officers for the demands of operational policing.

The review took the form of a paper-based dip sample review of several SODP and PODP lesson plans, documents, marking and assessment schemes. Ongoing quality assurance support with police trainers involved in the delivery of lessons regularly occurs as a part of daily business. The following lesson plans and training documents were reviewed in order to provide a dip sample as part of this annual audit: Human Rights, Vulnerability and Mental Health as part of the PODP, Problem Solving Policing (PODP), Domestic Abuse, Supporting Victims and Witnesses, Sexual Offences, Powers of Entry and Search, Statement and Notebook Refresher, Stop and Search Art. 3-5 PACE<sup>5</sup> Video Content, Scene Management, Tier 1 Suspect Interview Training, Custody and Disposals, Theft, PSP in use of Baton and Handcuffs, Officer Safety and Wellbeing, Investigative Skills, Public Protection and Safety, Problem Solving Project and PSP Scenarios.

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5 Police and Criminal Evidence Order 1989

In relation to human rights specifically and in situations where human rights are engaged (which encompasses all aspects of operational policing), the student officers are taught using the P.L.A.N.E<sup>6</sup> methodology when making decisions and justifying their rationale for making decisions in situations where human rights are engaged and each of these are explored and examined in detail. The PSNI Code of Ethics is discussed and the reasons why it is considered central to everything PSNI do as an organisation, particularly in the context of NI and the importance of a human rights-centred and ethical approach to building trust with all levels of society.

Within the Probationary Officer programme a new session was developed looking specifically at Ethical Practice. This fully online session will be delivered to all probationary officers completing either the degree or graduate certificate. The session goes live to the first cohort in January 2023. Additionally, the College Advisor updated the training content according to legislation introduced in 2021/22. Stalking and Harassment training content was updated to include new legislative context under the Protection from Stalking Act (NI) 2022. The European Court of Human Rights (ECtHR) judgement in Kurt v Austria on June 15, 2021, had implications for authorities' immediate response to allegations of domestic violence and content was updated to reflect this.

The College Advisor recommends that new training staff be reminded of the Human Rights screening self-assessment tool introduced in 2019 for use in new course content/course commissioning. It is encouraging that training staff approached during the review had a good understanding of human rights obligations. In practical sessions, student officers demonstrated the ability to develop rapport during interview, demonstrated empathy in vulnerability encounters and mitigate use and justify proportionate of force.

## **CUSTODY TRAINING**

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It is essential that the administration, authorisation, and use of police custody complies with its human rights obligations in relation to the treatment of persons arrested, detained and departing from police custody. Use of police custody will necessarily involve interaction and engagement with the Human Rights Act 1998, primarily, in relation to compliance with Article 2 (Right to Life), Article 3 (Torture and Degrading Treatment), Article 5 (Right to Liberty and Security) and Article 8 (Right to Privacy). Accordingly, it is essential that custody training equips staff to recognise their human rights obligations in relation to the management and care of detained persons, and to appropriately assess and mitigate the risks posed by vulnerable persons detained in police custody. This is essential in ensuring the delivery of safer custody and detention.

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6 The acronym represents: Proportionality, Legality, Accountability, Necessity and Ethics.

The review of custody training took the form of a paper-based dip sample review of a number of custody training lesson plans, documents, marking and assessment schemes. The following lesson plans and training documents were reviewed in order to provide a dip sample review: Risks in the Suite, Preventing Deaths in Custody, PSP, Human Rights, Risk Assessment and Police National Computer (PNC), Rights, Care Plan, Pre-release Risk Assessment, Custody Visit Lesson Plan, Role of Defence Solicitor, Immigration Enforcement Northern Ireland, Post Incident Management, Northern Ireland Appropriate Adult Scheme, Introduction to Neurodiversity / Autism Custody Toolkit, Level 1 and 2 – Adverse Childhood Experiences (ACE's), Risks in relation to the Roles and Responsibilities of a Custody Sergeant.

Through discussions with all levels within Custody Training, the Advisor confirmed staffs' awareness and understanding of human rights obligations and compliance processes in place. The Advisor attended training practicals, scenarios and lectures. The reviewed courses contain job-specific content relating to risk assessment (pre-release/booking-in/handover of detainee/medical conditions/swallowing of substances/cell-checks) on vulnerability and sufficient controls to assist staff to mitigate the risk of self-harm, near-misses and/or death in custody.

## **HUMAN RIGHTS TRAINING FOR TRAINERS**

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Police trainers have the capacity to play an important role in promoting and maintaining a positive culture of human rights within PSNI. Furthermore, police trainers play a crucial role in ensuring that teaching on the delivery of core policing functions (e.g. use of force) successfully integrates human rights considerations as a core element of police decision-making in order to ensure successful criminal justice outcomes for PSNI. As such, police trainers assist learners in transforming the theory of human rights into the effective learned behaviour of police officers.

As part of ongoing quality assurance, the College Advisor updated the Human Rights training content for College Trainers (Train the Trainer) to focus upon Human Rights and Decision Making. Officers' understanding of human rights primarily comes into play within decision-making, and trainers are encouraged to discuss with students the following questions and apply them to a variety of scenarios and contexts:

- a)** What is the right trying to protect?
- b)** Why do we need to limit the right?
- c)** What is the legitimate purpose of this action, decision, or policy?
- d)** Can I show the connection between the limitation and the purpose? Will this achieve what I am trying to do?
- e)** Can I achieve the purpose in a less intrusive or restrictive way



## **HATE AND SIGNAL CRIME OFFICER ROLE TRAINING**

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The Human Rights Advisor to the Policing Board sampled the lesson plans for the role of Hate and Signal Crime Officer, which the Advisor welcomed. This is a two-day programme designed for officers performing an enhanced Hate Crime role regarding sectarian, disability, race, trans- and homophobic hate crimes. The training is delivered by community and advocacy groups. The programme includes the following content: Identifying barriers to reporting for the monitored strands of Hate Crime, Outlining misconceptions around migration, Outlining the PSNI objectives in dealing with Hate and Signal Incidents, Explaining how these objectives fit alongside Policing with the Community Values.

## **OBSERVATION OF TRAINING BY HUMAN RIGHTS ADVISOR TO THE POLICING BOARD**

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The Human Rights Advisor to the Policing Board undertook several visits to observe training including, sexual offences training for students officers and public order training. The Human Rights Advisor reports that the training was satisfactory and showed trainers' knowledge of human rights. The Advisor welcomed the thoughtful discussion about human rights by students and trainers that followed each lesson, however it was noted that there was an absence of the issue of consent and coercive behaviour in the SODP sexual offences lesson, and it has been advised that this is currently being incorporated into the Train the Trainer programme by the College.

## 4. POLICY

### POLICY IN THE PSNI

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PSNI policy governs the conduct of police officers and police staff and sets out the framework within which decisions may be made. PSNI policy is contained within five sets of documents which vary in the level of detail that they provide to officers.<sup>7</sup>

At the highest level is ‘Corporate Policy’ which lists PSNI’s services and high-level corporate decisions and secondly, ‘Service Policy’ is described as being “principles to govern the organisation”. Thirdly, there are over fifty ‘Service Instructions’, which are defined as ‘practical instructions for service delivery to inform decision making in line with Service Policy’. Fourthly, there are three ‘Service Procedures’ on sick pay, alcohol misuse and policing with children and young people. Finally, there is the detailed Conflict Management Model, which sets out guidance on the Use of Force by police officers.

Two recommendations have been made in previous Human Rights Annual Reports, Recommendation 2 of the 2019/20 stated:

*‘The PSNI should develop and publish a plan and timetable to ensure that all of its policies are published and, where relevant, they set out the human rights issues involved in sufficient detail to allow a member of the public to be reassured that proper consideration has been given to them. It is accepted that there may be some policies that contain sensitive issues and in those cases the Policing Board or its Human Rights Advisor should be consulted on what can or cannot be disclosed to the public.’*

And Recommendation 3 of the 2020/21 Report stated:

*‘Given the delay in taking action on recommendation 3 from the 2019/20 report (albeit the delay was partly during the Pandemic) the PSNI should prioritise this work and, where necessary, provide the resources that are needed to take action without unnecessary delay.’*

PSNI, in relation to these two recommendations suggested that the best way forward was to create a template along with some training material / guidance for use by the authors. PSNI have released a Human Rights Assessment Form for all new or updated Service Instructions and Policies as of September 27, 2022.<sup>8</sup>

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<sup>7</sup> [https://www.psnipolice.uk/advice\\_information/our-publications/corporate-policy/](https://www.psnipolice.uk/advice_information/our-publications/corporate-policy/)

<sup>8</sup> [Human Rights Assessment Template \(psnipolice.uk\)](https://www.psnipolice.uk/human-rights-assessment-template/)

## **RECOMMENDATION 1**

PSNI to report to the Policing Board within six months of the publication of this report with a plan of roll out of the internal human rights assessment form including training, guidance and publication.

## **BIOMETRIC RETENTION**

Previous Annual Reports have set out the current difficulties with biometric retention by the PSNI and the series of cases in the ECtHR. More recently, the Department of Justice proposed to make provision for a regulation-making power that would enable it to set out, in secondary legislation, a detailed review mechanism that would apply to all material falling within the 75/50/25 year's maximum retention periods. However, the Justice (Miscellaneous Provisions) Bill did not include any of these provisions despite this detailed work, and it is understood that provisions will not be introduced in the Assembly until at least 2023 (the absence of a functioning Assembly contributing to this delay).

Currently the PSNI are having to operate a system that is unlawful with all the risks of litigation that this involves, the only permanent solution is for the Assembly to change the law.

In March 2022 the PSNI proposed to revisit the original proposal and to continue the work of the Biometric Ratification Committee on the basis of a Biometric Retention Service Instruction and this is now being implemented. The approach taken in the Service Instruction does not attempt to remedy the faults identified by the two ECtHR judgments referred to above but is much more limited in its aims. Individuals who request the deletion of their PACE biometrics will have their case considered by the PSNI's Biometric Ratification Committee, however this Committee will only consider early deletion in very restricted circumstances:

- Where the fingerprints and DNA were taken unlawfully;
- Where it has subsequently been decided that the alleged crime that resulted in the samples being taken did not occur – the example given is an arrest after a death but where subsequently it was discovered that the person died of natural causes;
- Where a person has a proven alibi and were eliminated from the enquiry following the arrest;
- Where the 'disposal' following the arrest was incorrect;
- Where the arrest was unlawful;
- Where the samples were taken as a result of mistaken identity;
- Where a judge recommends deletion; or
- Where another person is convicted for the offence and there is no possibility of their being more than one offender.

Whilst these are all good reasons for deletion, they do not deal with the unlawfulness identified by the ECtHR.

The PSNI should and can go further to ensure lawful retention and compliance with the ECHR. PACE, which provides the lawful basis for the taking and retention of samples and data, does not require retention, Article 64 of the Order only gives a power (and not a duty). The provision states samples ‘may be retained.’<sup>9</sup> This gives the PSNI a discretion, a discretion which must be exercised lawfully, including only if compliant with the Human Rights Act 1998, taking into account judgments of the ECtHR.<sup>10</sup> The current arrangements therefore appear to be unlawful and could open up the PSNI to expensive successful challenges and awards of compensation by, potentially, hundreds of people whose data continues to be held unlawfully (and was outlawed by the cases of *S and Marper* and *Gaughran*).<sup>11</sup>

Although a more lawful system would be more difficult to operate the ECtHR in *Gaughran* has set out the principles that need to apply (as above).

## **RECOMMENDATION 2**

PSNI to obtain legal advice, which it should provide, in confidence, to the Policing Board’s Human Rights Advisor so that it is able to re-write its Service Instruction relating to Biometric Retention, deletes the unlawfully retained material, and ensures that, as far as possible, it complies with the two ECtHR cases.

### **Retention for Legacy Cases**

The Northern Ireland Troubles (Legacy and Reconciliation) Bill, published in May 2022, includes a provision that would give the Secretary of State the power to retain this snapshot for purposes of investigations by the Independent Commission for Reconciliation and Information Recovery (ICRIR) – which is to be established once the Bill is officially enacted - and argues:

‘108. The Department considers that, notwithstanding the observations of the Court in *Gaughran*, the exercise of the power created by clause 30 to provide for the retention of legacy biometrics is compatible with Article 8. In *Gaughran* the Court was not directly concerned with the proposal contemplated in this Bill, but rather a legislative regime in which biometrics were retained for the general purpose of prevention and detection of all crime. Further, the Court seemed to assume that Troubles-related “cold cases” were like any other – a comparison which the Department does not consider to be apt, and, importantly, *Gaughran* is a single chamber judgment and does not represent a clear and consistent line of decisions.

9 Police and Criminal Evidence (Northern Ireland) Order 1989, Article 64(b).

10 Human Rights Act, section 2(1)(a).

11 For more details of the current retention and deletion arrangements see Service Instruction SI0422: Interim Service Instruction Biometric Retention 2022, <https://www.psni.police.uk/sites/default/files/2022-09/Biometric%20Retention%20and%20Disposal%2016%20September%202022.pdf>

109. The Department is satisfied there is a strong evidential basis for the proposed retention of legacy biometrics under clause 30, as an exception to the post *Marper/Gaughran* general retention regime.

110. The historical nature of the deaths with which the ICRIR is concerned - deaths and serious injuries between 1968 and 1998 - create particular difficulties because the evidential trail has significantly narrowed. Advice received by the Northern Ireland Office from an experienced senior operational officer, charged with managing legacy investigations on behalf of the PSNI, is that forensic evidence is “the strongest single strand in legacy investigations”. Having analysed the specific challenges in relying on other strands of evidence in historic murder investigations, he concluded that “unlike the other strands, [forensic evidence] is capable of providing corroborative evidence which is not impacted by fear, memory fade or organisational capacity. This creates the potential for offenders to be identified and prosecuted successfully.” Even though investigations carried out by the ICRIR will not result in prosecutions in cases where immunity is granted, they are still the State’s way of carrying out Article 2 compliant investigations into deaths, and this justification therefore applies equally to ICRIR investigations.

111. The kinds of incidents with which the ICRIR is concerned, many of which are bombings and shootings, are likely to rely on DNA or fingerprint evidence. The PSNI advises that the concept of DNA was unexplored during the majority of the Troubles and it is therefore likely that a relative lack of care was taken by terrorists (and criminals generally) with saliva, blood and other cellular material. Forensic Science Northern Ireland have similarly advised that in relation to older cases, even those offenders who were otherwise forensically aware would not have been taking ‘DNA precautions’ to avoid detection, as that technology was unknown at the time. The Department understands that developments in DNA profiling techniques over the last 30 years mean that exhibits previously determined as providing no forensic opportunities become potentially useful. This combined advice means that DNA will be particularly useful in relation to the cases examined by the ICRIR because in such cases there is a greater chance than in present day cases that offenders will not have guarded against leaving DNA traces on exhibits collected at crime scenes.

112. The Department considers that this evidence base is sufficient to justify some kind of exception to the new retention regime, and that the proposed retention regime in clause 30 can be justified as proportionate...<sup>12</sup>

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12 Northern Ireland Troubles (Legacy and Reconciliation) Bill: European Convention on Human Rights Memorandum.

However, the request to retain a similar ‘snapshot’ was rejected in *Gaughran v UK*. The Court accepted that it was not for them to decide this point, but stressed that in the context of unlawful killings, the legitimate aim under which a snapshot would be taken was not proportional to the potential serious breaches to the rights and freedoms guaranteed under the Convention, such as the right to a private and family life (Article 8).<sup>13</sup>

### **RECOMMENDATION 3**

In the event that the legacy snapshot is retained after the new Independent Commission for Reconciliation and Information Recovery has been established, the PSNI should obtain independent legal advice about the lawfulness of retention, disclosure and remedies.

## **FACIAL RECOGNITION**

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Recommendation 6 in the Human Rights Annual Report 2020/21 stated that:

*‘The PSNI should consult the Policing Board and the wider public if facial recognition technology is to be recommended to assist in preventing crime or investigating offences and this should be subject to an equality impact assessment and human rights audit.’*

The PSNI responded:

‘The PSNI does not currently operate a Facial Identification System but fully recognises the value this could bring to investigations and public safety. We also recognise the need for robust governance around its use. To that end the Police Service is closely engaged with the Home Office Biometrics Programme who have plans to develop a National Facial Identification system. The Service will be invited to sit on the Home Office Biometrics Facial Matching Project Board, charged with delivering a National Facial Identification system and will contribute to its development.

However, this system will be based on using retrospective facial images, rather than the live facial images that have resulted in the recent legal challenge involving South Wales Police. As the national system develops the PSNI will fully consult with the Policing Board, Human Rights Commission and the public as the technology advances and will ensure equality assessments are completed. The Police Service’s desire is to ensure that there is a full transparency and governance around the use, sharing and retention of facial images.’

Therefore, the Human Rights Advisor considers this recommendation a work in progress and the issue will be considered in a future report.

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<sup>13</sup> Para. 93 and see *Osman v UK* (1998).

## **SOCIAL MEDIA DATA**

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Recommendation 5 in the last Human Rights Annual Report recommended that:

*'The PSNI publish its policy on its monitoring of social media for policing purposes and include in this its retention and access arrangements. If a new policy is to be developed this should be subject to public consultation and an equality impact assessment.'*

The PSNI responded:

'There is currently no Police Service policy on the use of social media to cover all organisational areas. This matter is under review at present as different teams use social media for different reasons. A refresh of the existing guidance is being considered for people working towards criminal justice objectives in line with the launch of a new C2 training package to enable all personnel to get online access. Other Police Service activity, such as community engagement work carried out by Neighbourhood Policing teams engagement by Senior Management teams, or media monitoring by Corporate Communications are not covered within this.'

### **RECOMMENDATION 4**

The PSNI should provide the Policing Board with a written update of its social media policy review by Spring 2023.

## 5. OPERATIONS

Over the last year the Board has considered the working arrangements put in place by the PSNI to ensure that its actual practice is human rights compliant and that any guidance on human rights is followed. This includes an examination of the extent to which officers seek and obtain specialist human rights advice where necessary.

The Chief Constable is responsible for making operational decisions and 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. The Human Rights Advisor conducted an after-the-event paper audit of some operations and examined other matters brought to his attention during the monitoring exercise.

### COMMUNITY BACKGROUND/RELIGION

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During the last year statistics have been published which raise some questions about fairness in policing of the two main communities of Northern Ireland.

In December 2021 the Detail obtained Freedom of Information responses from the PSNI which suggested that over the last five years twice as many people who self-identify as coming from the Catholic community as come from the Protestant community were arrested and twice as many Catholics were subsequently charged after arrest:

‘From the start of 2016 until the end of 2020, over 57,000 Catholics were recorded as being arrested with almost 27,000 charged. By contrast, nearly 31,000 Protestants were recorded as being arrested with under 15,000 charged.’<sup>14</sup>

It is understood that these figures are derived from a standard question asked by PSNI custody staff of all those arrested and taken into custody. It is also understood that a significant number of those asked declined to answer this question. There may be a number of different reasons for this disparity, including the possibility that people from the Catholic community are more willing to answer questions about their religious background.

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<sup>14</sup> Almost twice the number of Catholics as Protestants arrested and charged by PSNI, The Detail, 9 December 2021, <https://www.thedetail.tv/articles/almost-twice-the-number-of-catholics-than-protestants-arrested-and-charged-by-psni>



Interestingly in a recent report titled ‘Over representation in the Youth Justice System in Northern Ireland’ by the Department of Justice, similar differences were found but on further analysis, particularly taking into account socio-economic factors, a substantial part of the differences appeared to disappear.<sup>15</sup>

What is surprising is that, despite these statistics being collected by PSNI for the last few years (and possible for longer), they were never published and the Policing Board was apparently not aware of them. It is also surprising that the PSNI took no action to investigate the basis of these statistics and whether or not this prima facie disproportionality constituted unlawful discrimination. However, it is understood that the PSNI’s Police Powers Development Group in March 2022 was asked to investigate this issue.

This issue was further noted when the PSNI undertook an Equality Impact Assessment in relation to the introduction of Spit and Bite Guards in May 2021. At the time PSNI’s EQIA stated that 84 individuals had been subjected to a Spit and Bite Guard up to 31 December 2020. The PSNI found that in respect of Religion:

‘On the basis of the available data and the extensive engagement conducted, it has been concluded that differential / adverse impacts on people of different religions are unlikely to arise from the introduction of Spit and Bite Guards.

‘The religious breakdown recorded on Niche for the 84 individuals on whom a Spit and Bite Guard was deployed between 16 March 2020 and 31 December 2020 is shown below:

Religion	No of applications
<b>Roman Catholic</b>	40 or 48%
<b>Protestant</b>	17 or 20%
<b>None</b>	13 or 16%
<b>Refused/ Unknown</b>	11 or 16%
<b>Other Christian</b>	2 or 3%
<b>Buddhist</b>	1 or 3% <sup>16</sup>

15 Department of Justice, Over-Representation in the Youth Justice System in Northern Ireland (2022) [https://www.justice-ni.gov.uk/sites/default/files/publications/justice/over-rep%20in%20yjs%20main%20report\\_4.pdf](https://www.justice-ni.gov.uk/sites/default/files/publications/justice/over-rep%20in%20yjs%20main%20report_4.pdf)

16 The Use of Spit and Bite Guards by the Police Service of Northern Ireland Equality Impact Assessment 2021, <https://www.psnipolice.uk/sites/default/files/2022-09/Spit%20and%20Bite%20Guards%20Equality%20Impact%20Assessment.pdf>

A similar disproportionality was revealed by PSNI in relation to the special stop and search power under the Justice and Security Act (an anti-terrorism power) used in relation to searching for ‘munitions and wireless apparatus’:

‘The estimated religious composition of those persons stopped and searched/questioned under JSA powers between August 2020 and July 2021 across Northern Ireland was as follows:

- 45% Catholic
- 24% Protestant
- 4% Other/None
- 28% Missing<sup>17</sup>

As is well known, the issue of discrimination on the grounds of religion has been an important one in Northern Ireland for many years and the positive duty on institutions set out in Section 75 of the Northern Ireland Act 1998 is very important provision as a result. The Equality Commission’s Guidance on section 75 states:

‘Public authorities need to consider equality in all aspects of their organisation. This includes how they plan and deliver a service, to policies on employing people, enforcing the law, buying services, approving budgets and regulating others.’<sup>18</sup>

‘If you are a public authority you are required to:

- Monitor any adverse impacts of policies adopted and publish this information as per equality scheme commitments.’<sup>19</sup>

As the PSNI itself said in relation to Spit and Bite Guards:

‘In discharging its Section 75 responsibilities, PSNI must assess how the impact of deploying Spit and Bite Guards as a tactical option can or might be reduced against any of the protected Section 75 groups. This assessment includes how an alternative policy might lessen any impact and serve to promote equality of opportunity and good relations.’<sup>20</sup>

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17 Modelling 2011 Census Small Area Religious Composition onto Justice and Security Act Stop and Search postcode data from August 2020 to July 2021, PSNI, <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/stop-and-search-statistics/documents/religious-composition-jsa-aug20-jul21.pdf>

18 Emphasis added, <https://www.equalityni.org/S75duties>

19 Section 75 Using Evidence in Policy Making, NI Equality Commission, <https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Public%20Authorities/S75DataSignpostingGuide.pdf>

20 The Use of Spit and Bite Guards by the Police Service of Northern Ireland Equality Impact Assessment 2021.

In addition, section 76 of the Northern Act specifically states:

‘Discrimination by public authorities:

76 (1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion...

(7) The following are public authorities for the purposes of this section—

(e) the Police Service of Northern Ireland, the Police Service of Northern Ireland Reserve and the Police Ombudsman for Northern Ireland.’

The fact that the statistics indicate some kind of disproportionality does not necessarily mean that PSNI or its officers are involved in any intentional discrimination (which is obviously unlawful), but rather it might suggest unconscious unlawful indirect discrimination. The Equality Commission defines indirect discrimination as follows:

‘There are three definitions of indirect discrimination:

- 1) A provision, criterion or practice is applied or would apply equally in a situation which puts certain people at a disadvantage and which cannot be shown to be a proportionate means of achieving a legitimate aim;
- 2) A requirement or condition is applied or would apply equally in a situation: where a considerably smaller proportion of certain people can comply with it; which is not justifiable; and which is to the detriment of the individual because they cannot comply with it;
- 3) It covers not only individuals who are put at an actual disadvantage by a provision, criterion or practice but also individuals who would be put at such a disadvantage. This will therefore cover individuals who are deterred from trying to access a service because of a provision, criterion or practice.

Like direct discrimination, indirect discrimination can be unlawful even if it is not intentional. For any comparisons to take place under indirect discrimination, the circumstances in the case should be the same or not materially different.<sup>21</sup>

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21 Emphasis added, <https://www.equalityni.org/Employers-Service-Providers/What-is-discrimination>

## **The European Convention on Human Rights, Article 14: Indirect Discrimination**

Article 14 of the ECHR also prohibits discrimination in relation to the exercise of all the other rights of the Convention:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’<sup>22</sup>

The following Articles are particularly relevant to the issues raised above: Article 3 is engaged when the use of force is employed; Article 5 is engaged by arrests and detentions; Article 6 is engaged by charging a person with a criminal offence; and Article 8 is engaged by stop and search.

Evidence that any group of people (on the basis of their sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status) is subjected to interference with their other rights more than equivalent others, is unlawful, unless there is an evidence-based, objective and reasonable justification for this.<sup>23</sup> It is unlawful regardless of the absence of intentional discrimination. Unlawful discrimination under Article 14 does not require any other right to have been violated, only that the other right has been engaged.

Therefore, if the evidence is that a disproportionate number of people from one religion, national or social origin, national minority political group were subject to disproportionate action by a police service this would be unlawful – unless that difference can be objectively justified, and this justification is a legitimate one. It is the responsibility of the police service to investigate this disproportionality and to justify it, if the service is it to avoid the finding of a violation. In the leading case of *DH v Czech Republic*, the Grand Chamber of the ECtHR set out the following principles in relation to Article 14<sup>24</sup>:

‘175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.

177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment it is for the Government to show that it was justified.

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22 Emphasis added.

23 *DH and Others v Czech Republic*.

24 References to other cases in this quote have been omitted for simplicity.

180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory. However, in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation, the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in *Hoogendijk* the Court stated: “[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”...

189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (*ibid.*, § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof...

196. The Court reiterates that a difference in treatment is discriminatory if “it has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised.’

These principles set out by the Court clearly demonstrate that the onus is on the PSNI to provide an objective justification for any difference in the use of police powers irrespective of the less than perfect nature of the statistics. To fail to do so creates a prima facie violation of the Convention (which, of course may also be unlawful under domestic law).<sup>25</sup>

It is worth noting that in her most recent report of 2020/21, the Independent Reviewer of the Justice and Security Act also makes this recommendation:

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25 Section 75 and 76 of the Northern Ireland Act 1998 for instance.

'I have also commented at length on the long running issue of community monitoring, and the requirement to gather community monitoring data for people searched under the JSA. I urge the PSNI to implement a method for gathering this data without any further delay and whilst resolving other concerns around legislation. I also have recommended that they consult the Equality Commission on this issue and review their procedures and practices in relation to targeting, assessing, reporting and responding to community impact, particularly in communities where stop and search activities are concentrated.'<sup>26</sup>

### **RECOMMENDATION 5**

Given the history of the PSNI dealing with the difficult issue of policing all communities throughout Northern Ireland, the PSNI should engage an independent equality expert to assist with its analysis of the information and development of an action plan.

In the meantime, the PSNI should collect, collate, and compare the community background statistics of those arrested and charged with the figures of those subsequently prosecuted.

## **LEGACY**

Legacy Investigations Branch's (LIB) role was primarily to investigate homicide and security forces related deaths arising from the Northern Ireland 'Troubles' between 1969 and 2004. LIB were also responsible for unsolved 'non-troubles' related deaths between 1969 and 2004. In December 2014, the Historical Enquiries Team (HET) closed, and their caseload was passed to the LIB.

### **Caseload and Sequencing**

The current caseload of LIB extends to 1117 incidents of which 15 are under active investigation at this time. A further 13 cases are currently in the court system and 5 cases have been sent to the Public Prosecution Service (PPS) and are awaiting a prosecutorial direction.

The LIB has a 'Case Sequencing Model'<sup>27</sup> which the PSNI believes is in line with its duties as set out in section 32 of the Police (Northern Ireland) Act 2000 and Article 2 of the ECHR.

26 Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007, Fourteenth Report 1st August 2020 – 31st July 2021, para. 2.8

27 PSNI Legacy Investigation Branch, Case Sequencing Model Version 3 – January 2018 available at <https://www.psnipolice.uk/globalassets/inside-the-psni/our-departments/legacy-investigation-branch/documents/case-sequencing-model-updated-19012018-v03.pdf>

PSNI argues that the highest priority for investigation is those cases which involve ‘individuals that are considered by the police service to pose a potential threat to citizen’s safety today’. The other priority categories relate to ‘Forensic Potential’; ‘Criminal Justice Status’; and ‘Case Progression’.

The Case Sequencing Model (CSM) has recently been reprioritised to take account of the PSNI’s legal obligations in respect of legacy investigations as clarified in the December 2021 UK Supreme Court judgement in *McQuillan, McGuigan, McKenna*. LIB will use the findings of the Supreme Court as an enhanced criteria by which to reassess and re-prioritise the Case Sequencing Model with those cases benefitting from a definite legal obligation, achieving a higher priority on the Model (see below).

In addition, a further prioritisation will take place in accordance with the second limb of the ‘genuine connection’ test, as clarified in the judgement. LIB will examine cases that occurred between October 1988 and October 2000 (the introduction of the HRA) to assess whether the majority of the investigation took place or ought to have taken place after the commencement of the Human Rights Act. The criteria to be applied to this assessment is still under consideration and a framework is being developed to review those cases within this period and prioritise them accordingly within the CSM.

Some 491 cases are post 2nd October 1988, 408 of these cases will potentially be subject to a further ‘genuine connection’ assessment and 626 cases are pre-2nd October 1988.

In June and July 2021 LIB conducted its own engagement feedback surveys with families and advocacy groups who have engaged with LIB as part of ongoing reviews and investigations. The purpose of the survey was to identify areas for improvement to the service LIB provides.

All of the families who responded strongly agreed or agreed that LIB treated them with dignity and respect. The majority of the families who responded strongly agreed or agreed:

1. They had a better understanding of the role and remit of LIB;
2. LIB listened to what they had to say; and
3. LIB were approachable and professional.

Two thirds of families who responded indicated they were satisfied with how LIB dealt with their case or enquiry. Some families stated LIB were respectful and sympathetic to their case and had sensitivity in dealing with families’ frustrations.

All advocacy groups who responded strongly agreed or agreed that overall LIB were approachable and professional. Two thirds agreed that LIB dealt with cases in an open and transparent way and that personnel were sufficiently trained to deal with legacy cases. All strongly agreed or agreed that LIB dealt with their enquiries/requests in a timely and professional manner. Additionally, they agreed or strongly agreed that LIB valued them and their roles as an advocate. One advocacy group said that LIB officers treat people with genuine empathy and try to be as co-operative as possible in difficult circumstances. A number of judicial reviews which were pending the outcome of the Supreme Court case were being listed for hearing in the summer of 2022.

### **Litigation and Inquests**

PSNI's Legacy Support Unit (LSU) is based primarily at Seapark, with a small number of staff working at PSNI Headquarters in Brooklyn. The Unit is comprised solely of police staff and is lawyer-led. Legacy Support has a multidisciplinary workforce with a wealth of experience and expertise with many of the staff are highly qualified academics and professionals.

The legacy legal work conducted by LSU is varied and includes legacy inquests arising from the Lady Chief Justice's five-year legacy inquest plan, of which there are 40 inquests to complete. The work also involves legacy litigation, arising from the legacy inquests or matters peripherally associated to the inquests, there are approximately 200 legacy civil actions. LSU also have carriage of 30 judicial reviews. The unit also has a team of staff that service requests for information from the Victim's Pension Scheme (VPS), which is fast moving and high-volume work. Further to this, LSU has carriage of all contemporary core sensitive inquests.

PSNI Sensitive Litigation Team (SLT) deals with more contemporary sensitive civil litigation cases alongside the cohort of approximately 200 legacy civil actions handled by LSU. Currently, SLT has a total of 798 Pre-Action Protocol Letters/Letters of Claim. Civil proceedings have been issued in 345 of these to date. Many of these cases arise from some of the worst atrocities of the Troubles era and involve the research and disclosure of extensive materials. As with LSU, SLT has a highly qualified and experienced staff which is split between PSNI HQ in Brooklyn and Seapark.

In general terms, the work ongoing is voluminous in terms of the numbers of cases but also in respect of disclosure of materials into these different legal processes.



In July 2021 the UK Government decided to propose a new policy, which would involve creating a body to assist families ‘to seek and receive information about Troubles-related deaths and injuries’, to establish ‘a major oral history initiative’, and to introduce ‘a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to the divisive cycle of criminal investigations and prosecutions.’<sup>28</sup> There appears to have been universal opposition to this proposal from within Northern Ireland and many families of those who died during the Troubles have expressed their real concerns. From a purely policing perspective, it creates more uncertainty and instability for those within LIB, Jon Boutcher’s external investigation team and the Police Ombudsman who are trying to continue with a considerable number of very difficult and controversial investigations.

In May 2022 the Government published the Northern Ireland Troubles (Legacy and Reconciliation) Bill which will introduce a conditional immunity scheme. Those who cooperate with the proposed Independent Commission for Reconciliation and Information Recovery will receive immunity from prosecution for offences connected with Troubles-related deaths and serious injuries. This measure will seek to end any further civil actions, prosecutions and inquests relating to the Troubles. Further analysis of this provision and its consideration by the Westminster Parliament will be considered in the next Human Rights Annual Report.

### **Current Litigation Issues for the PSNI and the Investigatory Duty of Article 2**

The Supreme Court gave judgment in the *McQuillan and others* case in December 2021.<sup>29</sup> These cases dealt with by the Court had been considered in the lower courts and then in the Court of Appeal in Northern Ireland.<sup>30</sup> The cases were combined because of their similar and overlapping issues. The Supreme Court was made up of seven (rather than five judges) and the judgment of one hundred pages was unanimous. This is therefore a definitive judgment from the UK courts on the subjects dealt with. However, the cases are such that the individuals concerned are likely now to try the ECtHR – however cases in Strasbourg often take five years or more.

This judgment has been given without taking any account of the proposed legislation from the Secretary of State for Northern Ireland designed to impose complete immunity in these kinds of legacy cases. Also on the horizon are the proposed changes to the Human Rights Act 1998 proposed by the Secretary of State for Justice which are likely to limit the role of the ECtHR jurisprudence in UK courts and strengthen the position of Parliament and Government in human rights cases.

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28 Addressing the Legacy of Northern Ireland’s past, Command Paper 498, July 2021

29 In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) No 1, 15 December 2021.

30 For a more detailed analysis see Sealing the Past: *McQuillan and the Future of Legacy Litigation*, European Human Rights Law Review, Issue 4, 2022.

## **McQuillan**

Margaret McQuillan's case relates to the shooting of her sister Jean Smith in 1972. This case concerns the Article 2 (ECHR) requirement for a prompt, independent, and effective investigation into her death. Independence as defined by ECtHR requires hierarchical and institutional independence of the investigators from those being investigated in addition to their day to day 'practical independence'.

The Court confirmed the position of the lower courts and the ECtHR that PSNI **'did not lack hierarchical and institutional independence from the military and the RUC.'**<sup>31</sup>

On this basis the PSNI could investigate the death of Jean Smith and comply with Article 2. However, the Chief Constable had not demonstrated to the family in this particular case that he had put in place procedures to ensure **'practical independence'**.<sup>32</sup> The PSNI therefore lost this part of the case and in any subsequent investigations PSNI will have to set out the procedures guaranteeing practical independence to the family before the investigation begins. However, the Court accepted that the PSNI could meet this requirement subject to practical independent arrangements being in place (for instance no ex-RUC officers that might have been involved in the original events or a transfer to another investigation team – for instance, those being carried out by Jon Boutcher).

## **Hooded Men**

This case concerned the serious ill-treatment by the RUC in August 1971 (the five techniques – including hooding) of a number of men that were subject to internment. The case started in the ECtHR many years ago – Ireland v UK – which found a violation of Article 3 (and which now would be considered torture<sup>33</sup>). This part of the case was a challenge to the decision by PSNI in 2014 not to investigate those responsible for the ill-treatment (and claiming a violation under Articles 3 because there had been no prompt, independent, and effective investigation). The investigation, which was originally referred to Jon Boutcher's team, was suspended by the PSNI pending the judgments from the Supreme Court and it is not clear when (or if) it will be re-started.

The PSNI also lost this case and (but see below) normally would have to initiate an investigation into the Hooded Men cases. The Court concluded that the PSNI's reliance on a previous HET investigation as a basis to refuse an investigation was irrational. In a second part of this case the men argued that, in an answer by the then Chief Constable to a question from the Policing Board, the PSNI had promised an investigation and the courts should enforce this (the 'legitimate expectation' argument). The men lost this part of the case.

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31 Para 203.

32 Para 211.

33 See para 186 of the judgment.

This important judgment also summarised the current obligations to investigate under Articles 2 and 3 of the ECHR:

(i) Articles 2 and 3 of the Convention enshrine two of the basic values of democratic societies making up the Council of Europe. Article 2, which safeguards the right to life and sets out the circumstances in which deprivation of life may be justified, ranks as one of the most fundamental provisions of the Convention: *Anguelova v Bulgaria* (2004) 38 EHRR 31, para 109; *Jordan v United Kingdom* (2003) 37 EHRR 2, para 102. Article 3, which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”, is also one of the core provisions of the Convention from which no derogation is permitted even in time of war or other public emergency.

(ii) As the State has a general duty under Article 1 of the Convention to secure to everyone the rights and freedoms defined in the Convention, the combination of Articles 1 and 2 requires by implication that there be some form of official investigation when individuals have been killed by the use of force: *McCann v United Kingdom* (1996) 21 EHRR 97, para 161; *Nachova v Bulgaria* (2006) 42 EHRR 43, para 110 (Grand Chamber); *Tunç v Turkey* (Application No 24014/05) [2016] Inquest LR 1, para 169 (Grand Chamber). The essential purpose of such an investigation is two-fold. It is to secure the effective implementation of the domestic laws that protect the right to life; and, in cases involving State agents or bodies, it is to ensure their accountability for deaths occurring under their responsibility: *Nachova* (above) para 110; *Jordan* (above), para 105.

(iii) A similar duty of investigation arises under Article 3 of the Convention where there is a reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment: *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, para 182; *Al Nashiri v Romania* (2019) 68 EHRR 3, para 638; *R (Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin); [2013] HRLR 32.

(iv) An adequate and prompt investigation is essential to maintain public confidence in the adherence of the State authorities to the rule of law and in preventing any appearance of complicity or collusion in or tolerance of unlawful acts: *McKerr v United Kingdom* (2002) 34 EHRR 20, para 114; *Brecknell*, para 65; *Al Nashiri v Romania* (above), para 641. Victims, their families and the general public have a right to the truth, which necessitates public scrutiny and accountability in practice: *El-Masri v Former Yugoslav Republic of Macedonia* (above), para 191; *Al-Nashiri v Romania* (above), para 641. The authorities must act of their own motion, once the matter is brought to their attention: *McKerr v United Kingdom* (above), para 111.

(v) There must be a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice. The degree of public scrutiny that is required will vary from case to case but the next of kin or victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests: *McKerr v United Kingdom* (above), para 115; *Anguelova v Bulgaria* (above), para 140; *Jordan* (above), para 109.

(vi) There is an obligation to ensure that the investigation is effective; this is an obligation of means rather than result. The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used by an agent of the State was or was not justified in the circumstances and to the identification and punishment of those responsible: *Jordan* (above), para 107; *Nachova* (above), para 113; *Ramsahai v Netherlands* (2008) 46 EHRR 43, para 324. For the investigation to meet this criterion, the authorities must take whatever reasonable steps they can to secure the evidence and reach their conclusions on thorough, objective and impartial analysis of all relevant elements: *Giuliani and Gaggio v Italy* (2012) 54 EHRR 10, paras 301-302.

(vii) Another aspect of an effective investigation, which is the focus of one of the central issues in these appeals, is that the persons responsible for carrying out the investigation must be independent of those implicated in the events. The Strasbourg Court has emphasised, as we discuss more fully below, that this requires not only a lack of hierarchical or institutional connection but also practical independence. See *McKerr v United Kingdom* (above), para 112; *Jordan* (above), para 106; *Ramsahai* (above), para 325. In *Nachova* (above), para 112, the Grand Chamber stated: “For an investigation into alleged unlawful killing by state agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice.” In support of that proposition the Grand Chamber cited *Güleç v Turkey* (1999) 28 EHRR 121, paras 81-82; *Ógur v Turkey* (2001) 31 EHRR 40, paras 91-92; and *Ergi v Turkey* (2001) 32 EHRR 18, paras 83-84.<sup>34</sup>

## **Overall requirements**

One of the most significant parts of the judgment concerned the arguments from the Secretary of State about time limits in relation to duty of PSNI to reinvestigate legacy cases.

## **New Circumstances and the Revival of The Duty to Investigate**

The first question for the Court was whether the duty to investigate could be revived by new circumstances that have occurred since the death or the original investigation.

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34 Para 109.

The Court considered the key jurisprudence from the ECtHR:

‘In *Brecknell* the Strasbourg Court examined the extent to which, when an investigation into a suspicious death appeared to be closed, the coming to light of new evidence about the death might revive the investigative obligation under Article 2. The case concerned a terrorist murder in Northern Ireland which took place in 1975. (Since it is relevant to the discussion below, it should be noted that this was after the United Kingdom had entered into the Convention in 1953 and after it had accepted the right of individual petition to the Strasbourg Court on 14 January 1966.)...’<sup>35</sup> The Strasbourg Court decided:

‘events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued’<sup>36</sup>

The Supreme Court set out the Strasbourg test for a revival of the requirement for an investigation as follows:

‘... the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution. ...’<sup>37</sup>

The ECtHR added, that the extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply ‘will again depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above.’<sup>38</sup>

In particular:

‘Where the assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged.

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35 Para 116.

36 *Brecknell v UK*, para 68

37 Para 71.

38 Para 72.

Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining witness statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage.<sup>39</sup>

The Supreme Court found that the test to ‘revive’ the investigatory duty was not met by the facts in the Hooded Men case.<sup>40</sup>

### **Time Limits**

The UK Government ratified the ECHR as far back as 1953 but only allowed the right of individuals to take their cases to the Commission (now abolished) and the ECtHR in 1966. Finally, the ability to take advantage of the ECHR directly in UK courts only commenced in October 2000 when the Human Rights Act 1998 came into force. So the Supreme Court had to consider when the right to an independent investigation under Article 2 and 3 applied if alleged violation occurred many years ago, but new events since the original investigation met the test set out in Brecknell (see above).

The Supreme Court accepted that the time limits for this were set out in the Grand Chamber case of *Janowiec v Russia*:

‘...the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.’<sup>41</sup>

In the same ECtHR case, the Court concluded that for these purposes a ‘reasonable short’ period of time was ten years. The Supreme Court concluded:

‘In our judgment, an extension beyond the normal ten-year limit of up to two years is permissible where there are compelling reasons to allow such an adjustment constituted by circumstances that (a) any original investigation into the triggering death can be seen to have been seriously deficient and (b) the bulk of such investigative effort which has taken place post-dates the relevant critical date. If in these circumstances there is an extension of no more than two years beyond the ten-year limit mentioned in *Janowiec*, it remains possible to describe the lapse of time as “reasonably short” in accordance with the guidance in that judgment at paras 146 and 148.’<sup>42</sup>

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39 Para 72.

40 Paras 119 to 132.

41 Para 148 of the ECtHR case, quoted with approval by the Supreme Court at para 138.

42 Supreme Court, para 144.

The Supreme Court, despite arguments to the contrary, decided that the critical date from which these retrospective extensions derive in UK law is the coming into force of the Human Rights Act in October 2000. Thus 1988 is the deadline for the investigatory duty to have been triggered (subject to meeting the Brecknell test).<sup>43</sup>

The Supreme Court did, however, accept the possibility of a further extension of time if the case involved violations of the ‘underlying values of Convention’.<sup>44</sup> The Court considered this possibility in some detail in relation to the Hooded Men’s case but did not decide this point because it had already concluded that the ‘Brecknell’ test was not satisfied. The additional ‘Convention values’ point was not argued in the McQuillan case.

At the time of writing the PSNI are still considering the out-workings of this judgment and how it applies to the particular cases that are awaiting investigation and to those where investigation has already begun.

### **Operation Kenova**

In the Human Rights Annual Report 2020/21 it was suggested that, in the absence of the proposed Historical Investigations Unit, part of the Stormont House Agreement, legacy cases, that might be difficult for PSNI to investigate itself (to ensure compliance with Article 2) might be investigated instead by Mr Jon Boutcher.

Operation Kenova was launched to investigate allegations of murder, kidnap and torture dating back to the 1970s. Mr Jon Boutcher, previously Chief Constable of Bedfordshire Police until 2019, has now also taken on further investigations from PSNI. This has provided a process which avoids any conflicts of interest for PSNI officers and complies with the strictures of Article 2. Alyson Kilpatrick, previously the Human Rights Advisor to the Policing Board and now the Chief Commissioner of the Northern Ireland Human Rights Commission, when still in private practice, recently assessed the procedures in a ninety-one page opinion and concluded as follows:

‘It is impossible to sum up Kenova and do it justice but I can conclude, without any hesitation, that in so far as Article 2 ECHR compliance is concerned, it is the exemplar of what such an investigation should, and can, be with the right leadership and personnel.

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43 Supreme Court, para 168.

44 Supreme Court, para 179. At para 150 in *Janowiec v Russia* the ECtHR accepted that the time limit for the investigatory duty could not be restricted to such a ‘reasonably short period’ in all cases and: ... the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

I have not been able to identify any failings for which recommendations need to be made other than that the independent investigation must be supported, resourced and continue to be led by an expert independent team.<sup>45</sup>

The PSNI's response to the Supreme Court judgment was published on 20 May 2022:

'Following a UK Supreme Court (UKSC) ruling relating to Legacy cases, the Police Service of Northern Ireland examined the current system of reviewing Legacy cases to ensure they met the ruling of UKSC.

The UKSC ruled that there are no retrospective import of the provisions of the ECHR prior to its commencement in October 2000. In practise, there are certain provisions of the ECHR which could be imported back to the time period prior to its commencement depends upon whether or not a "genuine connection" event can be established.

Even if a genuine connection can be established prior to October 2000, there is a temporal limit of approximately 12 years beyond which this cannot apply.

We have made a decision to restructure the Case Sequencing Model (CSM) with cases post October 1988 achieving a higher prioritisation within the CSM.

In addition, the second limb of the test requires that where the case falls within the temporal limit, the majority of the investigation took place or ought to have taken place after the commencement of the Act. The Police Service will examine cases that occurred between October 1988 and October 2000 to assess this element of the genuine connection test. The criteria to be applied to this assessment is still under consideration and a framework is being developed to review those cases within this period and prioritise them accordingly within the CSM.

Legacy Investigation Branch (LIB) will use the findings of the UKSC as an enhanced criteria by which to reassess and re-prioritise the CSM with cases benefitting from a definite legal obligation, achieving a higher priority on the CSM.

This decision demonstrates that we have responded to both the legal direction provided by the UKSC whilst also continuing to demonstrate our commitment to the review and reinvestigation of legacy related occurrences in a revised sequencing model.

The families and their representatives can therefore be provided with confidence that their cases will be considered in accordance with that model.'

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45 Conclusion, para 1, <https://www.kenova.co.uk/kenova-exemplar-of-victimfocused-investigation-review-concludes>.



## **PUBLIC ORDER**

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As in previous years, the Human Rights Advisor attended PSNI Gold Command during the period July 9 to 12 2021. The parades and other events were relatively small and peaceful, partly as a result of the continuing threat of Covid-19 transmission and the restrictions imposed by regulations.

On Thursday evening (8th July) the High Court heard an application for judicial review JR169 against the PSNI, seeking action over the bonfire in Adam Street. There was also separate judicial review by two Ministers against PSNI which also concerned the bonfire. The cases were not joined and were heard one after the other in early evening by different judges. The order for interim relief requiring PSNI to take action to assist with the removal of the bonfire in the first case was refused, but no decision was made on the leave application. The second case was also refused on the basis that the first case had concluded the issue.

On 10 July AEPs (baton rounds) and the water cannon were authorised for use and were available but were subsequently not actually used.

### **Loyalist Action in April 2021**

Over 100 police officers were hurt in late March and early April 2021, possibly the worst public order incident seen for many years and the PSNI fired a number of Attenuated Energy Projectiles (AEPs) and used water cannon for the first time in six years. The trigger appearing to be the Northern Ireland Protocol to the EU trade agreement and the restrictions and bureaucracy imposed on trade between Great Britain and Northern Ireland. A second trigger concerned the decision by the PPS on 30 March not to take proceedings against those involved in organising the funeral of Bobby Storey which was attended by significant numbers of people in contravention of the Coronavirus Regulations.

On the night of 7 April, the disorder spilled over a peace wall in West Belfast that divides predominantly Protestant Loyalist communities from predominantly Catholic Nationalist communities. Water cannon was used for the first time in many years by the police, the review of its use (and the use of AEPs) and its operation will be considered in a future report on the Use of Force.

## Other Developments

There were two important judgments on the right to protest during the year. The first concerned a decision of the High Court dealing with the extent to which the Coronavirus Regulations restricted protest and assemblies.<sup>46</sup> This case concerned the ‘Reclaim our Streets’ vigil in London following the murder Sarah Everard by a serving police officer. In the case of Leigh and others v the Commissioner of Police for the Metropolitan Police, 11 March 2022, the High Court was asked to consider the Metropolitan Police’s restriction on this protest:

‘The claimants are members of an informal collective that goes by the name *#ReclaimTheseStreets* which planned to hold a vigil on Clapham Common, prompted by Sarah Everard’s disappearance. The date set for the vigil was 13 March 2021. Its purposes were to highlight risks to women’s safety and to campaign for changes in attitudes and responses to violence against women. The claimants advertised the event, and large numbers showed an interest in attending. In the event the claimants abandoned their plans. In this judicial review claim they allege that their plans were unlawfully thwarted by officers of the Metropolitan Police Service (“MPS”) for whose conduct the defendant Commissioner is responsible in law.

The claimants say the officers adopted an interpretation of the Regulations that was legally wrong as it categorised the proposed vigil as “unlawful”, meaning criminal, merely because it contravened the restrictions on gatherings. The police are said to have (1) ignored the possibility that the fundamental rights to freedom of expression and freedom of assembly might have supplied a “reasonable excuse” for contravening those restrictions on this occasion and (2) failed to carry out the fact-specific proportionality assessment which they were duty-bound to conduct in order to reach a decision on that point. It is on that legally mistaken basis, say the claimants, that officers made decisions and statements that prevented, or at the very least discouraged, the claimants from carrying out their plans.<sup>47</sup>

The Court found:

‘Here, the decisions of the MPS were legally flawed in that they did not give proper effect to the “reasonable excuse” provision in the Regulations and the MPS failed to carry out a fact-specific proportionality assessment in accordance with *Ziegler*. Those decisions had a chilling effect on the exercise by the claimants of their rights under Articles 10 and 11, which have been violated. The claimants have been deprived of a decision by the MPS in accordance with the law. They are entitled to a decision from the court which vindicates their position in relation to the unlawfulness which I find to have occurred.<sup>48</sup>

46 This case is important because it demonstrates the importance of human rights even during the pandemic and for the PSNI outlines the issues in relation to the Black Lives Matter protests set out in Policing Board’s Report on the Thematic Review of the Policing Response to Covid-19, November 2020. But note that the regulations that were the subject of this case were not the same as those in Northern Ireland in June 2020.

47 Para 3 and 4.

48 Para 107.

The second case concerned the balance between the criminal law and protest.<sup>49</sup> In England and Wales it is a criminal offence to trespass on land with the intention of intimidation, obstruction or disruption.<sup>50</sup> A person involved in protesting against the HS2 – the high speed rail project – (with others) dug a tunnel on land for an access way and occupied it and was charged and prosecuted with ‘aggravated trespass’. He was acquitted arguing that he was exercising his freedom of expression and association, members of the public were not inconvenienced and his action would cause little delay to the overall project.

The High Court decided that, unlike obstruction of the highway, this offence did not require the prosecution to establish that the defendant was acting unreasonably. Secondly that the right to protest is a public right and does not necessarily apply on private land. The Court went on to say:

‘First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1 [the right to peaceful possession of property]. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system.

Secondly, section 68 goes beyond simply protecting a landowner’s right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of Articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that Articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon Articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

Fourthly, Articles 10 and 11 do not bestow any “freedom of forum” to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

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49 DPP v Cuciurean, Divisional Court (Lord Chief Justice and Mr Justice Holgate), 30 March 2022.

50 Section 68, Criminal Justice and Public Order Act 1994.

Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

Sixthly, the Supreme Court in *Richardson* regarded the private law of trespass as a limitation on the freedom to protest which is “unchallengeably proportionate”. In our judgment, the same conclusion applies *a fortiori* to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass...<sup>51</sup>

Previous judgements in *Ziegler* allowed people facing criminal protest charges to argue that the court should determine whether a criminal conviction would be a proportionate interference with their rights to freedom of expression (Article 10 of the ECHR) and freedom of association (Article 11 ECHR). In *Cucicurean*, the court limited their previous judgement and found that such an exercise would only have to be conducted for offences, like obstructing a highway but not aggravated trespass, where it is a defence to have a “lawful excuse”.

This case is now to be considered by the Court of Appeal in England and Wales.

## **SEARCH WARRANTS**

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A documentary was made about the unsolved case of six murders in Loughinisland in 1994 and the film ‘No Stone Unturned’ was premiered in September 2017. A draft of the Police Ombudsman investigation into the Loughinisland murders, was shown in the film and as a result the then Chief Constable of the PSNI asked Durham Constabulary to conduct an independent investigation into the alleged theft or unlawful leaking of sensitive documentation from the Police Ombudsman (referred to as Operation Yurta). In August 2018, Trevor Birney and Barry McCaffrey, were arrested at their homes, their offices searched and material was seized. The journalists subsequently initiated a judicial review in respect of the search, its legitimacy and the seizure of the material. On 31 May 2019, the High Court (Lord Chief Justice, Lord Justice Treacy and Mrs Justice Keegan) ruled that the warrant was unlawful and 3 June 2019, the journalists were informed that the investigation into their actions would not be progressed. In February 2021 the PSNI initiated a lessons learned review by Senior Counsel and the Policing Board and Human Rights Advisor contributed to the terms of reference, which include issues of freedom of expression and the role of journalists. This review was completed in spring of 2022 and the summary of findings and recommendations was provided to the Policing Board and the key lessons to be learned were:

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51 Paras 74 to 79.

- i. In future when external Services are engaged to assist the PSNI in such an investigation, a brief statement could be recorded of the specific rationale for that engagement;
- ii. The apparent failure of the Operation Yurta investigators to robustly analyse the PSNI's views of the Article 2 risks infected their operational decision to pursue an application for a Search Warrant. The apparent unquestioning acceptance of the PSNI's views, may have been exacerbated by the fact that there did not appear to be any formal document articulating the assessment of that risk. The PSNI will want to avoid the possibility that such a situation could reoccur in future investigations. The addition of a specific officer to act as 'devil's advocate' in the course of an investigation, by challenging such views could be beneficial;
- iii. Specifically in cases involving journalism, it is insufficient to passively await the outcome of a journalists work before assessing relevant risks;
- iv. Applications for Warrants of this nature should not be left to junior ranking officers and therefore should made by more senior officers;
- v. Investigators approached the analysis of evidence with an insufficiently objective mind and demonstrated an underlying prejudice that the journalists were suspects;
- vi. Issues that should have been of nugatory evidential significance were viewed through an overly suspicious lens;
- vii. The investigators failed to properly set out the rationale as to why they entertained reasonable grounds to believe that the indictable offences of; theft, handling stolen goods, breaches of data protection laws, and the Official Secrets Act had been satisfied. The failure to appropriately evaluate how the requisite elements of each offence was met in the context of the factual matrix, was a fundamental failing;
- viii. While Search Warrants are critically important for criminal investigations, they also raise significant constitutional issues concerning the rule of law and the proper balance between the powers of the state and the right and freedoms of individuals. Nonetheless there are a number of hurdles and considerations which need to be satisfied, not least amongst which, is an objective and rational approach to the question of why a Production Order would not be as equally effective in obtaining the material sought;
- ix. The review has identified a wide range of considerations which will have to be factored into future operational decisions;
- x. All external Police Services commissioned by the Police Service of Northern Ireland to carry out investigations on our behalf, should receive the same level of training in applications for Warrants and associated issues as a result of this review;
- xi. There should be greater clarity in contractual arrangements with external Police Services, in order to define terms such as how regularly the PSNI should be updated in terms of critical developments and decisions, and what would constitute a significant event so as to trigger contact in between those points;

- xii. Greater clarity could also be brought to the contractual terms, should a member of the external Police Service cease to be a member of that Service, prior to the conclusion of the investigation. Improvements in clarifying the basis for the engagement are preferable to risking the Chief Constable being perceived as retaining the power to intervene in such investigations. The more complex the investigation is anticipated to be, the greater care and input from legal professionals will be merited in drawing up any arrangements; and
- xiii. In instances when material seized has been subject to Judicial Review challenge, efforts should be made to track all entries, and log all identifying information contemporaneously on a software package, such that it could be accessed in the archive if necessary.

The PSNI informed the Policing Board that ‘the issues arising from Operation Yurta have now been fully incorporated into our training for investigators. Further work has now been commissioned directly with the PSNI Senior Team to draw out all additional learning points from the review relevant to their area of business and ensure their full implementation.’<sup>52</sup>

The Human Rights Advisor has been given a copy, in confidence, of the report and the above lessons are the correct ones to take forward. The report itself is very detailed and picks up many of the key issues. The report is properly critical about the application for the warrant and questions the particular criminal offences which were alleged. In addition, it emphasises the importance of the enhanced protection for journalistic material. However, there remain questions about the nature of the alleged crimes, particularly whether or not they were serious or not, and whether they justified any investigation, let alone the resources that were actually deployed.

Unfortunately, and despite the PSNI’s review of procedures a new case revealed similar flaws in the process of obtaining search warrants – this warrant was granted in February 2021.<sup>53</sup> The PSNI executed a search warrant obtained from a lay magistrate searching a woman’s home and the hospital where she was resident. This followed a complaint to the PSNI by the woman that her ex-partner was making threats to her via social media. The PSNI’s warrant related to allegations that she had attempted to pervert the course of justice by making false claims. The High Court was highly critical of the procedures in the case:

‘...the two completed Forms 5A, the “*Complaint to Obtain Warrant to Enter and Search*”, together with the completed Forms 5B, represent the police applications to the Lay Magistrate to issue the search warrants. These are the critical documents in these proceedings. The Forms 5A were completed by a person of unspecified identity and designation. The most that can be deduced from a perusal of the Forms as a whole is that they were compiled by a “*police officer*.” The “signature” of the author is an unintelligible squiggle. This is not accompanied by the author’s name in printed form. The date follows.

52 Letter dated 1st July from Deputy Chief Constable, Mark Hamilton.

53 Judicial review by Andrea Hughes, 9 December 2021.

However, the “*Time*” is not specified. Next the rank and name of the authorising inspector are specified. Here one finds the use of another indecipherable squiggle where the inspector’s signature is required. While this part of the Form makes provision for the insertion by the authorising officer of “*Comments*”, nothing follows. In particular there is no indication that the authorising inspector was aware of the existence of a completed Form PACE 5B or any intelligence. This is not acceptable.

Paragraph 4(b) of each of the completed Forms 5A states that the premises to be searched are “*the home address of Ms Andrea Hughes.*” This was correct as regards one of the identified addresses. However it was manifestly incorrect in the case of the application for the search warrant directed to the specified hospital unit...<sup>54</sup>

The Court concluded:

‘The multiple shortcomings in the police applications to the Lay Magistrate for the search warrants have been detailed particularly in [20] - [23] above. They are not peripheral, trivial or technical. Rather they are matters of gravity and substance.’<sup>55</sup>

And

‘The Police Service and the body of Lay Magistrates and those who advise and support them will doubtless be aware that in recent times there has been a substantial number of cases of the present *genre*. While most of these are recorded in this judgment, others include *Re Fine Point Films and Others Application* [2020] NIQB 55, *Re Donaghy and Others* [2017] NIQB 123 and *Re McVeigh’s Application (No 2)* [2017] NIQB 61/[2020] NI 84. All have exposed legal flaws in the process. The indication that updated training of the body of Northern Ireland Lay Magistrates is imminent is to be welcomed. This court does not underestimate the difficulties and complexities of discharging the functions of this statutory judicial office. The Police Service will doubtless respond to this judgment in like manner.’<sup>56</sup>

## **RECOMMENDATION 6**

The PSNI should report to the Policing Board on actions taken to ensure that applications for search warrants are now being made correctly.

54 Paras 20 and 21.

55 Para 49.

56 Para 52.

## **STOP AND SEARCH**

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Stop and search is an important tool for the PSNI and, if used properly, can reduce crime, keep people safe and identify offenders. However, as set out in the previous Human Rights Annual Report, ‘the challenge for PSNI is given the consistently low outcomes, the potentially damaging impact on community relations and the lack of evidence to suggest stop and search reduces crime, and the human rights issues, why has stop and search not been subject to more fundamental reform?’

The basis for this question has been set out in the last two Reports and will not be repeated here. However, it is planned to return to this subject in due course and it is hoped that the position will have been improved in the interim.

### **The Justice and Security (Northern Ireland) Act 2007**

The 2007 Act provides the PSNI (but not other police services in the rest of the UK) with additional stop and search powers. These powers allow the PSNI to stop anyone to question them about their identity and movements and to question them about recent explosions or other similar incidents. The Act also allows the PSNI to stop and search a person (or a vehicle) or to search premises for any wireless apparatus or munitions without the usual human rights protection provided for by Article 8 (the right to privacy).<sup>57</sup> In particular, in relation to stop and search, and contrary to other stop and search powers, the officer does not need to have reasonable suspicion that the person is, carrying any such items. Failure to co-operate with the officer is a specific criminal offence. The officer can, therefore, stop and search without needing to suspect a particular person or group of persons.

Despite the original intention to replace some of the provisions of the Terrorism Act, these exceptional provisions are not restricted to those involved in terrorism but can and are also used for those involved in any criminal activity. The definition of munitions is also very wide and includes:

- ‘(ii) anything used or capable of being used in the manufacture of an explosive, a firearm or ammunition,
- (b) “explosive” means—
  - (i) an article or substance manufactured for the purpose of producing a practical effect by explosion,
  - (ii) materials for making an article or substance within sub-paragraph (i),
  - (iii) anything used or intended to be used for causing or assisting in causing an explosion, and
  - (iv) a part of anything within sub-paragraph (i) or (ii),
- (c) “firearm” includes an air gun or air pistol...’<sup>58</sup>

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57 See the case of Ramsey in the High Court and Court of Appeal (NI).

58 Schedule 3, para 1(3)(b) and (c)



Stop and search powers for munitions etc. in Northern Ireland have a very long history.<sup>59</sup> Even as late as the year 2000, the Terrorism Act 2000 originally had a substantial part of its provisions concerned with special powers in Northern Ireland. In Schedule 10, paragraph 6 of that Act the power was set out as follows:

*'Stopping and searching persons*

- 6 (1) An officer may—
- (a) stop a person in a public place, and
  - (b) search him for the purpose of ascertaining whether he has munitions unlawfully with him or wireless apparatus with him.
- (2) An officer may search a person who—
- (a) is not in a public place, and
  - (b) whom the officer reasonably suspects to have munitions unlawfully with him or to have wireless apparatus with him.
- (3) An officer may search a person entering or found in a dwelling entered under paragraph 2.<sup>60</sup>

This power was subsequently repealed, see the statement from the Secretary of State below. However, at the time the 2007 Act was being debated the Terrorism Act 2000 also contained a different stop and search power that did not require reasonable suspicion.<sup>61</sup>

### **The Justice and Security (Northern Ireland) Act 2007 – Stop and Search**

The new Independent Reviewer of the Justice and Security Act, Professor Marie Breen-Smyth, has produced her first Report and this provides a very detailed and comprehensive analysis of this stop and search power making it unnecessary to set out in detail the challenges and issues that this power brings with it.<sup>62</sup>

### **Parliamentary Scrutiny**

When this stop and search provision was being passed by the Westminster Parliament there was virtually no discussion. During the Second Reading in the House of Commons on 13 December 2006, Peter Hain, the Secretary of State for Northern Ireland set out the context as follows:

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59 Regulating Northern Ireland: The Special Powers Acts, 1922-1972, Laura K. Donohue, The Historical Journal Vol. 41, No. 4 (Dec 1998), Cambridge University Press.

60 Note that no reasonable suspicion is necessary for searches in public places, <https://www.legislation.gov.uk/ukpga/2000/11/schedule/10/enacted>

61 Section 44 onwards, this was repealed following the decision of the ECtHR in Gillan v UK, January 2010.

62 Report of the Independent Reviewer of the Justice and Security Act, Professor Marie Breen-Smyth, June 2022, <https://www.gov.uk/government/publications/annual-reports-of-the-independent-reviewer-of-justice-and-security-northern-ireland-act-2007>

‘I remind my hon. Friend that just eight of the 48 provisions in the previous legislation—the part 7 powers—have been transported into this Bill. Forty of them—the vast majority—have been lapsed, appropriately and rightly.

The powers are necessary to deal with a number of different circumstances. They will help in managing parades, road closures, and dealing with extreme public order incidents such as what happened at the Whiterock parade last year, which mercifully was not repeated this year. They may be used in dealing with organised crime and will be essential in combating loyalist and dissident republican terrorism, which is still with us.

Let me give some practical examples. The stop and search powers may be used to search people for weapons around a parade or a sports event where it is anticipated that there might be trouble, to deal effectively with bomb threats by allowing police to cordon off the area and providing appropriate powers of access if the device is on private property, to search premises ahead of VIP visits, and to allow the police or the Army to chase criminals across private land without breaching trespass laws.<sup>63</sup>

‘The safeguards ensure that the use of the powers will be reviewed each year, and that the Secretary of State will be able to repeal the powers by order, under clause 40, when they are no longer needed. As we make increasing progress towards normalisation, therefore, the option of lapsing the powers by order will be available, without the need for fresh primary legislation.’<sup>64</sup>

There appears then to have been little and, sometimes no, debate in the House of Commons or House of Lords about the stop and search provision and no attempt to amend it or raise concerns during either of the committee stages in either House. Even the Joint Committee on Human Rights does not comment on it.<sup>65</sup> However, the 2007 Act provides that the Secretary of State must appoint an independent person to review this legislation and that person’s annual report must be published by Parliament every year. The first of these annual reports was published in October 2008 and sets out the history and context of this legislation and the latest report by a newly appointed reviewer was published on 23rd June 2022.<sup>66</sup>

## **Human Rights**

The requirement that police officers need an objective basis – reasonable suspicion – before they are entitled to stop and search a person is a fundamental protection. The courts have stated that:

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63 Col 899, <https://publications.parliament.uk/pa/cm200607/cmhansrd/cm061213/debtext/61213-0007.htm#06121364000001>

64 Col 900.

65 Legislative Scrutiny: Third Progress Report, 12 February 2007.

66 Unfortunately this first report does not appear to be available online.

‘It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle.’<sup>67</sup>

And

‘The Government argue that in certain circumstances a particularly intrusive search may amount to an interference with an individual’s Article 8 rights, as may a search which involves perusing an address book or diary or correspondence, but that a superficial search which does not involve the discovery of such items does not do so. The Court is unable to accept this view. Irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed in the search, the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court’s view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public.’<sup>68</sup>

It is on the basis of these principles that the 2007 Act provides complicated protections before the provisions can be used.

### **The Justice and Security Act Authorisation Process**

The stop and search provision cannot apply without it being authorised by an Assistant Chief Constable of the PSNI, for a period of 48 hours, and only in relation to a defined geographical area. Confirmation by the Secretary of State for Northern Ireland (or an NIO minister) allows the power to extend for a total of 14 days. The basis in the Act for an authorisation of this unusual power is that the Assistant Chief Constable ‘reasonably suspects... that the safety of any person might be endangered by the use of munitions or wireless apparatus’ and that the ‘authorisation is necessary to prevent such danger’.

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67 Lord Bingham, para 1, *R (on the application of Gillan) v Commissioner of Police for the Metropolis*, [2006] UKHL 12.

68 *Gillan and Quinton v UK*, para 63.

Schedule 3 of the Act states:

- ‘4A (1) A senior officer may give an authorisation under this paragraph in relation to a specified area or place if the officer—
- (a) reasonably suspects (whether in relation to a particular case, a description of case or generally) that the safety of any person might be endangered by the use of munitions or wireless apparatus, and
  - (b) reasonably considers that—
    - (i) the authorisation is necessary to prevent such danger,
    - (ii) the specified area or place is no greater than is necessary to prevent such danger, and
    - (iii) the duration of the authorisation is no longer than is necessary to prevent such danger.
- (2) An authorisation under this paragraph authorises any constable to stop a person in the specified area or place and to search that person.
- (3) A constable may exercise the power conferred by an authorisation under this paragraph only for the purpose of ascertaining whether the person has munitions unlawfully with that person or wireless apparatus with that person.
- (4) But the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there are such munitions or wireless apparatus.’

As the Code of Practice for the Exercise of Powers in the Justice and Security (Northern Ireland) Act 2007 states:

‘The powers should therefore **not** be authorised solely on the basis that there is general endangerment from unlawfully held munitions or wireless apparatus. However, this may be taken into account when deciding whether to make an authorisation, especially where intelligence about endangerment is limited in terms of the potential target or attack method. An authorisation should not be given on the basis that the use of the powers provides public reassurance or that the powers are a useful deterrent or intelligence gathering tool.’<sup>69</sup>

The geographical area that is covered by the authorisation and its duration must be no greater than is necessary. Despite these restrictions the power has been authorised every two weeks and for every area of Northern Ireland since this provision of the Act came into force in 2007.<sup>70</sup>

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69 Para 8.21.

70 See the detail of the ‘Geographical Spread’ at para 5.14 of the latest report in June 2022 from the Independent Review of the JSA.

It is worth noting that the most similar non-reasonable suspicion stop and search power in England and Wales only requires that the police officer believes that ‘it is expedient to use these powers’. A much lower threshold than it is ‘necessary’ in the JSA.<sup>71</sup>

“‘Expedient’ has a meaning quite distinct from “necessary”. Parliament chose the first word... not the second. There is no warrant for treating Parliament as having meant something which it did not say. But there are other reasons also for rejecting the argument. It is true, as already recognised, that section 45(1)(b), in dispensing with the condition of reasonable suspicion, departs from the normal rule applicable where a constable exercises a power to stop and search.’<sup>72</sup>

In previous years, the Policing Board instructed Senior Counsel to consider the stop and search authorisations sought and obtained by the PSNI during the period 1st October 2019 to 22nd of February 2021. Dip samples of the 43 stop and search authorisations, of which 23 were examined in more detail (just over one out of every two authorisations during this period). All of the authorisations have been granted under the JSA (NI) 2007. No authorisations have taken place under S47A of the Terrorism Act 2000. She reported:

‘In considering the issues above I have remained mindful of the requirements of the European Convention on Human Rights. 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 Convention.

The exercise of powers to stop and search or question without suspicion is a direct intrusion into personal freedom and is a potential infringement of rights guaranteed by the European Convention on Human Rights.

The rights that are primarily engaged include Article 8, the right to respect for private and family life, Article 5, the right to liberty and security and also Article 14, the right to freedom from non-discrimination.

Whether the use of these powers by the police is in accordance with law, necessary in a democratic society and proportionate requires ongoing monitoring and scrutiny. The Policing Board and specifically the Performance Committee closely monitors the operational need for the use of these powers and their impact on the wider community...

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71 Section 60(1)(a), Criminal Justice and Public Order Act 1994.

72 Lord Bingham, para 14, R (on the application of Gillan v Commissioner of Police for the Metropolis, [2006] UKHL 12.

I confirm that in my opinion viewing one authorisation out of every two completed under the legislation is a sufficient safeguard. These authorisations are completed on a maximum 14 day cycle. I have advised the Policing Board in every authorisation I have viewed from mid-2017 onwards that the statutory grounds have been met. I am aware that the Independent Reviewer of the Justice and Security Act also dip samples the authorisations and ensures that they are being used in accordance with the law and the codes of practice. Thus, in my view the oversight provided from these two bodies is sufficient in my view to meet the requirement of the statutory code of practice.’

The Human Rights Advisor visited PSNI in May 2022 and was taken through the process and read through a sample of fifteen recent authorisations. It clear that the process is very thorough, those involved treat it very seriously and are very conscientious. The intelligence from the four police areas is set out in some detail and co-ordinated very efficiently by an Inspector in the C3 branch of PSNI. C3 add Northern Ireland wide intelligence, including intelligence from MI5. This is all set out in the formal application form. Once C3 is satisfied that an application is justified it is reviewed by the legal department of the PSNI and finally given to the ACC who considers it and then sets out his or her assessment in manuscript. As far as possible the ACC who authorises the powers is not the ACC who is generally involved in considering such intelligence as part of his or her own role (not ACC Crime).

The application is then reviewed by NIO civil servants and lawyers who provide the Minister with a cover briefing, leaving the decision authorisation to the Minister personally.

In the context of the threat level from Northern Ireland Related Terrorism being reduced from ‘severe’ to ‘substantial’, the first reduction since 2010, the Human Rights Advisor found that:

- (i) Some of the intelligence suggested that the PSNI needs to take urgent action to search specific address or person or act to protect a person and once that action had been taken<sup>73</sup> the intelligence would not justify an authorisation;
- (ii) Obviously, the number and significance of the pieces of intelligence varied from authorisation to authorisation and in relation to the four areas of Northern Ireland. However, several authorisations were very weak on the need for an authorisation covering every single of the four areas of Northern Ireland although the power is used across Northern Ireland;

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73 The action rarely involved the need to use any stop and search power, let alone a JSA power.

- (iii) It was rarely obvious to the reader of the intelligence that the JSA ‘non-reasonable suspicion power’ would assist with the particular threat set out in the intelligence;<sup>74</sup>
- (iv) There were no examples described in the intelligence where the JSA power had helped to deal with the threat (or the threat described in a previous authorisation);
- (v) The very low statistical ‘success rate’ of the JSA stop and search power<sup>75</sup> would suggest that its ability to deal with the threats is, in fact, unlikely and it was nowhere suggested in any of the applications that it would be successful;
- (vi) There were many examples in the intelligence where it appeared that the test of reasonable suspicion had been met and ‘normal’ Police and Criminal Evidence Order (PACE) stop and search powers or a warrants to search particular premises would have been available. This suggests that the more specific the intelligence is, the more PACE powers would have been sufficient, and the less likely it is that a JSA authorisation would be justified;
- (vii) It seems arguable that if a PACE stop and search power exists in the particular circumstances set out in the intelligence, that the PSNI are under a duty to use PACE instead of the less ‘human rights compliant’ JSA power;
- (viii) The intelligence in the applications for authorisations does sometimes give examples of intelligence that is not very specific or does not identify particular individuals or premises. In such circumstances the reasonable suspicion PACE powers might not be available and the JSA authorisation would then be justified under to the 2007 Act.<sup>76</sup> However, there appear to be no examples in the applications of any specific plans to use the powers or examples of where the power was actually used in practice;<sup>77</sup>

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74 ‘The authorising police officer must also be satisfied that the powers are necessary to prevent such endangerment and that the use of these powers is required to help deal with the perceived threat. He or she should also consider whether the paragraph 4A(1) power is the most appropriate to use in the circumstances. In determining whether or not the use of the powers is necessary the senior police officer must take into account not just available information on the endangerment from munitions or wireless apparatus, but also:

- the proportionality of the use of without reasonable suspicion search powers;
- that searches (if authorised) may be exercised only for the purpose of discovering unlawfully held munitions or wireless apparatus;
- the suitability of other search powers including those that require reasonable suspicion; and
- the safety of the public and the safety of officers.’

Para 8.22, Code of Practice, emphasis added.

75 Less than 1%, Use of Stop and Search Powers by the Police in Northern Ireland, 1st April to 31st March 2021.

76 However, even in these examples, there might have been more intelligence than had been set out in the authorisation that would have allowed the PACE power to be used anyway.

77 Note: the JSA stop and search power has always been available to deal with the issue identified in the intelligence examples because the applications include past intelligence when the power was, in fact, available.

(ix) It should also be noted that section 21 of the JSA (the stop and account power) applies without the need for any authorisation. This power allows the PSNI to stop anyone to question them about their identity and movements or to question them about recent explosions or other similar incidents. This power could be used in many situations not covered by PACE stop and search powers. In practice, these powers might also result in responses from the person questioned which then triggered the reasonable suspicion power of PACE and allowing a ‘normal’ stop and search.

The stop and search powers provided by the JSA are very similar in procedure and structure to the previous stop and search provisions in the Terrorism Act 2000, sections 44 and 45. Those provisions were ruled unlawful by the ECtHR in the case of *Gillan and Quinton v UK* (see quote above). Whilst there are differences and different safeguards, flawed authorisations and examples of the PSNI and the NIO not sticking closely to the details of the specific law may be problematic and may lead to findings like this:

‘In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, “in accordance with the law” and it follows that there has been a violation of Article 8 of the Convention.’<sup>78</sup>

However, the Human Rights Advisor provided an advance copy of his concerns to the PSNI over the summer of 2022 and as a result the PSNI has responded as follows:

‘I have directed the Authorising Officers to be more discriminating and more intrusive in their consideration of the applications and in particular I have asked them to closely consider the grounds to support authorisations which extend to the entirety of Northern Ireland. I am keen that we proceed in a direction which over time shows a reduction in the routine use of powers if the National Security threat continues to diminish. I am also encouraging more focused short-term use in response to emerging issues.

It is my hope that this signals a journey towards a more focused and hopefully much reduced usage of the JSA power.’<sup>79</sup>

The Human Rights Advisor therefore intends to again review the authorisation process early in 2023.

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78 Para. 87

79 Letter from the Deputy Chief Constable, 5 October 2022.



## RECOMMENDATION 7

The scrutiny of Justice and Security Act authorisations remains important and the PSNI response regarding the enhanced consideration of the grounds to support authorisations is very welcome.

In addition and at a more technical level, the current procedures could be improved in the following ways:

- (i) The cover emails that are sent to the Northern Ireland Office with the applications themselves are designed to set out the context or explain a particular expression used in the application. This material should be contained within the application itself in order to enhance transparency. It is also important to ensure that the application contains all the information needed for the Secretary of State to make a decision;
- (ii) Page 1, Section 5 of the application appears to add to the statutory justifications for authorisation other factors not specifically in the legislation. This section should state the law clearly and should include relevant extracts from the Code of Practice;
- (iii) The legal advice section should set out in detail how the intelligence for any authorisation of the stop and search power is 'necessary to prevent such danger' (the danger indicated by the intelligence) [as set out in Sch. 3, 4A(1)(b)(i)].

### Stop and Search of Young People

With regards to stopping children or individuals who have vulnerabilities the grounds for the search must be clearly communicated in simple and easy to understand language, the use of technical or legal language should be avoided unless required by law. Any decision taken to stop and search a child must be in the best interests of that child, taking into consideration that exploitation of the child may be a factor in the case.

The Human Rights Advisor made the following recommendations in last year's Annual Report regarding stop and search of young people:

*'Recommendation 10*

- A. *The category of 13 to 17 years old used by the PSNI for young people stopped and searched should be broken down further so that more information is available on the youngest children in this group; and*
- B. *The PSNI reconsider the proposal that an internal record be kept of any stop and search under JSA (Justice and Security Northern Ireland Act 2007) or TACT (Terrorism Act 2000) involving children or where an unexpected incident has occurred which might prove controversial.'*

*'Recommendation 11:*

- A. The PSNI should publish Dr Topping's research and provide an official response to its findings;*
- B. The PSNI should publish its leadership approach to stop and search and should make it transparent on why they use stop and search in the way that they do, including its analysis of how the use of these powers aligns with service objectives and clearly demonstrate why no mitigation measures are considered necessary;'*

In 2020, PSNI formed an Independent Advisory Group, together with external statutory and voluntary bodies, which is still ongoing. The group includes representatives of the Northern Ireland Commissioner for Children and Young People (NICCY), the Children's Law Centre, Youth Work Alliance, Policing Board officials, Action for Children, Education Authority NI, SE Health Trust, Include Youth, Department of Health NI, and Dr John Topping from Queen's University Belfast.

Following an online survey with 3235 participants which aimed to gather data on Children and Young Persons perceptions and experiences of the PSNI's use of Stop and Search Powers, an action plan was devised and presented to the Police Powers Development Group (PPDG). Currently, PSNI is undertaking a pilot exercise to assess how much impact there would be on front line supervisors to review the BWV footage of all stop searches involving people under the age of 18. The current guidance is that supervisors strongly consider a 100% supervision check regarding these searches. Furthermore, a guidance checklist designed to assist police supervisors with the task of supervising / dip sampling stop search encounters has been created. PSNI district training is developing awareness training to operational police officers. It will also contain a procedural element to include items such as informing young people why they are being stopped and searched and informing them what police are searching for.

PSNI has been developing stop and search information cards designed for young people and has engaged and consulted directly with three groups of young people from the Lurgan and Belfast areas, with more engagement planned in the near future with young people from the Lisburn and Newtownards areas.

However, the Independent Reviewer of the Justice and Security Act, Professor Marie Breen-Smyth, recommended in her 2020/21 report to expedite this and that;

*"a stop and search card designed for young people be developed and adopted by the PSNI without any further delay. A competition open to young people to design such a card could both expedite the development of a suitable card and afford opportunities for positive interactions between the PSNI and young people and their organisations and the PSNI."*<sup>80</sup>

<sup>80</sup> Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007, Fourteenth Report 1st August 2020 – 31st July 2021, para. 6.23

In its concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland of 2016, the UN Committee on the Rights of the Child recommended the recording of community background regarding stop and search of young children:

“The Committee recommends that the State party:

- (a) Prohibit the use of non-statutory stop-and-search checks against children;
- (b) Ensure that the statutory use of the stop-and-search checks is proportionate, taking into consideration the age and maturity of the child, and non-discriminatory;
- (c) Regularly collect, analyse and publish data relating to the use of stop and search on children, disaggregated by age, sex, disability, geographic location, ethnic origin and socioeconomic background.”<sup>81</sup>

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81 UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5

## 6. USE OF FORCE

### USE OF FORCE TRENDS

The legitimate use of force by police officers is one of their most significant and symbolic powers. The use of force by one person against another is ordinarily both a crime and a tort (a civil wrong) and, when used by law enforcement officials without justification, violation of the prohibition against ill-treatment in international human rights law. The use of the powers given to police officers to use force and the inevitable vulnerability of those in custody means that any use of force must be justified by the circumstances. In particular, once a person is in custody and/or restrained and is not able to escape, using force is very rarely likely to be justified unless officers continue to be threatened and cannot move away to a safe distance.

The PSNI have available the following kinds of force: Attenuated Energy Projectiles (AEP, also known as baton rounds), personal batons, irritant spray (PAVA), firearms, police dogs, Conducted Energy Devices (CED), handcuffs, limb restraints, unarmed physical tactics, spit and bite guards, stun grenades, and water cannon. Some of these devices are categorised by PSNI as 'less lethal options', including CED.

The use of force by police officers is reviewed regularly by PSNI. Any issues that arise are addressed by senior officers with whom the Board has a direct line of communication. Ultimately, the Chief Constable is accountable to the Board for all uses of force by the PSNI. It is an important element of oversight and accountability that officers using force record the use on an electronic use of force monitoring form. The following uses of force must be recorded on the electronic monitoring form and are considered by the Board: AEP; baton; PAVA irritant spray; personal firearms; police dog; CED; and water cannon.

Police officers have the authority to use force in order to defend themselves or another person, to affect 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. Mechanisms are in place, both internally and externally, to ensure that PSNI is held to account for all uses of force by its officers. These are reviewed regularly by PSNI, the Police Ombudsman and the Policing Board. Any issues identified during the reporting period continue to be raised directly with PSNI's senior command team. Police officers put themselves in harm's way to protect victims and others and have to deal with difficult, violent and out of control people every day. Unfortunately, they sometimes have to use force.

The Board's role and that of the Human Rights Advisor is to try to ensure that this use of lawful force is proportionate and justified and one method of doing this is to scrutinise the evidence of the use of force every year and to try to assist the PSNI to keep it to a minimum.

In his 2020/21 Annual Report, the Human Rights Advisor made three recommendations regarding use of force:

*Recommendation 12: The PSNI should change the recording system to ensure that in future any use of force is recorded in the stop and search record as well as being recorded as a use of force.*

This recommendation has been accepted and is currently being implemented by PSNI.

*Recommendation 5: The PSNI commission research to identify the factors that make the use of force (and what kind of force) more likely and to learn lessons to try to reduce, as far as possible, any use of force. Specifically, with the availability of firearms, what causes an officer to escalate the use of force to draw or point a firearm and how this can be reduced.*

This recommendation has been accepted by PSNI and the Human Rights Advisor will further consider the various uses of force over the coming months.

*Recommendation 16: The Policing Board will work with the PSNI over the next year to seek to make public the use of force statistics by gender, age, ethnic minority and disability etc. Subject to the actions taken by the PSNI to respond to the stop and search case of Ramsey, the Policing Board will discuss with the PSNI the production of statistics on the use of force and community background status of those subjected to this use of force. PSNI should report to the Board on the reasons for the increases in the number of times force has been used.*

The Police Statistics Branch have published a revised Use of Force statistical report with effect from December 2021 containing more detailed information than previously published, including use of force statistics by gender, age, and ethnicity for those persons subject to the uses of force.

### **Trends regarding unarmed and armed tactics**

From 1st April 2017 the PSNI started to report the number of uses of force involving restraints (handcuffs, flexi cuffs and limb restraints) and unarmed physical tactics (blocks/strikes, take downs, pressure points, physical restraints and other/improvised). Use of unarmed physical tactics has increased from 40% in 2017 to 57% in 2021/22.

In the reporting period of April 2021 to March 2022, only 1.6% of the use of force incidents in the PSNI statistics were resolved by drawing a CED, and in 21 out of those 17,304 total incidents was a CED actually fired. In 86% of cases of CED use in NI, the detainee was brandishing a firearm.

The number of instances where a CED was fired has remained low since the introduction of CED to all ARUs in December 2008. In the 5-year period of December 2008 to March 2013, CED were fired 46 times, compared to 21 times in the one-year period of April 2021 to March 2022, indicating an overall increase in the use of CED.<sup>82</sup> The highest occurrence of CED since their introduction was 35 times during the reporting period 2017/18.

In comparison, the use of AEP has also increased slightly over the past 10 years. In the period 2012/13, AEP was pointed 32 times and fired 20 times. However, the actual firing of AEP has overall decreased over the past ten years. In 2021/22, AEP was pointed 68 times, but only fired 8 times.

The use of police dogs has increased significantly, from 45 times in 2012/13 to 146 in 2021/22. This may be explained by PSNI's increased investment in police dogs.<sup>83</sup>

The use of the police officers' personal baton has decreased slightly and the use of irritant spray and firearms have remained stable.<sup>84</sup> The use of water cannons has dropped drastically, from 17 occurrences in 2012/13 to 2 in 2021/22, after five years of no deployment of water cannons.

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82 PSNI Use of Force Statistics 1st April 2012 to 31st March 2013, p. 9, [https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/statistics-on-police-use-of-force/documents/use\\_of\\_force\\_1\\_april\\_2012\\_-\\_31st\\_march\\_2013.pdf](https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/statistics-on-police-use-of-force/documents/use_of_force_1_april_2012_-_31st_march_2013.pdf)

83 PSNI News, New Police Dog Section now based in Maydown, <https://www.psni.police.uk/news/Latest-News/120422-new-dog-section-based-in-maydown/>

84 See Long-term trends on use of force, PSNI Use of Force Statistical Report 1 April 2021 - 31 March 2022, <https://www.psni.police.uk/sites/default/files/2022-08/psni-use-of-force-statistical-report-1-apr-2021---31-mar-2022.pdf>

## Use of Force Statistics for 2021/22<sup>85</sup>

Use of Force	Apr 20 - Mar 21	Apr 21 - Mar 22	% change <sup>(1)</sup>
AEP pointed	75 <sup>(2)</sup>	68 <sup>(3)</sup>	-9%
AEP discharged	9 <sup>(2)</sup>	8 <sup>(3)</sup>	-11%
AEP Total	84	76	-10%
Baton drawn only	220	206	-6%
Baton drawn and used	109	118	8%
Baton total	329	324	-2%
Irritant spray drawn only	191	229	20%
Irritant spray used	193	220	14%
Irritant spray total	384	449	17%
Firearm drawn or pointed	490	440	-10%
Firearm discharged	0	1	-
Firearm total	490	441	-10%
Police dog	190	146	-23%
CED drawn	288	288	0%
CED fired	24	21	-13%
CED total	3,112	3,019	-1%
Handcuffs / limb restraints	4,657	5,397	16%
Unarmed physical tactics	7,743	10,035	30%
Spit and bite guard	112	123	10%
Water cannon deployed	0	2	-
Water cannon deployed and used	0	2	-
Water cannon total	0	4	-
<b>Total</b>	<b>14,301</b>	<b>17,304</b>	<b>21%</b>

(1) Percentage figures are rounded to the nearest integer.

(2) During April 2020 - March 2021 AEP was pointed and discharged only as a less lethal option.

(3) During April 2021 - March 2022 AEP was pointed only as a less lethal option. On the 8 occasions it was discharged, 5 occasions were as a less lethal option and 3 occasions were during public disorder.

85 PSNI Use of Force Statistical Report 1 April 2021 - 31 March 2022, <https://www.psni.police.uk/sites/default/files/2022-08/psni-use-of-force-statistical-report-1-apr-2021---31-mar-2022.pdf>

On 29 April 2003 Neil John McConville was shot by a member of the PSNI, the first use of lethal force by the service. Mr McConville was the driver of a Cavalier car that had been under surveillance by police in the hours before he sustained a gunshot wound on Crumlin Road at Glenavy, County Antrim. The Police Ombudsman conducted an investigation into this death which concluded in August 2005 and its report was published on 4 October 2007.<sup>86</sup>

Since then, the PSNI have improved its procedures of the use of lethal force. The particular use of force by the officers involved in the McConville incident was lawful. However, lethal force must only be used where it is absolutely necessary, and the planning and operation must be designed to avoid this use of force as far as possible.<sup>87</sup>

In the McConville case, the Coroner made a number of findings and the PSNI has responded to the Human Rights Advisor in relation to each of those. The Coroner considered the importance of ensuring that the planning and the overall operation was structured so as to avoid the use of lethal force and the standard Gold, Silver and Bronze PSNI command structure and found:

‘The fact that such a structure was not properly in place meant that at times there was a lack of clarity in the thinking and direction of those in the control room both in terms of who was fulfilling what role and then in their responsibility in terms of decision-making. Proper utilisation of the G/S/B structure ensures that lines of responsibility are clear and that decisions, when made, are taken by the appropriate officer.’<sup>88</sup>

PSNI response:

‘The use of Gold/Silver/Bronze for firearms was at that time within its infancy in PSNI. The terms have now been replaced nationally (for firearms operations) by Strategic/Tactical/Operational. The roles and structures have been fully adopted by PSNI. Strategic firearms commanders attend a qualification course delivered by College of Policing. Tactical and Operational firearms commanders attend qualification courses delivered by PSNI under licence from the College of Policing and in compliance with their standards and delivery protocols. All delegates on these courses are assessed and must pass before they are allowed to perform the role. All firearms operations within PSNI require the Strategic, Tactical and Operational commanders to be identified. In the event of a spontaneous incident, the Tactical also performs the role of Strategic until the Strategic is in place.’

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86 Report of Inquest, 11 April 2022.

87 McCann v UK.

88 Para 106.



The Coroner stated:

‘I have given careful consideration to those findings and conclusions and having done so I am satisfied that the operation was not planned and controlled in such a way that it minimised to the greatest extent possible the need for recourse to lethal force.’<sup>89</sup>

PSNI replied that Firearms Tactical Advisors

‘... now complete courses delivered by PSNI under licence from the College of Policing and in compliance with their standards and delivery protocols and includes a requirement to maintain records. In the event of a spontaneous incident, the Firearms Tactical Advisor is identified once contacted. All planned firearms operations within PSNI require a Firearms tactical Advisor to be identified at the planning stage.’

The Coroner found that there were issues with the surveillance operation:

‘... it does show some confusion, at the very least, over documentation which requires completion in an appropriate manner. It must be remembered that directed surveillance impinges on an individual’s right to privacy and such matters must be strictly and properly dealt with in compliance with the relevant legislation. I do not feel that I have to make a finding as to who may be telling the truth but the position is far from satisfactory.’<sup>90</sup>

The PSNI responded:

‘Para 162 refers to confusion in the signing of a RIPA authorisation for the operation. At the time of the incident, firearms commanders applied for Directed Surveillance Authorisations under RIPA. This is no longer the case. Investigators who are not involved in firearms command apply for directed surveillance authorities and these are authorised at by a cadre of officers independent from the investigation in compliance with Surveillance Codes of Practice and PSNI policy.’

The Coroner found;

‘U126 [a PSNI officer] did not recall what conversation he had with HH/U129 during this drive. He did not take any note of anything that may have been said during this journey. It is hard to believe that nothing was said and the absence of any note at all is concerning. In her written submissions Ms. McCann draws attention to the ACPO manual which at the time required initial notes to be made as soon as practicable and the entry should be timed, dated and signed and, where notes have been made after conferring, or the incident has been discussed, the officers should endorse their notes to that effect, highlighting issues discussed and with whom, and any other document sources referred to when compiling notes should also be highlighted.’<sup>91</sup> The PSNI responded:

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89 Para 121.

90 Para 162.

91 Para 325.

‘PSNI now follows guidance from National Police Chief’s Council and College of Policing following the discharge of a firearm. This includes a conferring warning being communicated to officers at the scene to remind them of their obligations, consideration of separating police officers in certain circumstances and the provision of a Post Incident Manager to supervise and manage the process. PSNI Post Incident Managers attend qualification courses delivered by PSNI under licence from the College of Policing and in compliance with their standards and delivery protocols. In addition, body worn video is available to firearms officers and used in accordance with national and PSNI policy.’

The Coroner’s overall conclusion:

‘The operation was not planned and controlled in such a way that it minimised to the greatest extent possible the need for recourse to lethal force.’<sup>92</sup>

## **SPIT AND BITE GUARDS**

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A Spit and Bite Guard is a breathable, mesh material garment that covers the face and head. The Board’s Performance Committee has been responsible for monitoring the temporary introduction of Spit and Bite Guards by the PSNI since March 2020 in response to the pandemic. They constitute a use of force and must be therefore monitored and recorded as such. As part of this monitoring, the Policing Board has overseen the production of the Board’s ‘Review of the Policing Response to Covid-19’ with its recommendation to cease use of spit and bite guards.<sup>93</sup> The Policing Board has also taken into consideration the findings of the Ombudsman’s reviews of PSNI’s Use of Spit and Bite Guards in 2021 and reviewed PSNI’s Equality Impact Assessment Evidence Report that included the findings of the public consultation. The Human Rights Advisor published his Review of PSNI’s Use of Spit and Bite Guards in February 2022.<sup>94</sup>

The Board approved the publication of this Report in February 2022 and in doing so accepted the continued use of spit and bite guards by the PSNI, subject to the agreement of governance framework that will be reviewed on a regular basis.<sup>95</sup> Specifically, the Board requested that the Chief Constable take into consideration the Report and its Recommendations and, in particular, the following concerns when drafting this governance framework:

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92 Para 460.

93 Report on the Thematic Review of the Policing Response to Covid-19, Northern Ireland Policing Board, <https://www.nipolicingboard.org.uk/publication/report-thematic-review-policing-response-covid-19>

94 A Review of PSNI’s Use of Spit and Bite Guards by the NI Policing Board’s Human Rights Advisor, <https://www.nipolicingboard.org.uk/files/nipolicingboard/publications/review-of-the-psnil%E2%80%99s-use-of-spit-bite-guards-by-the-policing-board%E2%80%99s-human-rights-advisor.pdf>

95 **ibid.**

- The use on children and other vulnerable people;
- The possibility of greater opportunities for de-escalation;
- The use once a suspect has already been restrained and is no longer an active threat to officers or is in the custody suite or in a police vehicle; and
- The statistical differences in their use in relation to the community background of the suspect.

Finally, the Board suggested that the current training of officers and the current guidance to officers will need to be amended to take account of these concerns.

Correspondence from the Chief Constable in June 2022 notified Board Members of the decision to permanently introduce spit and bite guards and the acceptance of twenty out of 21 recommendations.<sup>96</sup>

It is accepted that the use of the guards is a use of force which engages in a direct and fundamental way the rights protected by the European Convention of Human Rights (ECHR), specifically Article 2, Article 3 and Article 14. The Advisor's Report considers these Articles and the proportionality, lawfulness, the Northern Ireland context, de-escalation and alternatives to spit and bite guards. The Report considers the safeguards and protections necessary if spit and bite guards are introduced and it sets out in detail what is required of the service in relation to training and Guidance. It considers the current online training package for officers and makes recommendations for this to be updated. The Human Rights Advisor makes several recommendations in respect of the current PSNI guidance and these are set out as operational recommendations. The Report also addresses other safeguard options; these include: de-escalation, disengagement and warnings; vehicles and custody settings; and identification of safeguards for vulnerabilities such as age, mental health, disability, drug and alcohol intoxication. The Report also sets out how the Board can provide continued monitoring and oversight of their use.

Following discussion with ACC Chris Todd at the Performance Committee meeting in September 2022, Members requested an update on the implementation of the recommendations in six months' time (Spring 2023). The Board will continue to monitor closely the use of spit and bite guards and an update will be given in the next Annual Human Rights Report 2022/23.

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96 The Board continues to scrutinise the implementation of the recommendations with a further report coming before the Performance Committee in February 2023.

## 7. NATIONAL SECURITY, COVERT POLICING AND TERRORISM

### THE ROLE OF THE POLICING BOARD

The Board has oversight of the Chief Constable and responsibility of holding PSNI to account in respect of all aspects of police work, including that which relates to national security. However, the Board has no remit in respect of the Security Service; although the Chief Constable remains responsible for and accountable to the Board in respect of all PSNI officers and staff working alongside the Security Service. The Performance Committee met with the Independent Reviewer of Terrorism Legislation, the Independent Reviewer of the Justice and Security Act and the Chair and Human Rights Advisor and the Independent Reviewer of National Security Arrangements in Northern Ireland.

MI5 is only accountable to politicians – directly to the Home Secretary<sup>97</sup> and to the Security and Intelligence Committee of the Westminster Parliament.<sup>98</sup> Although, as with other agencies, many of its surveillance powers are regulated by the Regulation of Investigatory Powers Act and complaints about its activities can be made to the Investigatory Powers Tribunal.<sup>99</sup> MI5 objectives are:

- The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means;
- It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands; and
- It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.<sup>100</sup>

97 The Security Service Act 1989, <https://www.mi5.gov.uk/people-and-organisation>

98 <https://isc.independent.gov.uk>. See its report on Northern Ireland-related terrorism which appears to be based on evidence from 2019, [https://isc.independent.gov.uk/wp-content/uploads/2021/01/20201005\\_CCS207\\_CCS0920226370-001\\_Northern\\_Ireland-related\\_terrorism\\_final.pdf](https://isc.independent.gov.uk/wp-content/uploads/2021/01/20201005_CCS207_CCS0920226370-001_Northern_Ireland-related_terrorism_final.pdf)

99 <https://www.ipt-uk.com>

100 Section 1, the Security Service Act 1989.

Not all covert policing operations involve a national security element, but national security policing is one area in which covert techniques are frequently deployed. Responsibility for national security intelligence work was transferred from the PSNI to the Security Services in 2007. However, in all circumstances, including where national security issues are involved, it is the role of the PSNI to mount executive policing operations, make arrests and take forward prosecutions under the direction of the PPS for Northern Ireland. 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 and includes the following principles:

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; and
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.

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 or to the public. 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 Policing 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>101</sup> There are recent examples of the PSNI seeking not to disclose sensitive material to Board Members (all of which were accepted by the Board) but in nearly all cases that material has been provided to the Board's (security vetted) Human Rights Advisor.

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<sup>101</sup> Section 59 of the 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.

Annex E also states that the Board's Human Rights Advisor should have a role in human rights proofing the relevant protocols that underpin the principles within which the PSNI must operate and also in confirming that satisfactory arrangements are in place to implement the principles.

The Human Rights Advisor had three meetings with senior representatives of PSNI and MI5 in the period Sept 2021 to February 2022 to examine human rights compliance of PSNI's joint work with MI5 in Northern Ireland. Whilst noting that MI5 are subject to separate national oversight arrangements outside of the Policing Board's remit, conversations were wide ranging, open and constructive with contributors content to engage and share experience of joint work. Despite the fact that MI5 are not accountable to the Policing Board, in the course of the Human Rights Advisor's engagement he was able to examine and probe how PSNI works with MI5 to conduct collaborative counter terrorism investigations in NI with the following observations:

- Whilst primarily related to Northern Ireland Related Terrorism (NIRT), the scope of joint terrorism work covers the full range of threats including International Counter Terrorism and Extreme Left/Right Wing Terrorism;
- While the NIRT threat primarily comes from violent dissident republicans, joint work recognises the persistent threat to communities posed by loyalist paramilitaries and continued tension around European Union (EU) exit outcomes;
- Ways of working, developed over many years, are founded on the Principles of the St Andrews Agreement and are aligned to wider GB practice wherever possible (recognising NI policing structures, terminology, specific threat and operating environment differ and that the St Andrew's Agreement demands closer joint working than might be the case in GB);
- The partnership approach aims to facilitate both organisations (and wider partners) to bring their capabilities and expertise to bear against shared challenges whilst respecting operational independence, legal frameworks and oversight arrangements. Critically it recognises that:
  - The Chief Constable is responsible for the policing of NI and nothing in the joint ways of working affects this responsibility;
  - MI5 has a statutory responsibility to ensure the protection of national security from a number of threats, including terrorism, under the Security Services Act 1989;
  - That success in tackling NIRT requires PSNI and MI5 to work in partnership throughout the investigative process;
  - That both organisations have a statutory duty to protect life (Police Act (Northern Ireland) 2000 and Human Rights Act 1998);

- There appears to be a joint commitment to criminal justice outcomes as a means to achieving long term successful outcomes against the threat. It recognises the need for MI5 to operate with regard to PSNI's interests (for instance gathering of evidence to support criminal justice outcomes) and PSNI's regard to MI5's requirements (for instance protecting national security);
- Human rights appear to be properly recognised and a persistent thread to the partnership and the ways of working adopted;
- Partnership working extends to all levels across both organisations via regular joint meetings and staff working alongside one another; and
- Shared ways of working appear to emphasise a culture of continuous learning and improvement.

In the last Human Rights Annual Report the following recommendation was made:

*Recommendation 17*

*There should be a wider debate of the asymmetry in intelligence gathering and law enforcement functions in Northern Ireland involving the PSNI and the Policing Board and this should be initiated by the PSNI.'*

The PSNI replied as follows:

'Crime Operations Department provide a detailed quarterly performance report related to Serious and Organised Crime to the Policing Board and this includes reporting against the crime types linked to paramilitary organised criminality.

There are existing joint working practices where national security and paramilitary related criminality are jointly assessed so tasking and prioritisation decisions can be made around deployment of covert policing resources.

It is recognised by a number of relevant stakeholders i.e. the Police Service, the Security Service, the Northern Ireland Office and the Department of Justice that there could/ should be enhanced levels of joint working across both the Northern Ireland Related Terrorism and Tackling Paramilitarism Programme service areas.

This recognition has led to the establishment of the 'Gearbox' concept where these discussions are taking place. The Paramilitary Crime Task Force (PCTF) works closely with Crime Operations Department to ensure that intelligence development and covert deployments are considered across the service and tasking decisions made based upon a collective assessment of threat, harm and risk.'

## THE SECURITY SITUATION

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This is a summary of the main findings from the report by His Honour Brian Barker KC, the Independent Reviewer of National Security Arrangements in Northern Ireland, covering the period from 1 January 2021 to 31 December 2021 presented to the Secretary of State for Northern Ireland:<sup>102</sup>

‘The year commemorated the centenary of the creation of Northern Ireland, the twentieth anniversary of the PSNI, and the appointment of the first Lady Chief Justice. More widely, this has been another entirely unpredictable twelve months. The coronavirus pandemic has continued to dominate life in Northern Ireland and across the rest of the United Kingdom, and developments and reactions had a significant impact on health and wellbeing, as well as on the economy and the administration of Government in Northern Ireland.

Unionist parties’ continuing opposition to the Northern Ireland Protocol has been a defining political theme throughout 2021. The Protocol has also constituted a significant part of the context for some paramilitary activity. The DUP contended that these unique arrangements would divide Northern Ireland from the rest of the UK, and would also threaten the constitutional integrity of the UK. These post-Brexit trade arrangements appeared to magnify the sense of unionist disenfranchisement, partly by raising fears that Northern Ireland would be drawn closer to the orbit of the Republic, and would accelerate a move to eventual unification.

Unrest in unionist areas was apparent, and objection to the Protocol was said to be the predominant cause of sporadic violence and rioting, mainly in loyalist areas of Belfast and Londonderry in late March and early April - the worst for some years. Included were attacks on police officers and a bus, and in the result over 100 officers received injuries.

Violence resurfaced in November with the hijacking and torching of a Translink bus in Newtownards by masked men, and less than a week later another bus was boarded and burnt out in Newtownabbey. It was believed the arson was carried out by loyalists from a local faction of the Ulster Volunteer Force in an apparent protest against the Protocol, although the real effect was to harm local people and make life more difficult for local communities.

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<sup>102</sup> Due to the classification of the Report it is not available publicly, but a summary is provided by the Secretary of State for NI. Statement made by the Secretary of State for NI, 30 June 2022, House of Commons, <https://questions-statements.parliament.uk/written-statements/detail/2022-06-30/hcws165>



The pandemic and the strictures towards working from home continued to have a profound effect. By mid-summer the Chief Medical Officer was concerned that the health service was having to operate under severe pressure and the Northern Ireland Minister for Health called in military medical staff to assist. In early September Stormont was recalled to discuss the high level of Covid-related school absence. Many of the communities hardest hit by the pandemic were those where social-economic problems were at their greatest and often where paramilitary presence was at its strongest.

The dissident activity picture remained much as it was in 2020 and it is assessed Covid-19 restrictions limited operational activity. The threat level in Northern Ireland from Northern Ireland-related Terrorism (NIRT) remained at SEVERE, meaning an attack is highly likely.

The first attack ascribed to NIRA since the arrest of the alleged leadership during Operation Arbacia, in August 2020, took place in April. An improvised firebomb was left next to a police officer's car outside her home in County Londonderry with the apparent intention of killing both the officer and her young daughter. Deputy First Minister Michelle O'Neill described the attack as 'shocking and deplorable'. Arrests were made later in the year, and a number of Continuity IRA members were arrested and charged in June. Arrests were made in September in relation to the shooting of Lyra McKee.

The success of Operation Arbacia in 2020, coordinated jointly by PSNI and MI5, was widely welcomed and the resulting arrests had restricted the ability of NIRA to operate and attack at a sustained level. The reduced activity compared with previous years was apparent, although constant vigilance and pressure was still necessary. The smaller groups of identifiable dissident republicans had been involved in some activity, not touching national security, attempting to retain their public profile.

The more visible activity was in the name of loyalism, the flash point being the objection to the perceived effects of the Protocol. Overall, the dial had been turned up and other issues of contention including the handling of legacy cases and the Irish language, remained just below the surface. On the positive side, the general threat picture was better, being confined to a small sector who were adept at preying on and deploying vulnerable youngsters.

The landscape continues to be complex, with participants ranging from those who use paramilitarism as a cloak for unadorned criminality to those who remain involved for political and identity reasons which reach back to the Troubles. The damage caused by paramilitary activities on communities and society as a whole is undiminished.

The cross-Executive Tackling Paramilitary Activity, Criminality and Organised Crime Programme supports people and communities across Northern Ireland who are vulnerable to paramilitary influence and uses a public health approach to violence reduction.

The Tackling Paramilitarism, Criminality and Organised Crime Programme Board, chaired by the Head of the Northern Ireland Civil Service and the Political Advisory Group chaired by the Justice Minister, welcomed the increasing emphasis on a 'whole of Government' approach in tackling paramilitarism, the development of multi-agency hubs, and the impact of more joined-up, inter-agency approach.

The same observational difficulties that applied in 2020 continued in that it was not possible to conform to any sort of structured plan of visits or avenues of inquiry. It was evident that the various offices and organisations of interest were all under enormous pressure, coping not just with unforeseen unpredicted events but also with illness, self-isolation and working from home, resulting in most offices being pared down to critical staff.

In the event the approach to meetings and research that I adopted in 2020 of some virtual contact where possible, was continued for much of the year. Regular communication continued nevertheless, and I was fully informed of any significant developments. It was not until November, as infection rates subsided, that a suitable opportunity arose for a visit to Belfast, and some more useful face to face personal contact was re-established.

My major update with MI5 was conducted through the secure link from Whitehall in July. Again, although any briefing and discussion on particular investigations was not practical, I was given a clear insight of both the current direction, the prevailing budgetary conditions and the interaction with PSNI. I was able to have a better understanding of the additional problems created by working in a Covid-19 restricted environment and a better picture of how MI5 had adapted to the current conditions. Necessary absences and revised practices had been challenging, but not undermining, and the policy of wider collaboration and further community initiatives continued.

Of note was the continuing development of high-level regular meetings of agency representatives with obvious advantages in mutual understanding and identifying best practice and effective integrated planning and strategic approach to tackling NIRT. Work was also continuing with broader communication and improving protocols with partners in order to be more cooperative with releasing information while maintaining essential security.

I am confident, however, that MI5 continues to maintain the strategic approach to tackling NIRT and the sharing of intelligence at as high a level as is possible. I have been kept apprised of significant events personally, and the Northern Ireland Committee on Protection at its meetings receives an instructive update at each meeting.

I was able to visit PSNI HQ in November, where I was briefed by the Chief Constable Simon Byrne, and other senior officers as to the effective cooperation achieved. They underlined the difficulty of managing and deploying a public service in an environment that was unstable and unpredictable from both the health and political standpoints. A worrying development was the spread of public disorder in a number of areas in late March and early April leading to the need for strategic and tactical command structures in order to protect communities from harm and to keep people safe. There was considerable assistance and support from community leaders and youth workers in seeking to restore calm, but the widespread and unnecessary level of violence directed towards the police was a serious concern.

Maintaining public confidence within some sections of the community remained a problem, and accusations and perceptions of ‘two-tier’ policing remained prominent. Directing a virus-struck, depleted service that had to interact with the public in changing conditions – with regulations that were difficult to explain and liable to change – resulted in situations which attracted criticism from many sides while pleasing few. There was also the necessity of maintaining vigilance and effectiveness in the drive against organised crime and terrorism, where resilience among the dissident republican groups remained, and about a third of the organised crime groups were loyalist paramilitary organisations or had paramilitary links.

With PSNI as the public face, the response to the worrying period of disorder witnessed in parts of the Protestant, unionist, loyalist community during April was led by the Executive.

Recorded crime level in the spring was below average although antisocial activity was consistent. The absence of disorder and relative stability over the summer was encouraging. The agreement with MI5 and the management of CHIS operatives continues to be carefully monitored particularly in the light of the new power under the Covert Human Intelligence Source (Criminal Conduct) Act 2021. This power has been robustly reviewed and in no circumstances would serious crime against another person be allowed. The regular inter-agency meetings at a very senior level continued and provided a positive contribution in providing a best practice and a complimentary approach to the threat and changing landscape of operating national security during a difficult year.

The key security situation statistics during the year show there were 2 security-related deaths, the same number as in 2020. There were fewer bombings, shootings and paramilitary-style attacks than in 2020. There were 5 bombing incidents, compared to 18 in 2020 and 25 shootings, compared to 41. There were 36 casualties of paramilitary style assaults, compared to 26 previously. All casualties were aged over 18.

There were 14 casualties of paramilitary style shootings, compared to 15 previously, all of whom were over 18. There were 134 persons arrested under section 41 of the Terrorism Act 2000, compared with 76 of which 23 were subsequently charged, compared to 14 previously.

Overall, the continued development of regular meetings and exchanges at high level between the police and the security services is noticeable and commendable.

Although dissident republicans continue to pose the most significant threat to national security in Northern Ireland, successful investigations against them in 2020 lowered their operational capacity and activity into 2021. Concerted pressure directed towards them remained effective with positive results, and several plots were thwarted. Efforts by PSNI, MI5, An Garda Síochána, and the Ammunition Technical Officers meant that the overwhelming majority of the population were able to go about their daily lives untroubled by terrorism.

Despite fewer incidents, danger to serving police and prison officers doing a difficult job persists and regrettably the necessity for constant vigilance remains.

My conclusions, again restricted by difficult operational conditions, in relation to Annex E of the St Andrews are as follows:

**Further to reinforce this comprehensive set of safeguards, the Government confirms that it accepts and will ensure that effect is given to the five key principles which the Chief Constable has identified as crucial to the effective operation of the new arrangement:**

<b>a:</b> All Security Service intelligence relating to terrorism in Northern Ireland will be visible to the PSNI	Clear evidence of continued successful collaboration. There is compliance.
<b>b:</b> PSNI will be informed of all Security Service counter terrorist activities relating to Northern Ireland	Regular and effective high-level meetings. There is compliance.
<b>c:</b> Security Service intelligence will be disseminated within PSNI according to the current PSNI dissemination policy, and using police procedures	There is compliance.
<b>d:</b> The great majority of national security CHIS in Northern Ireland will continue to be run by PSNI officers under existing handling protocols	There is compliance.
<b>e:</b> 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 Policing Board is under strong leadership and has an effective Human Rights advisor. PSNI continues to comply with the Human Rights Act.'

The Policing Board's Human Rights Advisor has discussed the national security assessment and the role of MI5 with Sir Brian Barker and, recently, has held discussions with the newly appointed Independent Reviewer of National Security, Professor Marie Breen-Smyth.

Perhaps the most important development was on 22nd March when the threat level from Northern Ireland Related Terrorism was reduced from 'severe' to 'substantial', the first reduction since 2010.

Regarding the oversight of specific counter-terrorism and security powers, the Westminster Government's appointed Independent Reviewer of Terrorism Legislation reviews and reports annually on the operation of the Terrorism Act 2000 (TACT) and Part 1 of the Terrorism Act 2006 across the UK. The powers provided to police officers within TACT include, amongst others, powers to stop and search persons and vehicles and the section 41 power to arrest and detain (which can last for up to 14 days on judicial authority).

Mr Jonathan Hall KC took over as the Independent Reviewer of Terrorism Legislation in May 2019. The Board Chair, the Performance Committee and the Human Rights Advisor have met with Mr Hall to discuss the findings from Mr Hall's annual reports. Jonathan Hall KC's latest Annual Report for 2020 was published in April 2022<sup>103</sup>, and helpfully, again, contains a separate chapter on Northern Ireland (Chapter 9) raising key issues for the PSNI and for the Board to consider. Jonathan Hall KC provides more details on the issue of arrests using the Terrorism Act rather than PACE which he raised last year (and which were reproduced in the Human Rights Annual Report for 2020/21):

'9.36...Once again, Northern Ireland has accounted for a high proportion of the arrests made under section 41 of the Terrorism Act 2000. This year the figure was 75% of all section 41 arrests in the United Kingdom (last year it was 77%). There is no legal requirement for the police to use section 41 arrest powers when arresting for terrorism-related activity. In fact, in Great Britain the vast majority (86%) of arrests for terrorism-related activity are carried out under non-terrorism arrests powers, i.e. under PACE powers do not enable the long periods of pre-charge detention available under section 41 Terrorism Act 2000 (up to 14 days) but do allow release on bail, which may be a useful accommodation between the demands of the investigation and the protection of the public in lower threat investigations. However, PSNI take the view that arrests for terrorist-related activity ought to be carried out using terrorism powers for reasons relating to public perception: that terrorism is being taken seriously (because more serious arrest powers are being used) and that there is nothing underhand in the manner of the investigation (which might be suggested by the use of non-terrorism powers in relation to suspected terrorism). The recent Pitt Park arrests were followed by a PSNI announcement that the arrests were 'conducted under the Terrorism Act;

<sup>103</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1071570/IRTL\\_Report\\_Terrorism\\_Acts\\_in\\_2020\\_independent.gov.uk](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1071570/IRTL_Report_Terrorism_Acts_in_2020_independent.gov.uk)

9.37. Whilst this does offer some explanation for the rate of section 41 use in Northern Ireland, it is dismaying that the choice of arrest power is affected by reasons relating to public perception;

9.38. Firstly, if a less intrusive investigative measure can be used against an individual who is after all only suspected of criminal wrongdoing, it should be. Section 41 is a more restrictive detention regime than detention under PACE (the Police and Criminal Evidence (Northern Ireland) Order 1989) because it permits deprivation of liberty for up to 14 days. Reasons relating to public perception should not be used to interfere with fundamental rights;

9.39. Secondly, it may be sensible for PSNI to have the option of releasing under investigation on conditional bail. Conditional bail may provide greater protection to the public if further investigation is required before charge;

9.40. Thirdly, it is a requirement of section 31A Police (Northern Ireland) Act 2000 that officers shall carry out their functions with the aim, inter alia, of securing the support of the local community. Community confidence is unlikely to be served if the PSNI use arrest powers based on public perception rather than policing need. Nor does securing community support mean pandering to the irrational, and it is irrational to suggest that police in Great Britain are taking terrorism any less seriously because they mainly arrest under PACE. Policing to public perception also carries the risk of even out-cited suggestion of two-tier policing;

9.41. Of the 79 people detained under section 41 of the Terrorism Act 2000, there were 13 applications for warrants of further detention and no refusals;

9.42. The 79 arrests made under section 41 resulted in 14 people being charged with an offence (4 less than last year). This represents a charge rate of 18% (which is marginally better than last year's figure of 12%. In 2020, 13 people were convicted of terrorism offences;

9.43. Both I and my immediate predecessors have consistently made the point that the charge rate following a section 41 arrest in Northern Ireland appears to be anomalous compared to the comparable figure in Great Britain. This year the charge rate in Northern Ireland following arrest under section 41 was 18%, while in Great Britain it was 50%;

9.44. I explored this issue with the PSNI in the preparation of last year's report and, as I have already explained, I was informed that the default position in Northern Ireland when an arrest for a terrorism related offence is being planned is to rely upon section 41 of the Terrorism Act 2000. Bearing in mind that in Great Britain the vast majority of arrests for terrorism-related activity are carried out using non-section 41 powers, the better comparison may be between, in Northern Ireland, the charge rate following section 41 arrest and, in Great Britain, the charge rate following both section 41 and non-section 41 arrest.

The latter rate, for the 2020, is 30% although in previous years it has been between 37% and 55%. The use of section 41 is therefore unlikely to provide an explanation for the low charge rate in Northern Ireland;

9.45. I have been informed that the PSNI is considering commissioning a working group to review current practices on the use of section 41 of the Terrorism Act 2000. This is a welcome development but does not preclude me from making the following recommendation: PSNI should not take account of public perception when deciding on the appropriate arrest power for terrorist-related activity.’

### **RECOMMENDATION 8**

Considering Northern Ireland’s high proportion of arrests under section 41 of the Terrorism Act rather than PACE and subsequent low charge rate compared to Police Services in Great Britain, Jonathan Hall KC recommends that PSNI not take account of public perception when deciding on the appropriate arrest power for terrorist related activity. The proposed PSNI stop and search working group is a positive development but Jonathan Hall’s recommendation relating to the use of the Terrorism Act is also endorsed again by the Policing Board.

### **Terrorism Act - Ports Examinations**

The High Court in London has recently provided important guidance to the police service on the use of the Terrorism Act power to stop, examine and detain people travelling through ports. In particular, in relation to avoiding discrimination, making it clear that deciding to stop a person on the basis of their legitimate political beliefs is unlawful. The judges stated:

‘The Chief Magistrate appears to have conflated the issue of terrorism and legitimate political beliefs. There are two separate questions to be asked namely (1) was the stop because of a protected characteristic, what was the reason for the stop? (2) if there is no discriminatory reason, was the purpose of the stop to determine if the individual appeared to be concerned in terrorism or was the stop linked to racial, religious or political views which would be unlawful under the provisions of the Equality Act 2010? The Chief Magistrate stated that political views and terrorism are inherently linked which led to his finding that the stop was for the statutory purpose and not discriminatory...

The Chief Magistrate appears to have considered that because terrorism may be committed for the purpose of advancing a political cause then a person can be lawfully stopped on the basis of legitimate political beliefs. That was an error of law. It is unlawful for the Sch.7 power to be exercised in respect of a protected characteristic of legitimate political belief.<sup>104</sup>

104 Hakan Cifci v Crown Prosecution Service, Divisional Court, 1 July 2022 , paras 21 and 23 <https://www.doughtystreet.co.uk/sites/default/files/media/document/Cifci%20v%20CPS%20final%20judgment.pdf>

## **National Crime Agency**

The Policing Board was given responsibility for holding the National Crime Agency (NCA) to account when the NCA was established.<sup>105</sup> The arrangements for monitoring the NCA by the Board have been set out in detail in a Memorandum of Understanding between the NCA and the Policing Board.<sup>106</sup> The Board exercises its responsibilities by receiving regular written reports on the work of the NCA in Northern Ireland and inviting the Director General and other NCA staff to Board meetings for discussion and to deal with Members' questions, including holding a public session with the Chief Constable of the PSNI. The Human Rights Advisor accompanied Board Members on a day long series of meetings and discussions at the NCA's London headquarters in the summer of 2021. Furthermore, more detailed discussions with the NCA about human rights compliance with the Human Rights Advisor were held in November 2021.

### **RECOMMENDATION 9**

The regular reports by the NCA to the Policing Board should contain a section dealing with human rights compliance issues arising from its work in Northern Ireland, including any challenges and difficult issues.

## **Covert Surveillance**

Police covert powers are governed by the Regulation of Investigatory Powers Act 2000 (RIPA) and the Investigatory Powers Act 2016. These powers include: 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 (CHIS - commonly referred to as police informants, agents and undercover officers); and the authorisation of criminal conduct (Criminal Conduct Authorisations); 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.

<sup>105</sup> Section 3A of the Police (Northern Ireland) Act 2000 (as amended): '(3A) The Board shall— monitor the exercise of the functions of the National Crime Agency in Northern Ireland and make arrangements for obtaining the co-operation of the public with the National Crime Agency in the prevention of organised crime and serious crime.'

<sup>106</sup> <https://www.nipolicingboard.org.uk/national-crime-agfurfhency>



## **Investigatory Powers Act 2016**

The Investigatory Powers Act 2016 provided an updated framework for the use by the security and intelligence agencies. It sets out the statutory tests that must be met before a power may be used and the authorisation regime for each investigative tool, including a requirement for Judicial Commissioners to approve the issuing of warrants for the most sensitive and intrusive powers. There is also a provision to create an Investigatory Powers Commissioner for Northern Ireland, but this is yet to be implemented and it is hoped that this can be remedied as soon as possible.

CHIS<sup>107</sup> may only be authorised for use in accordance with the RIPA. Under RIPA a person is a CHIS if they establish or maintain a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within: the covert use of a relationship to obtain information or to provide access to any information to another person; or the covert disclosure of information obtained by the use of such a relationship or as a consequence of the existence of such a relationship. Police officers and other personnel from law enforcement agencies can also be authorised as a CHIS (undercover police officers).

Special safeguards apply to the use or conduct of CHIS who are under 18 years. For example, the use or conduct of CHIS less than 16 years of age can never be authorised to give information against their parents or any person who has parental responsibility for them. In other cases, authorisations should not be granted unless special provisions are complied with.

Litigation by a number of NGOs raised questions about the lawfulness of CHIS being 'authorised' to commit criminal offences (see last year's Human Rights Annual Report for more details). As a result the Government in Westminster brought forward a Bill which was enacted by Parliament – the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. Criminal Conduct Authorisations now allow MI5, police services (including the PSNI), and a range of other public authorities to authorise their agents and informants or CHIS to commit criminal offences, where it is necessary and give those people and those that made the authorisation complete immunity. In practice, the Act makes lawful an already widespread practice.

The Board suggested that the PSNI develop its own guidance on this authorisation process and that the Board have a role in approving this guidance. It was suggested that this guidance might help to reassure the public in Northern Ireland about both the procedures and the kinds of crimes that might be authorised. The guidance could impose specific restrictions or controls to try to deal with, at least some, of the important issues raised in Parliament during the passage of the Act but which were not dealt with sufficiently in that legislation.

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<sup>107</sup> Sometimes referred to as 'informers'.

Careful guidance might also avoid the risk that PSNI violates human rights law (including the rights of innocent victims), limit the use of children in committing “authorised crimes” and resolve some of the issues resulting from PSNI agents or others committing crimes in the Republic. The guidance (or at least parts of it) could also be subject to some kind of public consultation (including an equality impact assessment). The Human Rights Annual Report 2020/21 recommended:

‘Recommendation 20:

*Given the identification by many Parliamentarians of flaws in this Act and the concerns from the past of the use of CHIS and possible criminal offences, the PSNI should develop more detailed guidance to ensure human rights compliance.’*

The PSNI rejected that recommendation although internal guidance was drafted. However, the PSNI have been very open with the Human Rights Advisor on how it will use the new law and he attended a training seminar with the Criminal Conduct Authorisations (CCA) authorising officers and was able to ask questions and discuss the procedures and processes. In February 2022 he was shown the PSNI’s internal draft guidance on CCAs and provided comments to try to strengthen the human rights principle that were set out. In September 2022 the Advisor was shown the final version and, with the consent of PSNI, can include the following extracts from that guidance. Note that because some parts have been ‘redacted’ by PSNI the text appears a little broken and difficult to understand:

**‘PSNI Criminal Conduct Authorisations Guidance 2021 – includes redactions**

The use of Covert Human Intelligence Sources (CHIS) is a crucial tactic in preventing many crimes and safeguarding victims and the public from serious harm, including terrorism, drugs, firearms offences and child sexual exploitation.

The Criminal Conduct Act 2021 (the 2021 Act) provides an express power to authorise CHIS to participate in conduct which would otherwise constitute a criminal offence. This will only be authorised – **in very carefully managed circumstances**.

The new legislation is summarised below and the updated CHIS Codes of Practice 2021 outlines the process and consideration for the authorisation of Criminal Conduct and should be read in conjunction with this Policy.

Full implementation of the 2021 Act came into effect for the PSNI on 15 September 2021. This will necessitate the adoption of some transitional arrangements and a permanent change in how authorisations are granted for CHIS criminal participation.

As is the case from the inception of RIPA 2000 nearly 20 years ago, all CHIS authorisations **must be considered in terms of necessity and proportionality**. In addition CHIS authorisations must be in compliance with overarching obligations under the European Convention on Human Rights (ECHR). These include the right to life, the absolute prohibition of torture and inhuman and degrading treatment and punishment and the prohibition of discrimination. Further details are set out at page 8 below.

CHIS will never be given unlimited authority to commit any and all crimes. A CCA must be detailed and specific about the conduct authorised and it must be accompanied by detailed risk assessments.

**The Act will not prevent prosecutors from considering a prosecution for any activity outside the authorised activity.**

The authorisations will have judicial oversight and will be overseen by the Investigatory Powers Commissioner (IPCO) who will be notified of any criminal conduct authorisation in writing as soon as practicable and always within 7 (seven) days...

**CoP 3.14**

The following elements of proportionality should therefore be considered before granting a Criminal Conduct Authorisation (CCA).

- Whether what is sought to be achieved by the authorised conduct could reasonably be achieved by other conduct which would not constitute crime;
- Whether the criminal conduct to be authorised is part of efforts to prevent or detect more serious criminality;
- Whether the potential harm to the public interest from the proposed criminal conduct would be outweighed by the potential benefit to the public interest and that the potential benefit would be proportionate to the criminal conduct in question...

**CoP 6.45 – 6.49**

6.45 Where a purported Criminal Conduct Authorisation does not meet the requirement the Part II of the 2000 Act, the conduct will not be rendered lawful by it.

6.46 Conduct that goes beyond what is authorised by Criminal Conduct Authorisation will also not be rendered lawful by it...

**Human Rights Considerations for CHIS Criminal Conduct Authorisations**

The key aspects of compliance with Human Rights law are already built in to the Act and as previously highlighted section 29B(4), it sets out clearly that the granting of a CCA must be necessary (a) and proportionate to what is sought (b).

At section 29B(5) the grounds for necessity are set out, and at 29B(6) the important caveat in all covert deployments, that there was no less intrusive method available to achieve the same aim, in this case, activity that does not constitute a crime.

Section 29B(7) is very important, because it stipulates “that subsection (6) is without prejudice to the need to take into account other matters so far as they are relevant (for example, the requirements of the Human Rights Act 1998).

This means that human rights considerations must be taken into account and applied at all stages during consideration of a CCA. Authorisations should identify human rights issues and address them appropriately.

This is where you can add in some of the other considerations, for example;

**Article 2 ECHR** – duty to consider any real and immediate risk to life to any individual who is either subject to the CCA, or may be affected by it.

**Article 3 ECHR** – duty to protect individuals from torture and inhumane treatment, commonly associated with paramilitary style assault (PSA). A CCA cannot authorise conduct which could constitute torture or inhuman or degrading treatment or punishment. This is an absolute prohibition.

**Article 8 ECHR** – right to privacy and respect for family life. This is more commonly engaged in DSA, but may be relevant to CCA deployment.

**Articles 10 and 11 ECHR** – deal with freedom of expression and right to assembly and association. These rights are frequently engaged in protest situations, but are more likely to be infringed if the protest is stopped or prevented. Any consideration of Articles 10 and 11 would be very case specific, but are the nonetheless important.

**Article 14 ECHR** – freedom from discrimination, this would be engaged if an individual CCA or theme of CCAs amounted to a perceived targeting of any particular group without lawful purpose. Compliance with Article 14 can be achieved through proper consideration of all of the operational requirements and the necessity and proportionality tests.

Section 29C sets out very specific and detailed provisions regarding the tasking of juvenile CHIS. In addition to the significant legal protections within Section 29C, there are also considerations within the United Nations Convention on the Rights of the Child (UNCRC) which are vast. The Act was written with those protections in mind, but it is good to note that these may be relevant if we did in fact authorise in this manner.’

The Human Rights Advisor has also asked to attend an individual CHIS governance meeting to understand how one of the safeguards works in practice but this has not yet taken place.

IPCO conduct annual inspections of PSNI and makes recommendations. The Human Rights Advisor has reviewed the inspection reports by the Independent Powers Commissioner's Office again this year and noted that, overall, it is positive in respect of PSNI practice and procedure.

The Human Rights Annual Report 2020/21 recommended:

*Recommendation 19*

*The Investigatory Powers Commissioner encourages all those inspected to publish the reports from his Office (suitably redacted if necessary) and PSNI should follow this approach, perhaps starting by producing a summary of the inspection and the action that it has taken. Further consideration should be given to disclosing other Service Instructions, policies and procedures to ensure greater transparency and to prevent others from distorting the PSNI's covert policing activities.*

The PSNI responded:

Not accepted at this time – the PSNI provides full access for the Human Rights Advisor to the annual inspection reports together with a full briefing regarding the Service action plan in respect of any observations or recommendation which have been made. Given the operational sensitivities and very detailed covert methodology contained in these reports there is a risk to covert tactics and capability if this material exposed and, therefore, it is not feasible to publish the reports even in a redacted or summary form.

The PSNI is committed to continuing the current arrangement whereby NIPB Human Rights Advisor has access to all relevant Regulation of Investigatory Powers Act and Investigatory Powers Act material to review so that they can appraise the Board of human rights compliance. Furthermore, RIPA and IPA Codes of practice which guide the Police Service in its approach to covert tactics and which form the basis of our internal policies and guidance is publicly available.'

The Human Rights Advisor has read the detailed report (18 pages) from IPCO's inspection in April 2022 and can confirm that this is very positive. The following extracts from that report, with the consent of the PSNI and IPCO, can be included here. Note that because some parts have been 'redacted' by PSNI so the text appears a little broken and difficult to understand:

#### ‘4. **Actions taken on previous inspection**

**Discharged** – professional discussion has assured the inspection team..

continues to be managed and staffed by highly experienced officers...

the oversight and reassurance regime that has been created by...

continues to provide valuable assurance and learning to those engaged in covert operations...

#### 5.2 **Errors**

an administrative error rather than a breach of the legislation...

not renewed in time...No contact or taskings took place during the unauthorised period...

#### 5.3 **Confidential Information**

It is important that consideration always be given to the possible presence of LPP [Legal Professional Privilege] material in all cases...

legal advisors are both highly experienced and well versed in criminal law...confident in their ability to assess the presence of Legal Professional Privilege material...

Investigating officers need to be aware that it is an area where professional legal guidance is usually required...

It was pleasing to note that there had been improvements made to applications and authorisations...

In general, applications were of a very good standard and benefited from the oversight and quality assurance of a number of persons...

Some operations can be very complex in nature, it is inevitable that the necessity and proportionality grounds can appear to be weakened progressively with the passage of time. The renewals tended to repeat the original grounds for the authorisation, rather than acknowledge the protracted nature of the deployment. A greater focus on what intelligence or evidential gaps remained, and how the continued use of the covert tactics could fill these, is recommended...

The applicant's assessment of collateral intrusion should describe in more detail what collateral intrusion has taken place, the future likelihood of it occurring, and the measures proposed to mitigate it. Such assessments should be bespoke to the nature of the activity and the tactics deployed...

While it was pleasing to note that cancellations were completed promptly...

Risk assessments clearly detailed the risks attached to each of the CHIS examined and were well maintained throughout the duration of the authorisation...

Very good practice was found in the submission and maintenance of policy logs detailing the regular reviews of the procedures attached to emergency contact and emergency extraction plans...this process is one the Force may wish to consider adopting as standard practice...

The oversight and governance of CHIS is extremely robust, and evidence of good practice was found in the frequent use of policy logs...

Contact sheets are very well maintained and demonstrate a detailed account of meetings with the CHIS, with an appropriate focus being placed on welfare...general good standards found...observations are made in relation to some of the cases examined...

Juvenile CHIS - No authorisations have been granted for the use of Juvenile sources within the inspection period...

PSNI has been subject of two previous standalone inspections on data assurance... The records should be clearly set out and supported by suitable reasoning for retention, review and disposal periods...

## **6 Conclusion**

This inspection has demonstrated that PSNI has continued to maintain a high level of legislative compliance in respect of CHIS and Surveillance. The recommendation highlighted in the 2021 report has been discharged, albeit one area of non-compliance has emanated from this inspection, together with several observations highlighted as learning points to improve the already high standards found.'

## RECOMMENDATION 10

- (a) The PSNI should provide a detailed, but confidential, written report to the Policing Board's Human Rights Advisor on the operation of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 by the Spring of 2023 and, subsequently, a summary of that report to the Performance Committee in Spring 2023; and
- (b) The PSNI should invite the Human Rights Advisor to the briefing by the Investigatory Powers Commissioner's Office (IPCO) inspection team at the conclusion of their next inspection in 2023. The PSNI should consult IPCO in advance of this inspection, allowing the Human Rights Advisor to discuss this directly with IPCO if this is necessary.

### Non-Jury Trials (NJT)

The Justice and Security (Northern Ireland) Act 2007 provides for a NJT where there is a risk from paramilitary or community-based pressure on a jury. The decision to proceed is made by the Director of Public Prosecutions, following a request from the Police Service of Northern Ireland or the Public Prosecution Service. These provisions expire after a period of two years but may be extended and there is no limit to the number of times that the NJT provisions may be extended. The provisions were last extended in July 2021 and will expire on 31 July 2023.

Last year, the Westminster Government said it is committed to bringing these provisions to an end. In order to work towards this, the Northern Ireland Office established the working group recommended by the previous Independent Reviewer of the Justice and Security Act. The Human Rights Advisor accepted an invitation to join this working group after seeking the consent of the Policing Board.

The Terms of Reference for the working group, agreed at the first meeting, were to: (1) identify practical measures and legal measures that could be taken to reduce the number of non-jury trials taking place; and (2) identify the indicators that members would look to in order to be satisfied that the non-jury trial provisions were no longer necessary.

Regular meetings were held during 2021 and they have continued during 2022. A summary and recommendations by the Independent Reviewer were set out in her latest report.<sup>108</sup>

<sup>108</sup> Marie Breen-Smyth, June 2022, Part 2, section 9.



## 8. VULNERABLE VICTIMS OF CRIME

Outcome 1 of the Northern Ireland Policing Plan 2020-2025 contains measures focused on repeat victims of crime; specifically, victims of domestic abuse, child sexual abuse and exploitation, and hate crime. This chapter will focus on those groups and focuses on their right to be protected. The Policing Plan Outcome ‘sets out impacts that the Board wishes to see in policing in order to make Northern Ireland a safe place to live. It is encouraging that when compared to other areas in England and Wales, Northern Ireland continues to be one of the safest places, recording the second lowest overall crime rate. Indeed, recent survey data finds that only a small proportion of people feel very unsafe (7%). However, rises in domestic violence and abuse incidents, more hate crime incidents and an increase in repeat victims are worrying in this year.’<sup>109</sup>

The repeat victimisation<sup>110</sup> rate in Northern Ireland is currently 17.6% (0.5% of the Northern Ireland population); and for females the rate is 19.3%, 16.1% for males and 11.3% for individuals over 60 years of age. In September 2021 PSNI started a process to address repeat victimisation by identifying and targeting repeat victims. Early indicators show that this has shown an 8.6% decrease in the number of active repeat victims who PSNI are addressing through this process, which is positive.

A worrying societal issue that PSNI report is that 75% of repeat victims have been flagged as having a vulnerability (including physical and mental health, drug and alcohol dependency), however through this flagging system, officers have shown that they are aware of these victims and their vulnerabilities and are using early intervention techniques to address this. PSNI can often find itself as the first responder where there is a perceived risk involving a member of the public – including those who may be vulnerable and/or in crisis. Officers spend a considerable amount of time looking after people in crisis, such as accompanying vulnerable individuals to hospital Emergency Departments.<sup>111</sup> It is estimated that 70% of calls to police are not crime related and police now answer upwards of 20,000 calls annually which are crisis related or are dealing with mental health or vulnerability issues. Those who are vulnerable require a health-led response and on occasions, the arrival of police officers is not conducive to de-escalating the situation. PSNI has invested in significant training for frontline officers to better equip them to deal with the changing environment they are expected to police. Initiatives, such as the Multi-Agency Triage Team and Police Custody Healthcare aim to address these needs. The Minister for Health and the Minister for Justice meet regularly to discuss justice and health interrelated issues.

<sup>109</sup> [Annual Report and Accounts 2021-22 \(nipolicingboard.org.uk\)](https://www.nipolicingboard.org.uk/annual-report-and-accounts-2021-22)

<sup>110</sup> A repeat victim is a person who has been linked to more than one crime within the past 365 days

<sup>111</sup> [Policing and mental health: picking up the pieces \(justiceinspectorates.gov.uk\)](https://www.justiceinspectorates.gov.uk/policing-and-mental-health-picking-up-the-pieces)

## **Domestic Abuse**

Domestic abuse continues to account for a significant proportion of overall crime across Northern Ireland. According to PSNI's statistical bulletin<sup>112</sup> this year shows the highest financial year figure recorded since 2004/05 for the number of domestic abuse crimes [21,723], an increase of 2,698 (14.2%) on the previous 12 months and two and a quarter times higher than when records began in 2004/05. 33,186 domestic abuse incidents were recorded during the 12 months from 1st April 2021 to 31st March 2022- an increase of 1,990 (6.4%) on the previous 12 months<sup>113</sup>. Just under 70% of perpetrators of domestic abuse are male, however this increased to 86% for repeat perpetrators. Statistics shared by the Rainbow Project and Cara-Friend during the development of an e-learning package on the new domestic abuse offence indicate that domestic abuse has been experienced by one in four lesbian and bisexual women and four in 10 gay and bisexual men. In addition, they advised that 80% of transgender people had experienced domestic abuse from a partner or an ex-partner.

There were nine homicides with a domestic abuse motivation in 2021/22. Four of the victims in 2021/22 were female, while there were eight female victims during the previous 12 months. Two of the victims in 2021/22 were under 18, compared with all victims in 2020/21 being 18 or over. In December 2020 the Department of Justice launched domestic homicide reviews<sup>114</sup> and three of these have been commissioned with the first formal report due during 2022. It will be important for PSNI to identify the learning from each and provide the Board with assurances on how they will be addressed.

The Domestic Abuse and Civil Proceedings (Northern Ireland) Act 2021<sup>115</sup> came into operation on 21 February 2022, closing a gap in the current law and ensuring that protection is not limited to physically violent behaviour. It sends a clear message that domestic abuse in all its forms, both physical and non-physical will not be tolerated. A wide range of work has also been undertaken to supplement the introduction of the new offence, including producing an e-Learning package developed in conjunction with voluntary sector partners; a new public facing digital awareness raising tool; and a multi-media advertising campaign that will encourage reporting and signpost people to support services.

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112 **Domestic Abuse Incidents and Crime Recorded in Northern Ireland Monthly Update to 31st March 2022** ([psni.police.uk](https://psni.police.uk))

113 Ibid.

114 If a person aged over 16 dies from or what appears to be from domestic violence and abuse a Domestic Homicide Review (DHR) may be carried out. Any decision to carry out a DHR will be so lessons can be learned from the death which will lead to improved responses and services for victims, and prevent future domestic homicides. Section 9 of the Domestic Violence, Crime and Victim's Act 2004 was commenced in Northern Ireland on 10 December 2020. The legislation provides specific functions for the Department of Justice and a duty on other statutory organisations to participate in the domestic homicide review process.

115 **Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021** ([legislation.gov.uk](https://legislation.gov.uk))

On 26 April 2022 two new offences regarding stalking were passed into law in Northern Ireland under the Protection from Stalking Act (Northern Ireland) 2022<sup>116</sup>. Under section 1 of the Protection from Stalking Act (Northern Ireland) 2022, a new offence of stalking is created. This offence is committed if a person (A) engages in a course of conduct that causes another person (B) to suffer fear, alarm or substantial distress or is such that a reasonable person, or a reasonable person who has any particular knowledge of B, would consider to be likely to cause them to suffer fear, alarm or substantial distress. However, in order for the offence to be committed, A must have either intended the conduct to cause fear, alarm or substantial distress, or ought in the circumstances to have known that this effect would have been caused. Under section 2 of the Act, an offence of threatening or abusive behaviour is also created. The Act provides for the introduction of Stalking Protection Orders. Such an Order can prohibit a person from carrying out acts associated with stalking, such as entering certain locations where the victim resides or frequently visits, contacting the victim by any means or approaching the victim. A Stalking Protection Order can also impose requirements such as attending a perpetrator intervention programme. The PSNI may apply to the court for such an order if it appears that a person has carried out acts associated with stalking and poses a risk associated with stalking, and that there is reasonable cause to believe that an order is necessary to protect another person from this risk.

Westminster has ratified the Council of Europe's Istanbul Convention (the Convention on preventing and combating violence against women and domestic violence), which came into force on 1st November 2022. The new legislation is therefore an important step in bringing Northern Ireland in line with the rest of the UK and internationally regarding violence against women and girls, which includes domestic abuse and stalking.

PSNI has also developed its Repeat Perpetrators Strategy which focuses on those who have been identified as involved in seven or more domestic incidents/crimes over a 12-month period. Revised body worn video policy, which was published in July 2022, explicitly states that:

*“Any Domestic Abuse incidents without a recording will require a reasoned explanation why this is so, which will need to be agreed by a supervisor and noted.”*

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<sup>116</sup> [Protection from Stalking Act \(Northern Ireland\) 2022 \(legislation.gov.uk\)](https://legislation.gov.uk)

Following consideration of PSNI's implementation of a recommendation<sup>117</sup> contained in the Human Rights Annual Report 2020/21 examining PSNI policy and training in respect of the new domestic abuse legislation, the Human Rights Advisor has closed this recommendation; however work has continued in this area, and it is regularly reported on through the Policing Plan reports to Performance Committee.

There are many practical measures already in place to help all victims of domestic abuse as well as a wide range of support services and information that can be discreetly accessed. All PCSPs have a range of initiatives aimed at addressing domestic abuse locally.

Operation Encompass, which was rolled out in September 2021, covering 140 schools to date across NI, aims for all children experiencing domestic abuse to receive timely support in their school via informing the school of incidents without delay. The positive work by the NI Executive Office on the development of the Violence Against Women and Girls (VAWG) Strategy is very welcome and PSNI are scheduled to launch their own action plan later in 2022. The new streamlined advocacy service will provide high-quality and consistent support, information and a single point of contact for qualifying victims accessing it on their journey through the criminal justice system, regardless of gender, age, sexual orientation, background etc. The service is provided by a partnership between Women's Aid and Men's Advisory Project.

The Ask for ANI national safe code word scheme was launched in January 2021 operating in a large number of pharmacies across Northern Ireland, ensuring that victims can get help in a safe and discreet way. There is also the UK 'Safe Space' initiative which provides an opportunity for a domestic abuse victim to use a pharmacy consultation room in order to contact a specialist support service. Free travel on Translink public transport has also been made available to women and men fleeing a domestic abuse situation and a 24-hour helpline is available along with local initiatives funded through the PCSPs. A multi-media advertising campaign was recently launched to raise awareness of domestic abuse, using six scenarios, and the new offence; encourage reporting; and signpost people to support.

## **Hate Crime**

From April 2021 to March 2022<sup>118</sup>, the number of incidents recorded rose across five of the six hate motivations (racist, homophobic, sectarian, disability, and faith/religion) when compared with the previous 12 months, with the number of homophobic incidents the highest since the data series began in 2004/05.

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117 As a result of the proposed new legislation on domestic violence in respect of domestic abuse, harassment, stalking and coercive control, which is expected to be in place this year, it is now recommended that PSNI should provide the Board with its draft written policy and guidance on the use of the new powers and the proposed training plan for officers. [Rec 12].

118 **Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland Update to 31st March 2022 (psni.police.uk)**

The number of crimes recorded increased across all the six motivations (racist, homophobic, sectarian, disability, faith/religion and transphobic) when compared with the previous 12 months. This was the highest number of crimes recorded in a financial year since the start of each data series for four of the six motivations (racist, homophobic, disability and transphobic). Additionally, faith/religion showed the highest number of crimes since 2009/10<sup>119</sup>. Incidents with a transphobic motivation showed the only decrease (6), and crimes with a transphobic motivation showed the smallest increase (8). Incidents and crimes with a racist motivation showed the largest overall increase (341 incidents and 213 crimes).

The PSNI outlined that the highest number of repeat victims<sup>120</sup> continues to be in relation to racist, sectarian and homophobic abuse. They specifically outlined that racist repeat victimisation has increased this year and is in line with the overall increase in reported racist abuse. The PSNI also highlighted that, *'...when non-hate crimes and incidents were added to the dataset, the overall level of repeat victimisation increased considerably to 35%,'* which is an increase from 29% outlined in June 2021 reporting. They stated that, *'...this confirms that victims of hate crime or abuse are often victims of other crime and incident types also. This may be due in part to the prevalence of ongoing harassment and disputes within the hate profile,'* and as such it would appear, that these victims experience enhanced vulnerability. A positive measure has been that the Hate Crime Advocacy Service, jointly funded by the PSNI and DOJ, has moved to a commissioned service model with effect from 1 April 2022. This service offers a safe and confidential space to provide support to victims of hate and signal crimes across the different protected characteristics, delivered through a consortium of advocacy organisations, including: Victim Support NI, Leonard Cheshire, the Rainbow Project and the Migrant Centre NI. It is encouraging that all police districts have a Hate Crime Champion at Chief Inspector rank who is responsible for ensuring that hate crimes are recorded and investigated accurately. The Police Property Fund, administered by the Policing Board, has provided funding to a range of initiatives aimed at tackling racism in communities and improving local community safety.

Since publication of the Review of Hate Crime Legislation in December 2020 by Judge Marrinan<sup>121</sup> and the Department of Justice response issued in July 2021<sup>122</sup> and a dedicated hate crime branch established in the DOJ to progress the recommendations, work has been taken forward to progress the implementation of non-legislative recommendations, in addition to the development of a Hate Crime Bill to be introduced in the next mandate.

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119 When improvements were made to the data quality assurance process for incidents and crimes with a faith/religion motivation to ensure that the motivation was accurately assigned.

120 Repeat hate victims are persons who have experienced two or more of the same strand of hate abuse (incident and/or crime) in the past 365 days.

121 [hate-crime-review.pdf \(justice-ni.gov.uk\)](#)

122 [review-of-hate-crime-legislation-doj-response.pdf \(justice-ni.gov.uk\)](#)

The DOJ has been liaising with the UK Government on its development of the UK Online Safety Bill to ensure concerns raised in the Review, aimed at protecting hate crime victims from harm, continue to be considered as this legislation develops. A public consultation which closed in March 2022, covered a range of proposals including a new statutory aggravation model; sectarian offending in the context of hate crime law; special measures for victims of hate crime; prohibition of cross examination by the alleged perpetrator; elements of stirring up hatred and a call for views on adding misogyny to hate crime law. Policy development on the proposals covering stirring up offences; age and gender as protected characteristics; and a statutory duty for public authorities to remove hate expressions from public spaces, is due to begin this year with a second consultation to follow in early 2023.

In December 2021, the Court of Appeal ruled on a case involving the College of Policing's hate crime operational guidance. This related to an appeal lodged by Mr Miller who had posted a number of tweets between November 2018 and January 2019 about transgender issues as part of the debate about reforming the Gender Recognition Act 2004. These were subsequently reported to Humberside Police as being allegedly transphobic and Mr Miller was visited by officers at his workplace and the matter was recorded on the national database as a non-crime hate incident. Mr Miller challenged Humberside Police's actions at the High Court, which ruled in February 2020 that the force's response was unlawful and a "disproportionate interference" with Mr Miller's right to freedom of expression. The Court of Appeal ruling stated that national rules set by the College of Policing had placed too much emphasis on the perception of transphobic hostility, despite no evidence recorded by police; however an additional challenge to the lawfulness of the College of Policing's guidance was dismissed, with the High Court finding that it:

"serves legitimate purposes and is not disproportionate. The guidance has been revised with updates including "a strong warning against police taking a disproportionate response to reports of a non-crime hate incident."

### **Child Sexual Abuse and Exploitation**

The Northern Ireland Policing Plan 2020-25 measures PSNI's performance in this area and performance in this year shows that 13.9% of victims under 18 were repeat victims of crime. PSNI regularly report to the Board on the number of children identified as at risk of Child Sexual Abuse and Exploitation (CSAE). The PSNI outlined that across all areas of CSAE they had more than doubled their actions from the previous year. They also have one Detective Inspector and two Detective Sergeants now dedicated to this role, resulting in a reduction in investigative file submission times and an improvement in quality of investigations which enhances consistency and raises standards of practice and investigation.

Technological advances mean that more time is spent by young people and children online, with statistics provided in June 2021 showing that on average there were five cases per week recorded by the PSNI involving a child being targeted online by sex offenders.

In addition to this, at district level, as part of the PSNI's 'Make Safe' campaign, local neighbourhood officers have delivered training packages to the night-time economy educating them on what to look out for that may indicate a child is at risk. In previous Policing Plans, linkages were made between children who are missing and those children most at risk of becoming a victim of child sexual abuse and exploitation. The new process which PSNI introduced in January 2020 regarding repeat missing children has resulted in a downward trajectory of those missing 3 times or more with a reduction of 23% of missing episodes attributable to repeat missing children.<sup>123</sup>

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<sup>123</sup> PSNI Serious and Organised Crime Report to Northern Ireland Policing Board, December 2021.

## 9. TREATMENT OF SUSPECTS

When the police detain a person, they assume responsibility for the protection of the detainee's ECHR rights. Detention directly engages Article 5 of the ECHR (right to liberty and security) and police must follow strict procedures and must also take every reasonable step to uphold the rights and welfare of all detained persons. Articles within the PSNI Code of Ethics also require police officers to ensure that all detained persons are treated in a humane and dignified manner. It stipulates that arrest and detention must be carried out in accordance with the relevant PACE Codes of Practice and in compliance with the ECHR. Police also have a duty to protect the health and safety of detained persons and take immediate action to secure medical assistance where required. When any person is arrested the police have a duty to ensure that subsequent detention complies with international standards as "Detention by the police is the moment when detainees are most at risk of ill-treatment or of suffering other types of abuse".<sup>124</sup> The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is an international human rights treaty designed to strengthen protection for people who are detained. Inspections on the efficiency, effectiveness and treatment of detained persons in custody in Northern Ireland are conducted by the Criminal Justice Inspection Northern Ireland (CJINI) and the Regulation Quality and Improvement Authority (RQIA), and the Policing Board's Independent Custody Visiting Scheme (ICVS) are part of the system of protections included within the UK Government's system for compliance.

During 2021/22, there were 20,528 arrests made (compared to 19,689 in the previous year) under the Police and Criminal Evidence (PACE) Order, 82% of which were males.<sup>125</sup> 24,178 detained persons were processed through custody during the period April 2021 to March 2022. There were 24 applications to Magistrates Courts for warrants of further detention in 2021/22, in relation to 17 individuals. Five of these applications were for 24 hours or less, 6 were for between 25 and 35 hours and the other 13 were for a period of 36 hours. Of the 24 applications to Magistrates Courts for warrants of further detention, 7 of these were for a second warrant of further detention. Of the 17 persons subject to a warrant of further detention, 3 spent less than 24 hours under its authority, while 7 spent between 24 hours and 36 hours and the remaining 7 people were detained over 36 hours under the authority of these warrants. A total of 12 persons were subsequently charged. No intimate searches were recorded during 2021/22.

<sup>124</sup> Association for the Prevention of Torture, Police custody: Risks and safeguards, APT website, online at: [www.ap.t.ch/en/police-custody-risks-and-safeguards](http://www.ap.t.ch/en/police-custody-risks-and-safeguards)

<sup>125</sup> Police and Criminal Evidence (PACE) Order Statistics, April 2021 to March 2022, <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-and-criminal-evidence/2021/pace-statistics-report-2021.22.pdf>



## **Independent Custody Visiting Scheme (ICVS)**

The Board is responsible for the ICVS to make, and keep under review, arrangements for designated places of detention to be visited by Independent Custody Visitors (ICVs). They are impartial volunteers from the community who are unconnected with the police or the criminal justice system. They make unannounced visits to police custody suites to check the conditions, treatment and welfare of persons detained, by inspecting the facilities, checking custody records and, with consent, speaking to detainees. Where reasons for concern are identified during these visits, they are raised by ICVs with PSNI who must advise the Board within 28 days of the action taken to remedy the concern. Currently, there are 29 ICVs with a mixed composition of gender, age and community backgrounds based in three Custody Visiting Teams regionally across Northern Ireland. An ICV recruitment campaign is scheduled to take place this year with the intention to recruit additional volunteers and also create a reserve list. The Board keeps under review the arrangements for the ICV Scheme and where issues are raised in respect of PSNI's compliance with the Human Rights Act 1998, these are discussed with the Board's Human Rights Advisor to assess the adequacy of the PSNI response.

As mentioned, PSNI advised that 24,178 detained persons were processed through custody during the period April 2021 to March 2022 with a total of 1,207 detainees at the time of the ICV visits.<sup>126</sup> There were a total of 514 visits made by ICVs across Northern Ireland between April 2021 and March 2022. During this time 481 valid<sup>127</sup> visits were conducted, of which ICVs saw 557 detainees (46%). The length of visits ranged from 5 minutes to 2 hour 35 minutes, with the average length of time spent on a visit being 30 minutes. The overall refusal rate for April 2021 - March 2022 was 2%, which is the same as that recorded in the previous year's Annual Report.

Where a valid visit takes place, there can be one of two potential outcomes, namely; a satisfactory visit, which is defined as a visit where no issues within the suite are identified either by the ICVs or raised by the detained person in custody. In this situation no PSNI response or action is required. An unsatisfactory visit is when issues within the suite have been identified and in this situation a PSNI response is required to advise of action taken to either explain or resolve the issue. In comparison to the previous year, there has been a 1% reduction in unsatisfactory visits, down from 2% last year to 1% in this years' reporting period.

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<sup>126</sup> All figures from [annual-custody-visitors-annual-report-april-2021-march-2022.pdf \(nipolicingboard.org.uk\)](https://www.nipolicingboard.org.uk/annual-custody-visitors-annual-report-april-2021-march-2022.pdf)

<sup>127</sup> A visit is classed as invalid if the ICV cannot gain access to the custody suite, this can be for example due to the station being very busy, closed for maintenance or being closed due to Covid-19.

There were 42 visits made to detainees held under the Terrorism Act 2000 (TACT). 7 visits were invalid, which resulted in 35 valid TACT visits. There were 65 detainees held during this period, compared to 57 in the previous year, ICVs saw 25 (38%) detainees, compared to 24 (42%) in the previous year. No TACT visits were classified as unsatisfactory, which was the same as the previous year. Five out of 65 detainees refused an interview with ICVS (8%) in 2021/22 compared to 16% in the previous reporting year ICVs are trained to inspect the Custody Record of any detainee who has consented to the inspection. This is a vital part of being an ICV and the central importance of this role has been emphasised in previous Annual Reports. Having access to these records allows the volunteer to check that: detainees have been afforded their rights and entitlements to have someone informed of their arrest, to consult with a solicitor, and to consult the PACE Codes of Practice; that medication, injuries, medical examinations, meals and diet are recorded and if treatment was required whether it was given; that the procedures to assess special risks or vulnerabilities have been properly recorded and implemented; that rules concerning the timing and frequency of cell inspections, particularly for inebriated or otherwise vulnerable detainees, have been complied with; and that reviews of the continuing requirement for detention have been conducted. The Custody Records of all 25 detainees seen by ICVs were checked.

Jonathan Hall KC's latest Annual Report for (2020) was published in April 2022 and in it he stated:

'9.50. I have remarked in previous reports that the number of detainees who consent to being visited by an independent custody visitor in Northern Ireland is low. The Policing Board has acknowledged that the rate remains low, despite a change in policy to allow self-introduction to individuals who are detained under section 41 of the Terrorism Act 2000.'

As mentioned, only five out of 65 detainees refused an interview with ICVS (8%) in 2021/22 compared to 16% in the previous reporting year which Mr Hall looked at, possibly indicating a downward trend. Furthermore, the Human Rights Advisor has discussed the issue with the Law Society of Northern Ireland and promoted the work of the independent custody visitors with several online training events.

### **Confidentiality**

The Human Rights Advisor highlighted issues around confidentiality and ICVs with PSNI. The first issue concerns confidentiality and the importance of ICVs' private conversations with detained persons, which is a requirement set out by the United Nations Optional Protocol to the Convention Against Torture (OPCAT). This is the international treaty, ratified by the UK Government, and which provided the basis for the designation with the United Nations of the ICVs scheme in Northern Ireland. Article 20 (d) requires:

‘The opportunity to have private interviews with the persons deprived of their liberty without witness...’)

This has been translated in the practice of officers and Custody Detention Officers remaining within sight but out of hearing when the ICVs introduce themselves to detainees and start a discussion. The Human Rights Advisor asked PSNI to ensure that, within custody suites, everyone complies with these arrangements (subject, of course, to any exceptional risks that particular detainees may pose).

The second point regarding confidentiality is the PSNI’s (relatively) new CCTV and recording system within custody suites, which cannot be switched off at this time but which will pick up conversations held at the cell door. The Policing Board’s ICV handbook currently states:

‘You should reassure detainees that their conversations with you are private...’ (para 3.56)...

which replicates the United Nations Treaty human obligation referred to above. In response to the Human Rights Advisor’s query, PSNI replied:

- ‘1. When remaining for the initial ICV introduction (usually conducted at the cell door), afford as much privacy as is safe i.e. remain in view but out of hearing.
2. If the DP wishes to speak to an ICV in private, this will be facilitated in a consultation room if practicable. Dynamic risk assessments should be carried out in all cases.
3. If viewing/listening to Custody CCTV they must have a lawful business need. Indeed, the test for this should be clearly met and recorded, particularly if that involves the viewing of an ICV introduction/consultation.

In addition, current Police Service Custody CCTV policy clearly states:

‘Officers must ensure that, during an inspection by Custody Visitors, there is no possibility of the visitors’ conversations with the prisoners being monitored or overheard by custody staff through the CCTV system. Should the Custody Visitors express concern about privacy of their inspection, they should be offered the use of the consultation room if available”.

PSNI are in the advance stages of digitising all Custody CCTV. Not only will this improve the quality of the audio/visual content, but will also increase the accountability linked to the viewing of Custody CCTV.<sup>128</sup>

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128 Supt Christian Bradley’s letter to Human Rights Advisor, 30 March 2022.

## **RECOMMENDATION 11**

The Policing Board's Independent Custody Visitor Handbook para. 3.55, and the custody visitor report forms should be revised by the Board following consultation with the PSNI to make this confidentiality duty absolutely clear.

### **Ill-treatment**

The key objective of the visiting system is to prevent ill-treatment<sup>129</sup> and visitors have a duty to prevent this and to report anything you see or hear that is relevant (but the person's consent is needed to report anything he or she told the visitor). The Human Rights Act 1998 separately requires an independent investigation in any case of a credible allegation of a violation of Article 3 (prohibition of serious ill-treatment) and such an investigation must be initiated whether or not a complaint is made by the detained person (DP). As a public authority this duty also applies to the Policing Board.

### **Viewing Interviews**

The general objective of the visiting system - preventing ill-treatment (and OPCAT) - should mean that visitors are entitled to watch interviews and view recordings of interviews, including hearing what is said during those interviews. This would allow visitors to check that there is no evidence of ill-treatment from those interviews. For practical reasons, it might only be worthwhile visitors accessing the interview if a person was being interviewed at the time of the visit or because there was some reason to believe that a past interview would be helpful in checking that there was (or was not) any ill-treatment. Often for people who are ill-treated on arrest or in custody the interview is the first time they feel able to complain about treatment.

Section 73 of the Police (Northern Ireland) Act 2000 (as amended) does not mention interviews but does not appear to prevent the Policing Board authorising this.<sup>130</sup> However, there is an argument that this still requires the consent of the DP (as referenced in the Handbook at para. 3.137).

Currently custody visitors only have access to live TACT interviews (those arrested under the Terrorism Acts). This exception was recommended in the Patten Report (Handbook 4.25 – 4.36), however this still requires the DP's consent. In the past, TACT DPs were asked at the 'booking-in' stage (when they first arrive at the police station) whether they would permit a visitor to view the live interview. This procedure was ended because the DP was also asked at this same time by the police officer whether they also consented to speak to a visitor if one was available (rather than by the preferred process of 'self-introduction').

<sup>129</sup> Including, torture and other cruel, inhumane or degrading treatment or punishment.

<sup>130</sup> The expression 'examine records' would include interview records.

It is difficult to understand the logic of allowing live TACT interviews but not recordings or not allowing PACE interviews to be watched at all (or for the recording of the PACE interview to be viewed by the visitor). It is suggested that these restrictions are discussed in the first instance with the PSNI.

(The Home Office's Code for custody visitors, para. 66, allows access to recordings only in TACT detentions either on the basis of a request by the DP or because the custody visitor has particular concerns about the conduct of the interview).

### **Multi Agency Triage Team (MATT)**

In the Human Rights Annual Report 2019/20, Recommendation 4 stated:

*"The street triage pilots, subject to a positive evaluation, should be expanded to the whole of Northern Ireland and the PSNI should seek support from the Department of Health to achieve this."*

The MATT crisis service initially operated in the Lisburn, Castlereagh and North Down and Ards areas since 2018, expanding to Belfast Trust areas since August 2019. It has, to date, has been wholly funded by the Public Health Agency (PHA) which is finalising an independently commissioned evaluation report into the service.

By the time someone gets to PSNI, particularly in custody, they have been failed and have often been a victim before. Adverse Childhood Experiences increase the risk of violence perpetration and victimisation.<sup>131</sup> This means that subjects have often been failed by the education system or the health system before they have entered the criminal justice system. The MATT service is a step in the right direction of providing much needed services to people experiencing mental health crises and potentially decreasing pressure on PSNI. This issue is further explored in the Human Rights Review of PSNI's Use of Force.

### **Nurse-Led Custody Service**

Musgrave station runs a full nurse-led custody service. Currently, a person who is detained under TACT will be assessed initially by a medical officer initially rather than a nurse. This is a positive pilot project and a full rollout would be welcome.

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<sup>131</sup> Forster M, Gower AL, McMorris BJ, Borowsky IW. Adverse Childhood Experiences and School-Based Victimization and Perpetration. *J Interpers Violence*. 2020 Feb;35(3-4):662-681

# 10. APPENDICES

## **IMPLEMENTATION STATUS OF OUTSTANDING RECOMMENDATIONS**

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This is an overview of outstanding recommendations from the previous two Annual Human Rights Reports and the Thematic Review of the Policing Response to Covid-19. All of the recommendations in the Covid-19 Thematic Review have now been closed.

Similarly, most of the recommendations in the Human Rights Annual Report 2019/20 have been implemented and closed, however there are three recommendations that have been superseded by new recommendations in this year's report.<sup>132</sup>

The Human Rights Advisor continues to track progress on all recommendations with PSNI.

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<sup>132</sup> For a status overview of all 2019/20 recommendations, see NIPB Human Rights Annual Report 2020/21, p. 167

## **THEMATIC REVIEW OF THE POLICING RESPONSE TO COVID-19 OUTSTANDING RECOMMENDATIONS**

### **RECOMMENDATION 1**

#### **DETAIL:**

The Executive should always consult the Assembly on draft laws that create criminal offences, even if this has to occur after the implementation of those laws in an emergency. Any such drafts should be subject to specific advanced consultation with the PSNI, the Policing Board and the Northern Ireland Human Rights Commission. These principles should also apply to any proposed amendments to the law;

#### **PSNI UPDATE:**

PSNI support this recommendation and have been engaging with the Executive on the drafting of the most current regulations. Our response has reflected the finding of this report and that of the Police Ombudsman.

#### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**

### **RECOMMENDATION 2**

#### **DETAIL:**

All laws, especially those having a significant effect on peoples' lives or creating crimes, should be accessible and written in a way that they are easy to understand;

#### **PSNI UPDATE:**

PSNI support this recommendation and have been engaging with the Executive on the drafting of the most current regulations. Their response has reflected the finding of this report and that of the Police Ombudsman.

#### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**

### **RECOMMENDATION 3**

#### **DETAIL:**

Politicians and the Executive should link any key statements on what the public should do (or not do) directly to the guidance on the law and the law itself. Guidance needs to be directly aligned with the law

#### **PSNI UPDATE:**

PSNI support the recommendation.

#### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**

#### **RECOMMENDATION 4**

##### **DETAIL:**

Such Regulations and laws should include human rights principles and any guidance should make issues of overlap or contradictions with human rights clear and there should be an accompanying human rights assessment document;

##### **PSNI UPDATE:**

PSNI support this recommendation. This is critical to assisting the Police Service in carrying out the balancing exercises necessary to ensure confidence in the law and the upholding of the law.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**

#### **RECOMMENDATION 5**

##### **DETAIL:**

The Department of Health should have a greater role in working with police on policing strategies where laws are designed to protect the health of the community.

##### **PSNI UPDATE:**

PSNI continues to inform and encourage the Executive to provide the Department of Health with greater powers of enforcement to support the PSNI and other legislative bodies in managing the Covid-19 pandemic. Governance structures are in place to ensure accountability.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**

#### **RECOMMENDATION 6**

##### **DETAIL:**

##### **Fixed Penalty Notices and the Coronavirus Regulations**

The PSNI should always initiate quality control mechanism for urgent and novel laws (particularly those giving officers on the street significant discretion) and especially in urgent cases where there is bound to be a lack of time for officer training.

##### **PSNI UPDATE:**

Quality control mechanisms have been in place for the Coronavirus regulations in terms of SCC reviewing each PND prior to issue and providing the authorisation.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Closed**



## RECOMMENDATION 7

### DETAIL:

The PSNI and the Public Prosecution Service should review all of the Coronavirus Regulation cases, both Fixed Penalty Notices and possible prosecutions and ensure that: (1) All those that involve peaceful protest are assessed as to their compliance with the Human Rights Act; (2) All those where the subject's right to a family life (to leave home, travel, meet family members) was affected to check that any interference was not disproportionate and (3) They are still clearly in the public interest, taking into account the fact the criminal laws that may have been breached have never existed as crimes ever before, are not likely to be crimes after this emergency has passed and, that the defendants are unlikely to commit the same offences again.

### PSNI UPDATE:

In respect of points (1) and (2) of the recommendation it was agreed that the PPS do not have a role in the issue or review of FPNs that have not been discharged, officials clarified that was a drafting oversight and that part of the recommendation was intended solely for PSNI.

In respect of part (3) of the recommendation regarding the public interest test, the PPS provided assurance that this was already considered as part of the application of the Test of Prosecution .

The recommendation has been implemented and all fines removed from PSNI systems.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 8

### DETAIL:

#### **Fixed Penalty Notices and the Coronavirus Regulations**

The PSNI should review its records as far as possible to publish Section 75 statistics of those subject to the additional powers and the equipment that it used during the lockdown (inc figures based on the community background of the people involved)

### PSNI UPDATE:

Section 75 statistics are reliant on persons subject to Notices providing details and most of whom refuse these details.

Any statistics are therefore unreliable and not suitable for a review.

Notwithstanding this, PSNI will look again to see if the limited records we possess are capable of being published

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 9

### DETAIL:

#### Human Rights

Effective policing and human rights compliance do not have to be in conflict and a sophisticated approach will not constrain proactive and responsive policing or risk undermining the professional judgement of police officers. Despite the excellent processes and procedures within the PSNI to embed human rights into all of its operations, it needs to work even harder, perhaps involving the PSNI lawyers and human rights experts more in its operations policies and take the initiative of consulting the Policing Board on these challenges and become even more transparent about the challenges it faces with implementation. This process will need to include a transparent assessment of the human rights in more detail including involving alternative strategies at the Gold, Silver, and Bronze commander levels

### PSNI UPDATE:

#### Accepted

PSNI have noted that the speed at which the Coronavirus regulations were enacted to address the risk to our communities did not allow for a full examination of the Human Rights impact of these Regulations as would normally be the case and the development of guidance for police officers by the Government. PSNI recognise, following the BLM protests on 6 June 2020, that their approach to balancing the enforcement of Health Protection Regulations with Human Rights had adversely impacted upon confidence in policing within the Black and Ethnic Minority community. Renewed emphasis will be given to ensuring that legal advice and expert human rights advice informs policy, strategy and operational decision making. This will be relayed in Command Training programmes and subsequent Gold Strategies, Silver and Bronze Operational plans and applicable Criminal Justice strategies. These lessons will be embraced and actively applied to future policing operations. PSNI conclude that they will continue to provide the Board with all relevant information to facilitate it in exercising its oversight function. In addition, PSNI will undertake to highlight to the Board any relevant operational challenges as they arise.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### Closed

## RECOMMENDATION 10

### DETAIL:

#### Human Rights

PSNI should report to the Board on any lessons learnt from the apparent inconsistency in approach to the enforcement of all large gatherings of people during April, May and June 2020

### PSNI UPDATE:

A report has been sent to the Board on October 31 2022.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 11

### DETAIL:

#### Human Rights

PSNI should hold discussions with the organisers of the Black Lives Matter protests on future co-operation to ensure peaceful protests are facilitated and that both sides understand the positive obligations of the police and the key role of the organisers

### PSNI UPDATE:

PSNI has carried out a series of virtual engagements facilitated by third parties (the most recent on the evening of Tuesday 20 April 2021) which on this date included both organisers of the Black Lives Matter protests.

Feelings of mistrust and anger within this diverse BAME community remain high towards the PSNI, however, consent was gained to further engage with Mutual Gain, the independent specialist community empowerment group, with a view to improve relations and mutual understanding between the BLM organisers and the wider BAME community with the Police.

This will take some time but we remain committed to grow these engagements into stronger relationships of trust and regain the lost confidence in the legitimacy of the PSNI to achieve this stated outcome.

There are no known planned future protests involving both BLM organisers at this time.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 12

### DETAIL:

#### Human Rights

It may also be useful for the PSNI to create an Independent Advisory Group on protests and to co-op representatives of those organisers (this IAG should not deal with the traditional challenges and debates surrounding parades and protests in NI which are the focus of many other forums and processes).

### PSNI UPDATE:

A series of Independent Advisory Groups (IAGs) have now taken place on a wide range of issues and remains an ongoing process of external consultation led by the Chief Constable on occasion or Head of Branch. The creation of this IAG process has enabled a much more diverse range of views to be collated to help inform strategy, policy and operational activity.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 13

### DETAIL:

The PSNI should hold a seminar with OPONI, the Northern Ireland Human Rights Commission, Human Rights NGOs and the Policing Board to assist them with ensuring a consistent approach to all protests.

### PSNI UPDATE:

When Covid-19 Regulations permit a face to face meeting, Ops Support will liaise with the Board officials to arrange the event. This is likely to be Autumn 2021.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Work in Progress**

## RECOMMENDATION 14

### DETAIL:

The Police Ombudsman is investigating a number of protests and is likely to consider whether there was any discrimination in relation to the treatment of individuals in the enforcement of the Regulations at the Black Lives Matter protests. The Human Rights Advisor will consider the report once published, as to whether the Board should support the recommendations and whether any further investigations are needed.

### PSNI UPDATE:

The OPONI report on the policing of the Black Lives Matter and the Protect Our Monuments protests states:

‘The differential treatment by PSNI of protesters on 6 June when compared with those attending ‘Protect Our Monuments’ on 13 gave rise to claims of unfairness and discrimination against those persons who organised and attended the ‘Black Lives Matter’ protests. These concerns are in my view cogent, have substance and are justified in the circumstances. I believe that this unfairness was not intentional. Neither was it based on race or ethnicity of those who attended the event. Rather PSNI failed to balance Human Rights with the public health considerations and requirements of the Regulations.’<sup>133</sup>

PSNI have shared a ‘Lessons Learnt’ document with the Board.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

<sup>133</sup> Police Ombudsman Statutory Report: Public Statement by the Police Ombudsman pursuant to Section 62 of the Police (Northern Ireland) Act 1998. An Investigation into Police Policy and Practice Of Protests In Northern Ireland. (2020) para. 9.24 <https://www.policeombudsman.org/PONI/files/85/858a4b0b-9b99-4921-b947-5fae248ba683.pdf>

## **RECOMMENDATION 15**

### **DETAIL:**

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In the light of the fact that the deployment of spit and bite guards was triggered by the Covid-19 emergency, spit and bite guards should now be phased out as soon as possible and officers who have been provided with spit and bite guards should, instead, be provided with the necessary Personal Protection Equipment (PPE) or other alternative. The PPE provided should be of sufficient quality to protect these officers from contamination from spitting, aerosol droplets and other bodily fluids reducing the risk of transmission of Covid-19 and other diseases. The use of spit and bite guards should, regardless, cease by 31st December 2020.

### **PSNI UPDATE:**

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**Not Accepted**

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

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**Closed**

## RECOMMENDATION 16

### DETAIL:

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The PSNI should ensure that the innovation, progress and learning made in developing new approaches to collaborative working for vulnerable people during the pandemic emergency period is harnessed and used to inform better collaboration in the future.

### PSNI UPDATE:

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**PSNI** continue to review their Covid-19 response to addressing vulnerability and ensure learning will result in sustainable outcomes.

Public Protection – Following the first lockdown, a review was conducted in relation to the establishment of the Collectively Preventing Harm Group. Many of the aspects implemented were adopted as business as usual with the work of the group being absorbed by the Strategic Community Safety framework. The same response has been adopted for the second lockdown with bi weekly partners meeting. A de-brief is planned as part of the recovery phase to draw down any further learning.

Multi Agency Community Safety Board – the Board was established in the midst of the pandemic. It provides a platform to engage on shared issues in relation to contributors to community safety. This includes early intervention, prevention, diversion and use of restorative practices, all of which directly feed into community safety. The meetings in May and June in particular helped provide a focus on emerging community safety concerns related to Covid-19. The Community Safety Board continues to meet on a quarterly basis and intends to make the Community Safety Framework available on each member's website to help aid a common understanding of the collaborative approach being taken regarding community safety.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

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**Closed**

### **RECOMMENDATION 17**

**DETAIL:**

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OPONI and Policing Board should plan and co-operate more often on significant or serious challenges confronting PSNI; and

**PSNI UPDATE:**

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We support this recommendation and are keen to assist both the Policing Board and OPONI where appropriate.

**HUMAN RIGHTS ADVISOR ASSESSMENT:**

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**Closed**

### **RECOMMENDATION 18**

**DETAIL:**

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The two organisations should therefore consider making joint or parallel submissions to the review of police oversight arrangements which is currently being led by the Department of Justice, whilst both ensuring their unique and independent roles.

**PSNI UPDATE:**

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The Board were unable to agree an agreed position to the OPINI five-year review and DOJ stock take exercise

**HUMAN RIGHTS ADVISOR ASSESSMENT:**

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**Closed**



## **HUMAN RIGHTS ANNUAL REPORT 2019/2020**

### **OUTSTANDING RECOMMENDATIONS**

#### **RECOMMENDATION 2**

##### **DETAIL:**

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##### **Policy**

The PSNI should develop and publish a plan and timetable to ensure that all of its policies are published and, where relevant, they set out the human rights issues involved in sufficient detail to allow a member of the public to be reassured that proper consideration has been given to them. It is accepted that there may be some policies that contain sensitive issues and in those cases the Policing Board or its Human Rights Advisor should be consulted on what can or cannot be disclosed to the public.

##### **PSNI UPDATE:**

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##### **Accepted**

Work is ongoing to review, update, timetable and publish Service Policy and Instruction. These policies reference Human Rights considerations. Some Service Instructions have been shared in their entirety with the Board for specific comment; such as The Use of Drones and Stop and Search.

The Human Rights Screening Template has been published. The screening is a top priority for Corporate Policy. A timetable for publishing policy is being progressed. A training event for authors is being planned for autumn and a Callsign article on Human Rights is being drafted.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

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**Closed**

## RECOMMENDATION 5

### DETAIL:

#### Operations

Pending the establishment of the Historical Investigations Unit the PSNI should put in place procedures that comply with the **Article 2 requirements for legacy investigations as set out in the Court of Appeal case of McQuillan**. At a minimum this should include consideration of the appointment of Senior Investigating Officers from outside the PSNI to lead investigations where practical independence is in question.

### PSNI UPDATE:

#### Not Accepted/ Unable to Accept

The 2019 Northern Ireland Court of Appeal judgement in the McQuillan case is subject to appeal to the Supreme Court, now listed for June 2021. It would, therefore, be premature, in advance of the outcome of the appeals, to put in place specific measures such as that recommended, for all legacy cases where independence has been questioned. When the outcome is known, PSNI will take any relevant and necessary steps to demonstrate the capacity to deliver practically independent investigations. Interim measures including a Conflict of Interest policy have been in place for some time.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Superseded by new recommendations included in the Human Rights Annual Report for 2021/22**

## RECOMMENDATION 8

### DETAIL:

#### Operations

The PSNI should draft a Service Instruction, or add to its current draft Service Instruction, on Stop and Search which sets out how police officers should record the basis for their stops and searches using Terrorism Act 2000 and Justice and Security (Northern Ireland) Act 2007 powers and how they should ascertain and record the community background of those subject to this power.

### PSNI UPDATE:

#### Accepted

A new Service Instruction has been published and related section 75 is complete. To maximise the understanding of operational officers new point pages have also been launched in support of the service instruction (Sept 2021)

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Superseded by new recommendation included in the Human Rights Annual Report in 2021/22**

## **RECOMMENDATION 11**

### **DETAIL:**

#### **Use of Force**

The Policing Board will work with the PSNI over the next year to seek to make public the use of force statistics by gender, age, ethnic minority and disability etc. Subject to the actions taken by the PSNI to respond to the stop and search case of Ramsey, the Policing Board will discuss with the PSNI the production of statistics on the use of force and community background status of those subjected to this use of force. PSNI should report to the Board on how use of force is monitored and the reasons for the increases in the number of times force has been used.

### **PSNI UPDATE:**

#### **Accepted**

Work to progress community monitoring data continues following recommendations by Lord Chief Justice, HMIC and the Policing Board. Further to the Ramsey judgement, significant steps have been taken to address, in particular, records relating to the basis of a search. In the short term, this included new instructions to officers and an update to the existing IT recording system.

In the longer term, a new IT solution (due around Spring 2021) will be implemented. Work to improve the reporting of Use of Force incidents continues. A specific plan has been developed which will culminate in an updated IT solution which seeks to automate requests.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Superseded by new recommendation included in the Human Rights Annual Report in 2021/22**

## **UPDATE ON HUMAN RIGHTS ANNUAL REPORT 2020/21 RECOMMENDATIONS**

### **RECOMMENDATION 1**

#### **DETAIL:**

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##### **Training**

Within the restrictions that the Covid-19 pandemic has brought to the training/classroom environment and the Board's stated position that the use of Spit and Bite Guards should cease, it is recommended that if spit and bite guards are proposed for permanent use by the Chief Constable, a spit and bite guard practical element should be considered/introduced within the annual operational personal safety programme {PSP} refresher for officers designated to use the guards in order to provide further reinforcement on their use, subject welfare and possible medical considerations. It is also recommended that future training on Spit and Bite Guards, if introduced, be carried out face to face rather than only online.

#### **PSNI UPDATE:**

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##### **Accepted**

The Spit and Bite Guard training course is currently a mandatory online training video that must be completed by all officers and staff authorised to carry a Spit and Bite Guard.

Officers and staff are also required to read Chapter 16 of the Conflict Management Manual (CMM), which contains Service Policy on the use of Spit and Bite Guards.

As we continue to return to face-to-face Personal Safety Programme (PSP) training, officers and staff are currently receiving a physical input on the use of Spit and Bite Guards. This will ultimately become the vehicle for training decisions with officers also being required to view the video.

A re-launch of the training package in January 2022 will require officers and staff to complete online training again.

#### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

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##### **Closed**

PSP training now includes a lesson on the application of a Spit and Bite Guard and the policy on their use. The mandatory online training video will, however, continue to be the primary training tool for officers and staff.

## RECOMMENDATION 2

### DETAIL:

#### Training

In order to assess the level of human rights awareness in PSNI and to assess the extent to which a human rights culture exists, the PSNI and the Policing Board should jointly commission an independent organisation to repeat the assessment to enable the PSNI and Board to understand how far the PSNI, its officers and staff have moved and what still remains to be done.

### PSNI UPDATE:

#### Accepted

ACC Criminal Justice is taking this area forward in conjunction with the Policing Board.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### Work in Progress

## RECOMMENDATION 3

### DETAIL:

Given the delay in taking action on Recommendation 3 from 2020/21 that the Body Worn Video guidance should be expanded to include more information about the human rights issues involved in the use of Body Worn Video (especially in relation to privacy) from the 2019/20 report (albeit the delay was partly during the Pandemic) the PSNI should prioritise this work and, where necessary, provide the resources that are needed to take action without unnecessary delay.

### PSNI UPDATE:

#### Accepted

PSNI confirmed the template went live with the launch of the new external PSNI website which was created on the 26 September 2022.

**The template can be viewed here.**

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### Closed

#### **RECOMMENDATION 4**

##### **DETAIL:**

##### **Operations**

The PSNI Service Instruction should be extended to cover the use of all **PSNI aircraft**, should be published alongside the Privacy Impact Assessment and should set out, in summary, the Regulation of Investigatory Powers Act 2000 authorisation processes.

##### **PSNI UPDATE:**

##### **Accepted**

The review of the Service Instruction is being progressed. Once the review has been completed, any relevant changes concerning the use of aircraft that impact on privacy will be made to the document. Post the review stage the Service Instruction and Privacy Impact will be subject to Service guidelines on the publication of official police documents to determine suitability for release in a public forum.

PSNI advise that early consultation has taken place and a provisional timeframe of 6 months has been set to write this Service Instruction.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Work in Progress**

#### **RECOMMENDATION 5**

##### **DETAIL:**

##### **Operations**

The PSNI publish its policy on its monitoring of **social media** for policing purposes and include in this its retention and access arrangements. If a new policy is to be developed this should be subject to public consultation and an equality impact assessment.

##### **PSNI UPDATE:**

##### **Under Review**

There is currently no PSNI policy on the use of social media to cover all organisational areas. This matter is under review at present as different teams use social media for different reasons. A refresh of the existing guidance is being considered for people working towards criminal justice objectives in line with the launch of a new C2 training package to enable all personnel to get online access. Other PSNI activity, such as community engagement work carried out by Neighbourhood Policing teams engagement by Senior Management teams, or media monitoring by Corporate Communications are not covered within this.

##### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Work in Progress**

## RECOMMENDATION 6

### DETAIL:

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#### Operations

The PSNI should consult the Policing Board and the wider public if **facial recognition technology** is to be recommended to assist in preventing crime or investigating offences and this should be subject to an equality impact assessment and human rights audit.

### PSNI UPDATE:

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#### Accepted

The Police Service of Northern Ireland does not currently operate a Facial Identification System but fully recognises the value this could bring to investigations and public safety. We also recognise the need for robust governance around its use. To that end the Police Service is closely engaged with the Home Office Biometrics Programme who have plans to develop a National Facial Identification system. The Service will be invited to sit on the Home Office Biometrics Facial Matching Project Board, charged with delivering a National Facial Identification system and will contribute to its development. However, this system will be based on using retrospective facial images, rather than the live facial images that have resulted in the recent legal challenge involving South Wales Police. As the national system develops the Police Service of Northern Ireland will fully consult with the Policing Board, Human Rights Commission and the public as the technology advances and will ensure equality assessments are completed. The Police Service's desire is to ensure that there is a full transparency and governance around the use, sharing and retention of facial images.

A Project Board chaired by ACC Chris Todd has been scheduled for October 2022 with an invitation extended to the Policing Board.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

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#### Work in Progress

## RECOMMENDATION 7

### DETAIL:

#### Legacy

Despite the delay to resolve the issue as to who should investigate legacy cases, the PSNI should continue to investigate these cases properly and promptly, should be adequately resourced for the task and, in the absence of guidance from the Supreme Court (and the cases pending still with the Council of Europe's Committee of Ministers), follow the advice from the Court of Appeal to ensure its compliance with Article 2.

### PSNI UPDATE:

#### Accepted

This Police Service position is clear in that we will continue to fulfil our legal obligations and conduct legacy investigations in line with current procedures until alternative legacy arrangements have been established. Our current procedures are as outlined in our Family Guidance Document, Family Engagement Strategy and Conflict of Interest Policy and are available externally through the Police Service of Northern Ireland website. Branch (LIB) remains unchanged. The effective sequencing of more than 1,100 cases within LIB's remit is a significant undertaking. It is understandable that every family who is affected by Northern Ireland's troubled past wishes that their case was prioritised, but with the relatively modest number of resources, it is simply not possible to open all cases simultaneously.

Cases are therefore managed and progressed according to a Case Sequencing Model (CSM), which focuses on factors such as whether a case involves contemporary persons of interest, forensic potential, criminal justice status and case progression. This brings to the fore those cases which contain offenders who continue to pose a risk to the public today, and those cases which appear to offer the best potential to bring offenders to justice.

The European Court of Human Rights in *Brecknell v UK* 2004 found that the Police Service of Northern Ireland was institutionally and hierarchically distinct from the Royal Ulster Constabulary. The 2019 Court of Appeal judgement in *McQuillan* however found that the Police Service had failed to demonstrate its capacity to deliver practical independence. The judgement stated that there was 'an obligation on the Chief Constable... to put in place suitable arrangements for practical independence and that those arrangements should be transparent'. Accordingly, Legacy Investigation Branch have taken a number of steps:



## RECOMMENDATION 7 (CONTINUED)

### DETAIL:

#### Legacy

Despite the delay to resolve the issue as to who should investigate legacy cases, the PSNI should continue to investigate these cases properly and promptly, should be adequately resourced for the task and, in the absence of guidance from the Supreme Court (and the cases pending still with the Council of Europe's Committee of Ministers), follow the advice from the Court of Appeal to ensure its compliance with Article 2.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Superseded by new recommendation included in the Human Rights Annual Report in 2021/22.**

### PSNI UPDATE:

- Development of a bespoke Conflict of Interest Policy
- Development of a bespoke Family Engagement Strategy
- Publicly available key documents
- External Engagement Survey
- Continued adherence to the Police Service of Northern Ireland Code of Ethics
- Developed a service profile of all LIB staff

The Court of Appeal decision in the McQuillan case was appealed by the Chief Constable to the Supreme Court in respect of, among other issues, whether the Police Service is sufficiently independent to conduct investigations into such (alleged state involved) cases and what steps are necessary to ensure that the investigation meets Article 2 standards. The appeal was heard in June 2021 and judgment handed down on 15 December 2021. The judgment stated that the PSNI had demonstrated their ability to be institutionally and practically independent from the RUC. The PSNI is now considering the potential impacts of the judgement for the investigation of legacy cases.

PSNI update 21/09/22: SMB agreed that LIB casework pre-October 1988 will be sequenced with the CSM to receive a lower priority grading, to provide community confidence that these cases would not be removed from the LIB casework despite the direction from the UKSC that there was not any Article 2 obligation upon the PSNI to investigate those cases. In addition, work is ongoing to develop a case assessment matrix to determine the 'genuine connection of cases' from October 1998 to 2000 to determine if they should be retained within the CSM. A conflict of interest process is in place within the branch to ensure that any potential conflict of interest can be identified, recorded and managed appropriately.

## **RECOMMENDATION 8**

### **DETAIL:**

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#### **Public Order**

The PSNI should review its use of the common law offence of unlawful assembly given its vague nature, likely violation of Article 7 (the requirement for clarity in the criminal law) and the fact that it was abolished in England and Wales many years ago. Consideration should also be given to the use of the Terrorism Act in such cases, perhaps by consulting the Independent Reviewer of Terrorism Legislation.

### **PSNI UPDATE:**

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#### **Accepted**

This is a common law power and hence we cannot ask for it to be repealed.

However, PSNI is working with Jonathan Hall KC.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

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#### **Work in Progress**

## RECOMMENDATION 9

### DETAIL:

#### Operations

(a) The PSNI should investigate and report to the Board on why the arrest rate varies so significantly between Districts; and

(b) The PSNI should take a series of representative samples of those stopped and searched and track them through the system to find out what substantive outcomes are achieved – what happens to those arrested or referred to the PPS.

### PSNI UPDATE:

(a) An outcomes paper was presented at Police Powers Development Group (PPDG) in March which detailed the no further police action outcome, including a District breakdown.

There are many possible reasons why figures fluctuate across Districts and some of these can be attributed to specific and targeted operations that are carried out in particular locations. In some cases it may be the case that where arrest rates are lower, other outcomes may have been used instead (e.g. report to Public Prosecution Service, Community Resolution etc). Belfast District can also have an impact on figures due to the fact that stop and searches are carried out there in conjunction with night-time economy operations (which other Districts may not have). Any significant fluctuations within stop and search figures are investigated and explanations are provided (regarding specific districts) to the quarterly PPDG meeting.

(b) Outcomes have been reviewed at several PPDG meetings and a dip sample of outcomes were tracked. PPDG will continue to monitor this data with the Policing Board after each meeting. Where inconsistencies arise in terms of use of force, community monitoring or other matters, additional research will be tasked.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### Work in Progress

## RECOMMENDATION 10

### DETAIL:

#### **Children and Young People**

(a) The category of 13 to 17 years old used by the PSNI for young people stopped and searched should be broken down further so that more information is available on the youngest children in this group; and

(b) The PSNI reconsider the proposal that an internal record be kept of any stop and search under JSA or TACT involving children or where an unexpected incident has occurred which might prove controversial

### PSNI UPDATE:

(a) Recommendation 10a is completed. Information on 13- to 17-year-olds is broken down by single year of age in the excel files that accompany the Quarterly Stop and Search published report and have been included each Quarter since the report covering the 12 month period of April 2019 to March 2020.

(b) The Police Service of Northern Ireland did not accept this recommendation when it was put forward in David Seymour's tenth report and the rationale at that time was because Section 24 of the Justice and Security Act (JSA) is a no reasonable suspicion power and it would not be feasible for a police officer to articulate the reasons why an individual had been stopped and searched. Since the case of Ramsey, the Police Service has now made several amendments to the information that is recorded during a JSA stop and search which consists of the selection of a basis from a pre populated list (i.e. Briefing, Incident, Subject Behaviour and Subjects Location) and a mandatory field in which officers must provide a free text input in the form of a short narrative regarding the basis selected.

Additionally and where children are concerned, the Police Service has made changes to the stop and search application to include a mandatory field that must be completed when a person under 18 years old in cases where the search is of a child who accompanies the principal subject of the search i.e. the child is not the target of the search but happens to be present in the vehicle or at the scene, the officer must record the reason why they decided that it was necessary and proportionate to conduct the search of the child, in addition to the search of the adult subject(s).

This matter is under consideration and PSNI have now made several amendments since the Ramsey case. All areas being address to bring recommendations into line.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### **Work in Progress**

## RECOMMENDATION 11

### DETAIL:

#### Operations

a) The PSNI should publish Dr Topping's research and provide an official response to its findings;

(b) The PSNI should publish its leadership approach to stop and search and should make it transparent on why they use stop and search in the way that they do, including its analysis of how the use of these powers aligns with service objectives and clearly demonstrate why no mitigation measures are considered necessary

### PSNI UPDATE:

#### Accepted

(a) In 2020 PSNI formed a Stop and Search working group regarding children and young people (as part of the Police Service Stop and Search Strategy) and Dr Topping is a member of this group, along with several other external statutory and voluntary bodies. Dr Topping assisted with the design and running of an online stop and search survey for young people, which was completed 3,235 times. This survey gathered statistical data regarding responses but also allowed for free text feedback in response to 10 questions. The free text responses from this survey have now been grouped into themes for analysis and as part of this analysis, the feedback will be compared to Dr Topping's research (regarding previous findings / new themes). The research was presented to Policing Powers Development Group in December 2021, as was a related action plan. Progress against the plan will be monitored at the quarterly PPDG meetings and Dr. Topping remains involved.

(b) The PSNI will review its leadership approach to stop and search including how the use of the powers align with service objectives.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Closed**

## RECOMMENDATION 12

### DETAIL:

#### Public Order

The PSNI should change the recording system to ensure that in future any use of force is recorded in the stop and search record as well as being recorded as a use of force.

### PSNI UPDATE:

#### Accepted

PSNI advised that Information and Communication Services department is progressing all matters around this recommendation.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

**Work in Progress**

## RECOMMENDATION 13

### DETAIL:

#### Operations

The Court of Appeal in Ramsey also required the PSNI to find a way to record the community background of those stopped under the JSA. The system for recording community background is put in place quickly and, at least, by 1st January 2022.

### HUMAN RIGHTS ADVISOR ASSESSMENT:

#### Work in Progress

As mentioned in this year's report, community background monitoring remains an ongoing discussion. The Independent Reviewer for Justice and Security Act has also recommended the implementation

of community background monitoring. See p. 28 in this report for more information.

### PSNI UPDATE:

#### Not Accepted

The complex subject of community background monitoring of stop and search has been an ongoing matter since 2015, with related recommendations from various oversight bodies. From a legal perspective, Police do not in fact have a legislative power to ask those who are subjected to stop and search, to provide information on their community background. Whilst oversight bodies have suggested that this matter is simple and should have been progressed many years ago, the requirement to balance human rights, police powers, lawful duty, data protection principles and accountability have made progression difficult. Whilst a number of options have been considered, the Police Service has not been in a position to implement a system for recording the community background of those stop searched under the Justice and Security (Northern Ireland) Act 2007 by January 2022. In June 2021 at the Service's Strategic Management Board, the progress of the internal working group was assessed and the various options considered. As a result, and taking account in particular of the limitations of all of the options presented, enabling legislation was assessed as the most appropriate course of action to take.

In October 2021, correspondence was sent to the Northern Ireland Justice Minister regarding the current and future legislative framework for the monitoring of community background information, for persons who are stopped and searched. The Justice Minister responded in October 2021 advising that this was a non-devolved matter

Further engagement has therefore taken place with NIO and options for enabling legislation have been discussed. A workshop has been arranged for late February 2022 when reps from the Equality Commission, Human Rights Commission, ICO, NIO, DOJ, Policing Board and others will discuss options to progress community monitoring.

## RECOMMENDATION 14

### DETAIL:

#### Use of Force

The PSNI should report to the Policing Board on improvements made on its reporting of the use of force and further deployment of Conducted Energy Devices (CEDs) to a wider range of officers should only be made following discussion with the Board and include consideration of the human rights implications, potential dangers with its use and benchmarking with other police services.

### PSNI UPDATE:

#### Accepted

Any use of force must be recorded as such on the Police Service's electronic use of force system. Policy on the use of Spit and Bite Guards instructs officers to complete a Use of Force form as soon as practicable and, in any event, prior to the termination of duty. Work is underway to include an automated prompt on IT operational systems such as NICHE, Controlworks and Custody for officers to complete a use of force form when any force is used. A mobile Use of Force app is also being explored to enable officers to complete the form at the scene.

A pilot scheme is currently underway to trial a new use of force monitoring process, which includes mandatory reviews of body worn video footage, to promote transparency and accountability on occasions whenever we use force against another person. The process is aimed at ensuring that any use of force is suitable to identify and disseminate learning and to hold officers to account when behaviour falls below acceptable standards.

In June 2020, a review of current and future Conducted Energy Devices (CED) capacity within the Service concluded that an uplift in Armed Response Unit (ARU) capacity would provide the Service with adequate Taser Stun Gun capacity in the present operating environment.

The ARU uplift was accepted in September 2021 with a proposal to increase the number Authorised Firearms Officers (AFOs) equipped with CED to allow for greater availability of trained officers across Northern Ireland and in particular the North West. Such an increase in CED capacity maintains its use by AFOs and does not authorise the use of CEDs to a wider range of officer roles (TSG, Response etc.). The ARU uplift is underway with an additional 15 officers being allocated to this role for each year over a three year period (2021/2022, 2022/2023 and 2023/2024).

## **RECOMMENDATION 14 (CONTINUED)**

### **DETAIL:**

#### **Use of Force**

The PSNI should report to the Policing Board on improvements made on its reporting of the use of force and further deployment of Conducted Energy Devices (CEDs) to a wider range of officers should only be made following discussion with the Board and include consideration of the human rights implications, potential dangers with its use and benchmarking with other police services.

### **PSNI UPDATE:**

Infrastructure to support the uplift (vehicles, kit, accommodation, etc.) is also being progressed and advancement is being monitored at the Service Transformation Board. Whilst the PSNI will obviously engage with the Policing Board on the subject the issue of CED is an operational decision for the Chief Constable.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

#### **Work in Progress**

This will be reconsidered as part of a Thematic Report on the PSNI's use of Conducted Energy Devices likely to be published end of 2022.

## **RECOMMENDATION 15**

### **DETAIL:**

#### **Use of Force**

The PSNI commission research to identify the factors that make the use of force (and what kind of force) more likely and to learn lessons to try to reduce, as far as possible, any use of force. Specifically, with the availability of firearms, what causes an officer to escalate the use of force to draw or point a firearm and how this can be reduced.

### **PSNI UPDATE:**

#### **Accepted**

A review of the Personal Safety Programme training has been commissioned via the Service Performance Board and will report in 2022.

The Policing Powers Development Group may commission further work on this matter in due course (and may explore national research) however it should be acknowledged that funding such academic research may not be possible in the current financial climate.

17/08/22: PPDG to obtain further update from operational and tactical development training unit.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

#### **Work in Progress**

This will be reconsidered in a specific Use of Force report.



## **RECOMMENDATION 16**

### **DETAIL:**

#### **Use of Force**

The Policing Board will work with the PSNI over the next year to seek to make public the use of force statistics by gender, age, ethnic minority and disability etc. Subject to the actions taken by the PSNI to respond to the stop and search case of Ramsey, the Policing Board will discuss with the PSNI the production of statistics on the use of force and community background status of those subjected to this use of force. PSNI should report to the Board on the reasons for the increases in the number of times force has been used.

### **PSNI UPDATE:**

#### **Accepted**

The Police Statistics Branch have published a revised use of force statistical report with effect from December 2021. This version contains more detailed information than previously published, including use of force statistics by gender, age and ethnicity for those persons subject to the uses of force. A draft of this report was sent to the Human Rights Advisor for comment. Age, gender and ethnicity are the only demographic fields captured on the current use of force system so we would be unable to provide further breakdowns on disability, community background or any other demographics at this time.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

#### **Closed**

Note that this will also be considered in a specific Use of Force report.

## RECOMMENDATION 17

### DETAIL:

#### Operations

There should be a wider debate of the asymmetry in intelligence gathering and law enforcement functions in Northern Ireland involving the PSNI and the Policing Board and this should be initiated by the PSNI.

### HUMAN RIGHTS

#### ADVISOR ASSESSMENT:

#### Work in Progress

To be reconsidered when the specific national security report is being drafted.

PSNI to provide an update by spring 2023.

### PSNI UPDATE:

#### Accepted

Crime Operations Department provide a detailed quarterly performance report related to Serious and Organised Crime to the Policing Board and this includes reporting against the crime types linked to paramilitary organised criminality.

There are existing joint working practices where national security and paramilitary related criminality are jointly assessed so tasking and prioritisation decisions can be made around deployment of covert policing resources

It is recognised by a number of relevant stakeholders i.e. the Police Service, the Security Service, the Northern Ireland Office and the Department of Justice that there could/ should be enhanced levels of joint working across both the Northern Ireland Related Terrorism and Tackling Paramilitarism Programme service areas

This recognition has led to the establishment of the 'Gearbox' concept where these discussions are taking place.

The Paramilitary Crime Task Force (PCTF) works closely with Crime Operations Department to ensure that intelligence development and covert deployments are considered across the service and tasking decisions made based upon a collective assessment of threat, harm and risk.

Update 17/08/22: the Paramilitary Crime Task Force (PCTF) works closely with Crime Operations Department to ensure that intelligence development and covert deployments are considered across the service and tasking decisions made based upon a collective assessment of threat, harm and risk.

The point about a broader asymmetry of approach is a consequence of political decisions on devolved and reserved matters. The PSNI are supportive of actions to increase public awareness, of the threats facing the safety of the communities in NI but as this is a political decision - it may not be appropriate for PSNI to initiate.

## RECOMMENDATION 18

### DETAIL:

#### **Children and Young People**

The PSNI should report to the Policing Board with its response to the criticism from Jonathan Hall QC that young and vulnerable people should, where there is a choice, be arrested under PACE rather than TACT so that bail is available and should consult those organisations representing children and young people on the consequences of the current policy.

### HUMAN RIGHTS

#### ADVISOR ASSESSMENT:

#### **Work in Progress**

### PSNI UPDATE:

#### **Accepted**

A full report has been submitted to ACC Crime. Crime Department will be in a position to provide an updated response w/c 7 November.

The PSNI is cognisant that the detention of juveniles and vulnerable persons can present challenges, specifically relating to the welfare of the detained person. Age and vulnerability are factored into decisions made, both prior to and during detention, with the custody process for both PACE and TACT detention including robust safeguards to identify vulnerabilities. The possibility of bail should not be a deciding factor in the method of detention to be used when detaining a person for a suspected offence. The nature and seriousness of the offending should be a deciding factor, allowing investigators to utilise the powers available under the applicable detention.

Since the time of the report published by Mr Hall KC, Senior Investigating Officers who predominantly deal with terrorism related offences have been reminded that there are options when deciding whether to detain a person suspected of a terrorism related offence under the Terrorism Act 2000 or PACE. Age and vulnerability are factored into decisions but are not the overriding factor in establishing the method of detention. The PSNI have also further established links with those bodies who safeguard the rights of young and vulnerable persons, along with ensuring that Independent Custody Visitors can conduct their role without delay.

## **RECOMMENDATION 19**

### **DETAIL:**

#### **Policy**

The Investigatory Powers Commissioner encourages all those inspected to publish the reports from his Office (suitably redacted if necessary) and PSNI should follow this approach, perhaps starting by producing a summary of the inspection and the action that it has taken. Further consideration should be given to disclosing other Service Instructions, policies and procedures to ensure greater transparency.

### **PSNI UPDATE:**

#### **Not Accepted**

Not accepted at this time – the Police Service of Northern Ireland provides full access for the Policing Board Human Rights Advisor to the Annual inspection reports together with a full briefing regarding the Service action plan in respect of any observations or recommendation which have been made. Given the operational sensitivities and very detailed covert methodology contained in these reports there is a risk to covert tactics and capability if this material exposed and, therefore, it is not feasible to publish the reports even in a redacted or summary form.

PSNI is committed to continuing the current arrangement whereby the Human Rights Advisor has access to all relevant Regulation of Investigatory Powers Act and Investigatory Powers Act material to review so that they can appraise the Board of human rights compliance.

Furthermore, RIPA and IPA Codes of practice which guide the Police Service in its approach to covert tactics and which form the basis of our internal policies and guidance is publicly available.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

**Superseded by new recommendations included in the Human Rights Annual Report for 2021/22**

## **RECOMMENDATION 20**

### **DETAIL:**

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#### **Policy**

Given the identification by many Parliamentarians of flaws in this Act and the concerns from the past of the use of CHIS and possible criminal offences, the PSNI should develop more detailed guidance to ensure human rights compliance.

### **PSNI UPDATE:**

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#### **Accepted**

This matter is now being progressed with internal guidance. The first draft of the internal guidance document is being shared with John Wadham, on 1 February 2022. Upon the receipt of feedback from this consultation, this matter will be prepared for sign off by ACC Crime Operations and circulated to relevant personnel in C3, anticipated date March 2022.

### **HUMAN RIGHTS ADVISOR ASSESSMENT:**

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**Superseded by new recommendations included in the Human Rights Annual Report for 2021/22**

## APPENDIX: GLOSSARY OF TERMS

### **ACE**

Adverse Childhood Experiences

### **AEPs**

Attenuating Energy Projectile

### **ARU**

Armed Response Unit

### **ARV**

Armed Response Vehicle

### **Bangkok Rules**

The United Nations Rules for the Treatment of Women Prisoner and Non-custodial Measures for Women Offenders

### **Beijing Rules**

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice

### **Body of Principles**

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

### **BWV**

Body Worn Video

### **CAT**

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

### **CED**

Conducted Energy Device

### **CCA**

Criminal Conduct Authorisations for Covert Human Intelligence Sources

### **CEDAW**

The United Nations Convention on the Elimination of All Forms of Discrimination against Women

### **CERD**

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination

### **CHIS**

Covert Human Intelligence Source

### **CPT**

The Council of Europe European Committee for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment

### **CRC**

The United Nations Convention on the Rights of the Child

### **CRPD**

The United Nations Convention on the Rights of Persons with Disabilities

### **CSAE**

Child Sexual Abuse Exploitation

### **DoJ**

Department of Justice

### **ECHR**

The European Convention of Human Rights

### **ECtHR**

The European Court of Human Rights

### **HET**

Historical Enquiries Team

### **ICRIR**

Independent Commission for Reconciliation and Information Recovery (part of the proposed Legacy Bill)

### **ICVs**

Independent Custody Visitors

### **ICVS**

Independent Custody Visiting Scheme

**ICCPR**

The United Nations International Covenant on Civil and Political Rights

**IPCO**

Independent Police Complaints Office

**Istanbul Convention**

Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence

**JSA**

Justice and Security Act (Northern Ireland) 2007

**LIB**

Legacy Investigations Branch

**LPP**

Legal Professional Privilege

**Mandela Rules**

The United Nations Standard Minimum Rules for the Treatment of Prisoners

**MPS**

Metropolitan Police Service

**NGO**

Non Government Organisation

**NIO**

Northern Ireland Office

**NIRT**

Northern Ireland Related Terrorism

**NCA**

National Crime Agency

**PACE**

Police and Criminal Evidence Act 1984 and Police and Criminal Evidence (NI) Order 1989

**PONI**

Police Ombudsman for Northern Ireland

**PCSPs**

Policing and Community Safety Partnerships

**PPS**

Public Prosecution Service

**PSP**

Personal Safety Programme

**PSNI**

Police Service of Northern Ireland

**RIPA**

Regulation of Investigatory Powers Act

**SODP**

Student Officer Development Programme

**TACT**

Terrorism Acts 2000 and 2006

**Tokyo Rules**

The United Nations Standard Minimum Rules for Non-custodial Measures

**UN**

United Nations

**UN Body of Principles**

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

**UN HRC**

United Nations Human Rights Committee (set up by the ICCPR)

**UN Principles on the Use of Force**

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

**UN Code of Conduct**

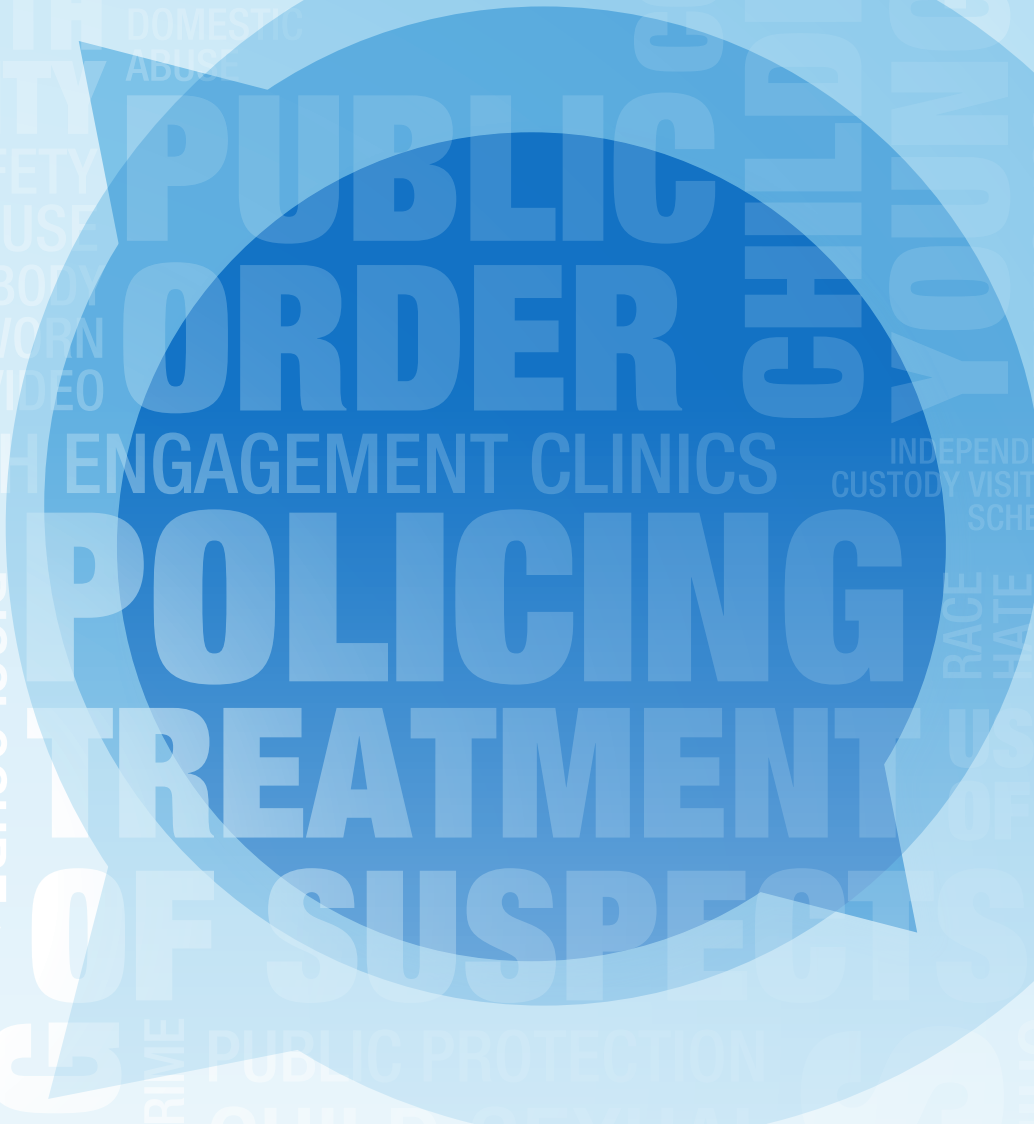
United Nations Code of Conduct for Law Enforcement Officials

**UDHR**

The United Nations Universal Declaration of Human Rights

**UKSC**

United Kingdom Supreme Court



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#### DOCUMENT TITLE

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**Northern Ireland Policing Board  
Human Rights Annual Report  
2021/22**

#### ONLINE FORMAT

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