

# **HUMAN RIGHTS ANNUAL REPORT**

## **2020/21**

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) 14th Human Rights Annual Report.

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 an overview of the monitoring work carried out during the year by the Board. With the specialist advice of the Board's appointed 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 2020/21 contains 20 recommendations for PSNI including human rights training and policy, PSNI use of aircraft, treatment of suspects, social media policy and legacy investigations.

This Report brings transparency to issues that infringe societal rights, assists public understanding of the implementation of human rights standards in police service delivery and explains how the Board conducts its monitoring work. 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.

PSNI has now implemented over 200 recommendations made in the 13 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 the PSNI's response to the Covid-19 pandemic. The sheer extent of the scope of work undertaken by the Policing Board and the Human Rights Advisor highlights the importance of keeping human rights under review as there are always new and emerging issues.

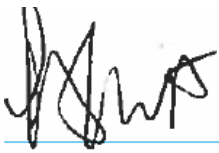
The report has been drafted in line with the Board's previous Human Rights Annual Reports using the existing Human Rights Monitoring Framework (2003). However, the Human Rights Advisor has since reviewed this framework and sought views with key stakeholders to assist in that review. Stakeholders agreed that in order for Human Rights monitoring to remain contemporary and dynamic the new Framework should apply criteria to identify future themes. It was further agreed that a number of core areas would be considered as part of the each of the future reports by the Human Rights Advisor.

These areas include policy, practical policing, training and human rights culture, complaints and adherence to the Code of Ethics. This new Human Rights Monitoring Framework has been included as an Annex at the end of the report.

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.

As a Board, we must also keep our own work under review and we welcome feedback on this Annual Report and the Human Rights Monitoring Framework. Views or comments can be provided to the Board at the following email address:  
**[PerformanceCommittee@nipolicingboard.org.uk](mailto:PerformanceCommittee@nipolicingboard.org.uk)**

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



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**Doug Garrett**

Chair

Northern Ireland Policing Board

## 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 2020/21.

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 close 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 nine 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; Complaints, Discipline and Code of Ethics; Use of Force; National Security and Covert Policing; Vulnerable Victims of Crime; and lastly Treatment of Suspects. The Human Rights Advisor has made 20 formal recommendations where it has been identified that PSNI action is necessary. It should be noted that not all of these recommendations have been agreed by all of the Policing Board's Members. Provided below is each recommendation with an overview of its context;

**RECOMMENDATION 1**

[GO TO SECTION](#)

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.

Spit and Bite Guards were introduced during the early stages of the COVID-19 pandemic. Their use has been discussed through Policing Board Committees throughout the year and the Board recommended PSNI stop their use by December 2020 in the previous Human Rights Annual Report 2019. As this recommendation regarding their use has not been implemented by PSNI, the Human Rights Advisor now recommends that all officers receive refresher training and are also trained on their use in person to ensure proper levels of understanding of their impact if their use continues. The Board has received a new report on Spit and Bite Guard use and the Human Rights Advisor will be setting his views in early 2022.

**RECOMMENDATION 2**

[GO TO SECTION](#)

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.

In 2004, the Board's Human Rights Advisor worked with the PSNI's Human Rights Champion to create a questionnaire that assessed PSNI officers' knowledge of human rights. The results were included in previous Human Rights Annual Reports, and the current Human Rights Advisor has now recommended that they should be reintroduced and included going forward with the questionnaire being delivered by an independent organisation.

**RECOMMENDATION 3**

[GO TO SECTION](#)

Given the delay in taking action on Recommendation 2 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.

Recommendation 2 from the previous Human Rights Annual Report involved PSNI developing and publishing a plan and timetable to ensure that all of its policies are published and, when relevant, set out the human rights issues involved in detail. The Board has previously asked for PSNI to publish all policy on its website, as to ensure that police action and policy is human rights compliant it must be accessible for the general public.

**RECOMMENDATION 4**

[GO TO SECTION](#)

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.

As well as traditional helicopters and fixed wing aircraft, PSNI now have the use of 12 operational drones. The Human Rights Advisor monitored the use of drones and gave feedback on a now-published Service Instruction. While other documents are due to be published with regards to aircraft, there is no overarching policy and the Human Rights Advisor has now recommended that the PSNI should extend their service instruction.

**RECOMMENDATION 5**

[GO TO SECTION](#)

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.

It is unclear whether the social media monitoring undertaken by PSNI is solely done by the Communications Branch to measure performance, or whether this was also accessible for criminal justice purposes. While PSNI have issued a directive to help officers and staff decide whether a proposed activity requires authorisation, the Human Rights Advisor has recommended that a policy should be published, and if no relevant policy exists one should be created.

**RECOMMENDATION 6**

[GO TO SECTION](#)

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 uses a CCTV Behavioural Analytics System which speeds up identification of activities and suspects on substantial hours of CCTV, however it is not the same process for facial recognition software. As other police forces in the UK begin to use facial recognition software, if PSNI considers following suit there should be transparent consultation with the Board and the public.

**RECOMMENDATION 7**

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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.

Article 2 of the European Convention of Human Rights relates to the right to life. Regarding the above recommendation, this is specifically involving the duty to have independent investigations following a death.

After a review by Her Majesty's Inspectorate of Constabulary in 2014/15, the Historical Enquiries Team (HET) was replaced by the Legacy Investigations Branch (LIB). In 2018, the Northern Ireland Office consulted on the creation of a Historical Investigations Unit which would cover all Troubles-related investigations, including those from the HET, LIB and Police Ombudsman. However, the UK government in 2021 proposed another new policy dealing with Troubles-related deaths and injuries, which has received universal opposition within Northern Ireland.

The shifting approach to legacy-related criminal investigations creates uncertainty and instability for not only LIB, but the Police Ombudsman and Jon Boutcher's external investigation team. Therefore, due to the delay to resolve this issue, the Human Rights Advisor is recommending that the PSNI should continue to investigate these cases and should be adequately resourced for the task, in the absence of guidance from the Supreme Court.

**RECOMMENDATION 8**

[GO TO SECTION](#)

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.

The Board's Independent Human Rights Advisor spent time with Gold and Silver Commands across Belfast during summer 2020 to get an in-depth insight into the most common public order issues faced by PSNI.

It was reported during 2020 that the PSNI had used the old common law offence of Unlawful Assembly while dealing with a public order event. This vague provision raises human rights issues that require consideration and has been abolished in England and Wales.



**RECOMMENDATION 9**

[GO TO SECTION](#)

- 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 (Public Prosecution Service).

This recommendation relates to the number of arrests made by PSNI after an individual was stopped and searched. In practice, the number of stops under Misuse of Drugs and PACE (powers of arrest) went up, with the success rate (a stop leading to an arrest or other outcome like a community resolution notice) went down.

PSNI's reported stop and search success rates vary between Districts and no information has been given to the Board on the reason for this. Therefore, the Human Rights Advisor has recommended tracking stop and search cases through the system to give a better view of stop and search effectiveness.

**RECOMMENDATION 10**

[GO TO SECTION](#)

- 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.

The Children's Law Centre has raised concerns in relation to the PSNI's Stop and Search Report for 1 January 2020 to 31 December 2020, contending that children and young people are being "systematically targeted through the disproportionate use of stop and search." In order to examine this, the Human Rights Advisor has noted that the above information is required.

In his 11th annual review the independent reviewer of Justice and Security for Northern Ireland, Mr David Seymour CB, made the above recommendation. In his most recent report, Mr Seymour notes that it is unfortunate that the PSNI did not accept this recommendation at least insofar as it applied to children.

**RECOMMENDATION 11**

[GO TO SECTION](#)

- 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;

Research undertaken for the PSNI by Dr Topping found that PSNI officers felt pressured to conduct high volumes of searches and that this was in response to the specific culture inside individual stations rather than any formal target-setting reasons. Therefore, the Human Rights Advisor has made the above recommendation that 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.

**RECOMMENDATION 12**

[GO TO SECTION](#)

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.

When a PSNI officer needs to use force during a stop and search – this includes using hand restraints on a person being searched – they must complete a separate “use of force” form which sits on a standalone system. Because of this, there is no automated way of recording a link between a search and a use of force.

**RECOMMENDATION 13**

[GO TO SECTION](#)

The system for recording community background is put in place quickly and, at least, by 1 January 2022.

Following the Ramsey judgement regarding the use of stop and search, the Court of Appeal required PSNI to find a way to record community background of those stopped under the Justice and Security (Northern Ireland) Act 2007. While there has been work undertaken by PSNI on this issue, a system to record community background has not yet been implemented.

**RECOMMENDATION 14**

[GO TO SECTION](#)

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.

A Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) report on the PSNI, published September 2020, stated that "the PSNI does not monitor its use of force or stop and search powers closely enough," and encouraged further scrutiny of the use of these powers from external bodies to measure appropriate use and improve performance.

CEDs are Conducted Energy Devices, such as TASERS. The HMICFRS report also highlighted that most PSNI frontline officers are not issued with TASERS, which are less lethal than firearms, and this leaves them with fewer options when using force. It recommended a wide consultation with communities led by the Chief Constable if further TASERS were to be introduced.

**RECOMMENDATION 15**

[GO TO SECTION](#)

The PSNI to 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.

The College of Policing recently published an analysis on the use of force by the police in England and Wales called Police Use of Force: Tactics, Assaults and Safety. The analysis aimed to identify whether there were any patterns in the data that might warrant more in-depth investigation using a range of research methods and data sources. The Board's Human Rights Advisor recommends similar examination of PSNI's use of force.

**RECOMMENDATION 16**

[GO TO SECTION](#)

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 PSNI currently use AEPs (baton rounds), personal batons, PAVA (irritant spray), firearms, police dogs, TASERS, handcuffs, limb restraints, unarmed physical tactics, spit and bite guards and water cannons. Some of these are considered "less lethal options." The use of these "less lethal options" was up 58% on the previous year, however no official public statistics are currently provided of the protected characteristics breakdown referred to in this recommendation.

**RECOMMENDATION 17**

[GO TO SECTION](#)

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.

Jonathan Hall QC, the Independent Review of Terrorism, pointed out in his 2019 annual report issues that the activities of law enforcement in Northern Ireland have some unhelpful and asymmetric structures. These have been created (albeit unintended) by the mandate of MI5 (including the Security Act 1989 that governs its work) and the definitions in the Terrorism Acts. These issues need to be considered and discussed to ensure they align with human rights principles and that adequate resources are provided to try to protect everyone's right to life and to try to ensure that everyone is free from harm.

**RECOMMENDATION 18**

[GO TO SECTION](#)

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.

Jonathan Hall QC, the Independent Reviewer of Terrorism, highlighted in his 2019 Annual Report that PSNI arrests people under TACT (Terrorism Act 2000) legislation more often than other police forces in UK, and also has a lower conviction rate.

Jonathan Hall QC, noted that it is of particular concern because, as he says there are perfectly justifiable reasons for not arresting someone under section 41 of the Terrorism Act 2000, for example if they are young or vulnerable and it would therefore be in their best interests to be released on bail while an investigation is ongoing.

**RECOMMENDATION 19**

[GO TO SECTION](#)

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.

Every year the Investigatory Powers Commission inspects the covert activities of the PSNI – use of informers (CHIS), listening devices, telephone taps, and other secret surveillance. The Commission produces a report, makes recommendations and suggestions for improvement every year as a result. This or a summary of it should be published to help to reassure the public that these covert activities are lawful, justified and subject to independent verification.

**RECOMMENDATION 20**

[GO TO SECTION](#)

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.

This recommendation relates to the Covert Human Intelligence Sources (Criminal Conduct) Act 2021. A CHIS is a Covert Human Intelligence Source. The Act allows MI5, police forces and some other public authorities to authorise their agents or officers to commit particular criminal offences where it is necessary.

The Human Rights Advisor has therefore recommended that the Chief Constable commence discussions in relation to the PSNI developing its own guidance on these issues in order to reassure both officers and the public.

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## 3.1 PSNI RESPONSE TO COVID-19

### INTRODUCTION

The last year has been dominated in Northern Ireland, as elsewhere, by the need to keep people safe and look after those that need care as a result of the pandemic. The Board, at its meeting in May 2020, requested that the Human Rights Advisor conduct a thematic review of the PSNI's response to COVID-19. The overarching aim of the review was to assess the impact of the policing response on public confidence. In November 2020 the Board published its 'Report on the Thematic Review of the Policing Response to COVID-19'. This report was designed to capture the key challenges that faced the PSNI in complying with human rights in its response to the COVID-19 pandemic. The report dealt with the period from 23 March until 30 June 2020. This report was not designed to be a definitive account of what happened during the period of review and did not attempt to adjudicate where there are competing accounts of what happened. This chapter summarises that Report and Appendix B sets out the recommendations made in that Report, the responses from PSNI and others, a few brief comments from the Human Rights Advisor and other relevant information available since that Report was published.

The COVID-19 virus reached Northern Ireland on 27 February 2020 with the first death recorded as occurring, as a result of the virus, on 19 March. According to the Northern Ireland Statistics and Research Agency (NISRA) there were 837 deaths with COVID-19 recorded on the death certificate between 1 March and 30 June 2020.

As is well known the virus spreads from person to person, usually as a result of close proximity (droplets moving from person to person from coughing, sneezing, talking and breathing). Reducing close contacts between people reduces the transmission of the virus around the community. Governments around the world put in place measures to try to reduce transmission by reducing the frequency of close contacts. In Northern Ireland and the rest of the UK, measures were introduced to criminalise many ordinary activities and to encourage people to stay at home.

The COVID-19 emergency resulted in police services throughout the UK being given very significant new powers. Perhaps more powers across the UK than any time since the Second World War and arguably even more than then. The general public in Northern Ireland generally accepted that these rules were necessary and complied with them. However, there were examples of many members of the public not understanding what the rules require or not accepting them. Some police officers in the UK, including in Northern Ireland, were also accused of not acting sensibly in their enforcement of them and problems occurred because people initially confused the Prime Minister's "instructions", the provisions of the Coronavirus Act 2020 and the new Health Protection Regulations. A few weeks into the first lockdown many police services suggested that they needed to use these laws more robustly.

1. FOREWORD

2. EXECUTIVE SUMMARY

3. REPORT CHAPTERS

4. APPENDICES

As the Chair of the Policing Board said in his Foreword to the COVID report:

‘The period of the COVID-19 pandemic has been a unique and challenging time for every one of us. It has also been a unique and challenging time for our Police Service. During the lockdown period, whilst everyone was instructed to stay at home and keep safe, PSNI officers could not stay at home. They had to have hundreds of interactions with members of the public every day in order to keep us all safe. The Board appreciates the commitment and service of all PSNI officers during this difficult and ongoing period.’

Although the Coronavirus has had a devastating impact on people’s lives, on the social fabric and on the economy, in some cases it has changed the ways that PSNI works for the better. For instance, the PSNI and PPS had developed new approaches. These are set out in ‘Joint PSNI and PPS Process Efficiencies and Innovation within the Criminal Justice System’.

Equally there is some data from PSNI which is more difficult to understand but features elsewhere in this Annual Report. For instance, the quarterly Misuse of Drugs Act stop and search figures for April to June was up 33% on the previous quarter of January to March but the overall arrest rate was now down to 5%. This seems surprising given the general lockdown and significant reduction in the numbers of people on the street. It also begs the question about the general profile of those subject to stop and search under these powers.

The new key powers given to the PSNI were contained in the Health Protections (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 which were made by the Department of Health under section 25 of the Public Health Act (Northern Ireland) 1967. They first came into force on 28 March 2020. These rules, as is generally well known, provided that:

- Certain shops and businesses must close or must restrict their activities to online activities and delivery only (Regulations 3 and 4 and Schedule 2, Part 1, 2 & 3);
- Severe restrictions on people leaving their homes (Regulation 5); and
- Restrictions on gatherings of more than two people (Regulation 6).

Police officers (and some public health officials) “may take such action as is necessary to enforce any requirement imposed by Regulation 3, 4 or 6” (Regulation 7). Police officers could also give “prohibition notices” if the officer “reasonably believes that” a person is contravening Regulation 3 or 4 and it is “necessary and proportionate” to prevent the person continuing to contravene the requirement. Officers could also direct a person to return home, remove a person to their home or disperse a gathering and can use reasonable force to do so. A person who, “without reasonable excuse”, contravenes these provisions commits an offence as does a person who obstructs an officer carrying out these functions. A police officer can also use their powers of arrest (PACE Order, Article 26).

These Regulations were then amended eleven times with the last set of changes (for the purpose of the COVID report) coming into force on 9 July. Although there was considerable discussion, debate and guidance in the media and from politicians generally, there was very little discussion or consultation about either the details of the rules or the Regulations themselves. Neither a draft nor the final version of the first set of Regulations were considered by the Assembly in advance of the introduction.

In fact, the first set of Regulations were made at 9.15 p.m. on 28 March 2020, laid before the Assembly at 10.00 p.m. on 28 March 2020 and came into force at 11.00 p.m. on the same day. The eleven amendments to the Regulations were also made, laid and came into force in a similar manner – without consultation, without notice and with (virtually) immediate effect. Although, they were considered by the Assembly Health Committee after introduction and were also introduced by an Executive Minister or Junior Minister in the Assembly. Both Committee and Assembly debates were broadcast online.

The Board's COVID report examined these lockdown rules and the PSNI's implementation in more detail, including in relation to gatherings and, particularly, the policing of the Black Lives Matter protest in June 2020. It also examined what happened during this period in the custody suites and also the issues that the introduction of Spit and Bite Guards caused during this period. The report also examines issues that the PSNI faced in sourcing and providing Personal Protective Equipment during this period and the report concluded with a review of the services provided by the PSNI over this period to those most vulnerable within our society. What follows is from the executive summary of that report, the recommendations made and the responses to those recommendations.

The Coronavirus pandemic has been a very significant crisis for Northern Ireland and the PSNI and along with other police services around the World, have had a crucially important role. It is not obvious that the police service should have been tasked with trying to save us from the worst effects of the virus by reducing transmission or devoting themselves to stopping us going about our usual activities to save lives. It was the law, particularly the criminal law, that was used to try to prevent the spread of the virus and the police, as a result, were expected to regulate our activities and force us to stay at home. Many law-abiding citizens trying to go about their lawful activities – trying to work, to visit relatives and loved ones or buying groceries – had to think about whether, in doing so, they were breaking the law and committing criminal offences. Some will have had unexpected and unwelcome interactions with police officers and, a few, will have committed offences.

Even without these extra and very considerable tasks the police service needed to do what everyone else was told not to do. They could not stay at home, they had to have hundreds of interactions, some involving close contact, and most of them unwanted, with members of the public. This was an obvious risk to them and, as with most other public servants, at least at the beginning, they had problems with accessing Personal Protection Equipment (PPE).



As a result, the Chief Constable issued officers with Spit and Bite Guards (SBGs). The question of deploying Spit and Bite Guards had been discussed by the Policing Board over the months before and there was no consensus on their use. In November 2020 the Board recommended that the use of Spit and Bite Guards cease by 31 December 2020.

In addition to all of this, they had to deal with emergency rules which they often did not see in draft or in advance, which were often flawed or which had significant gaps and which changed very frequently. And, of course, all this in a new environment and without any previous experience.

Thankfully the lockdown rules led to a significant reduction in overall crime and many potential victims did not have to suffer. However, the rules also put many people in extra danger from abusers in their own home and were now not able to contact those who might be able to help them. The police had to take the initiative themselves to try to protect them. This involved visiting those that the police knew were at risk and arresting those with warrants or were suspected of these kinds of crimes.

Not only did police officers need to be on the streets arresting people, getting closer to others than was healthy or safe, they needed to escort suspects to custody and then to look after them so that the risk of them becoming infected was low – and of course to ensure that they did not infect anyone else. As already mentioned, one of the tools they were given were Spit and Bite Guards, controversial equipment whose effectiveness in protecting them was unclear and could only be used by imposing additional restraint on the suspect and creating significant human right issues – and possibly violation of the prohibition against ill-treatment.

Overall the PSNI were careful in their use of the Regulations, particularly by following the four Es of; Engage, Explain, Encourage and Enforcement. They went out of their way to avoid enforcement, took the initiative to protect those at risk of abuse in their homes, took care of those detained and only used SBGs against those who were trying to spit at them or to bite them. However, it is not clear that they were helped to understand the overlap between the Regulations and the Human Rights Act by the Executive or Assembly Members and may have not done enough to protect the right to protest safely.

The evidence presented within the report would indicate that, across this first period of the pandemic emergency, from 23 March to 30 June 2020, the PSNI's performance was assessed as generally positive. In particular, those consulted pointed to the PSNI's response to vulnerable people, the overall leadership role it assumed, its innovative collaborative working with other statutory partners and its management of its custody suites as being a particularly positive experience. When criticisms were voiced they were focussed on the policing of gatherings and protests, the introduction of Spit and Bite Guards, PSNI's interpretation of certain Regulations and the impact these issues had on confidence in policing. These issues were complex, with decisions having to be taken expediently in a time of an unprecedented health emergency. All these issues are explored in more detail in the following chapters below.

## CONFIDENCE IN THE PSNI

As might be expected the actions of the PSNI during the pandemic have had differential effects on confidence. On the one hand, people who support the police can find many good reasons to applaud the important work that they had done. Their general sensitivity in the use of the new enforcement powers and the fact they have taken the initiative to support those at risk at home was supported by the NGOs dedicated to this work. There cannot really be any doubt that their actions in reducing face to face contacts, reduced transmission and will have saved many lives.

On the other hand, some pointed to the significant erosion of civil liberties and inconsistency in enforcement – for instance in relation to the Black Lives Matter protests, people fined or convicted for trying to go about their normal lives and the fact that the use of Spit and Bite Guards was introduced in the context of the pandemic.

In practice, the PSNI and the criminal law were the tool used by the government to enforce compliance on those reluctant or unable to comply with the lockdown. Albeit that the enforcement provisions are at the lower end of the criminal scale. This was a health emergency not a criminal justice crisis so maybe the more important question is whether there are better ways of doing this if there is a another future wave of the Coronavirus or a different virus threatening our lives in the future? However, the police are the obvious choice, they are used to dealing with public order, difficult individuals and have officers on the ground all around the country. It is not surprising though, that giving the police the job inevitably means they bring a policing and criminal justice approach to the problem.

If the choice is to use the police to protect our health then there is a very powerful argument for the health experts, at the Department of Health, to take responsibility and to assist the PSNI by suggesting both some overall objectives and to give guidance on the level of transmission risks. If the basis of the law was to reduce person to person contact, household to household contact and location to location contacts then that should have been made clear in the Regulations and the PSNI should have been supplied with daily ‘threat levels’ that could be shared with officers and in turn shared in interactions with members of the public. These threat level assessments would have also helped the PSNI and officers to gauge how far up the four Es enforcement escalation process they should go to achieve the objective of keeping us safe.<sup>1</sup> Interestingly, the PSNI has taken a more hands off approach to the Regulations regarding the wearing of face masks indoors and in the two weeks of those new Regulations no fines were issued. The PSNI stated that the primary responsibility for enforcement would lie with individual establishments, such as retailers.<sup>2</sup>

1 It is understood that senior officers proposed this very approach but it was not accepted by the Department of Health.

2 BBC website, 18 August 2020.

The expression ‘policing by consent’ probably does not accurately represent how policing is carried out in practice anywhere, but what is true is that protecting the public cannot happen without community engagement and some level of support for the police. Giving the police powers to tell people how to live their own lives is fraught with danger, however important the objective is. Support and confidence in the police is very difficult to build and very easy to erode.

## **FUNERALS**

The restrictions imposed by the Regulations on attending funerals has been difficult for the relations and friends of people who died during the year. The European Convention on Human Rights protects those wishing to attend by asserting the fundamental right of assembly (in article 11) and the right to ‘manifesting’ religious belief (article 9). Of course, both of these rights are ‘qualified rights’ and can be lawfully restricted if ‘prescribed by law and are necessary in a democratic society in the interests of ... public safety... for the protection of health...’

There is no doubt that, in the context of the pandemic, some restrictions would be justified. However, some politicians have suggested that the PSNI have not enforced the Regulations consistently and, in particular, breaches of the Regulations in republican and national funerals have been ignored. Obviously, the law must be enforced consistently and inconsistent and unjustified enforcement on the grounds of religion or political opinion would be in violation of the anti-discrimination provision of the ECHR (article 14).

The most high-profile issue concerned the funeral of Bobby Storey which was held on 30 June, the very end of the time period set for the Policing Board’s review of the PSNI’s response to the pandemic. Significant numbers of people attended that funeral, possibly in breach of the 30-person limit imposed by the Regulations at the time.<sup>3</sup> Evidence of the breaches, at least of those involved in the organisation, was passed to the PPS but a decision was made not to prosecute them. The Director of Public Prosecutions stated:

“It is relevant that by the time of this funeral, the original Regulations of March 2020 had been amended on nine separate occasions through a combination of deliberate relaxation and re-working at pace to meet policy change. As a result, on the 30 June, the Regulations had become extremely difficult to navigate and, in certain respects, inconsistent.

Furthermore, organisers of this particular funeral and police had engaged against the backdrop of evolving Regulations in an attempt to ensure that a balance was struck in the funeral arrangements between respecting the sensitivity of the occasion and minimising any risk to both public health and safety.

Prosecutions can only be brought where the available evidence provides a reasonable prospect of proving, beyond reasonable doubt, a breach of the criminal law.

<sup>3</sup> Though see the analysis by the PPS and HMICFRS, referred to below.

As a result of the factors considered we have concluded that the prosecution could not prove any breach of the Regulations to the required standard. Whether considered alone or in combination, the two reasons outlined - that is the lack of clarity and coherence within the Regulations and the prior engagement between organisers and police - would pose an insurmountable difficulty if any of the reported individuals were prosecuted. This is because they could all avail of a defence of reasonable excuse in terms of their actual or reasonably perceived compliance with a complex set of Regulations and/or their reliance on the prior engagement with PSNI.

The law as it applied to the Storey funeral was changed significantly on the evening before the funeral and further amended two days later. Even though prosecutions are not being brought on this occasion, they are being brought for breaches in relation to funerals at a point in time when the Regulations were clear and coherent.

As has been evident in other jurisdictions, the law relating to permissible conduct in the course of the pandemic is not always clear cut and this can be challenging when it comes to enforcement of what are essentially health Regulations in a criminal justice context...<sup>4</sup>

The decision of the PPS was reviewed but the decision not to prosecute was confirmed in June 2020.

The approach taken by the PSNI in the period before and during the event itself was also subject to a review. The review of the PSNI approach by HMICFRS made a number of recommendations and what follows are what the Human Rights Advisor believes are the key extracts from the Report:<sup>5</sup>

‘In our view, and the view of the PPS in its public statement, it would have been extremely challenging for the police to interpret and apply the relevant provisions of the Regulations in order to identify what conduct was and was not permitted as at 30 June 2020.’<sup>6</sup>

‘The Regulations in force in Northern Ireland at the time of the Mr Storey’s funeral must equally be interpreted and applied in a way that protects and gives effect to human rights. When considering whether to take enforcement action in respect of apparent breaches of restrictions in the Regulations, the police had to consider whether, in all the circumstances, enforcing the restrictions would be a disproportionate interference with the relevant individuals’ human rights, such that, if prosecuted for an offence under the Regulations, they would be able to establish a “reasonable excuse” defence.’<sup>7</sup>

4 <https://www.ppsni.gov.uk/news-centre/pps-issues-decisions-covid-funeral-files>

5 The Human Rights Advisor should, perhaps, declare an interest in that the Report states ‘...we quote extensively from Mr John Wadham’s report for the Northern Ireland Policing Board. We support his conclusions and recommendations wholeheartedly.’ Page 73.

6 Page 15, *The Police Service of Northern Ireland: An inspection into the Police Service of Northern Ireland’s handling of the Bobby Storey funeral on 30 June 2020*, 17 May 2021.

7 Page 18.

‘The PSNI prioritised security and public order over enforcing the Regulations. Whatever was written in the Gold Strategy, it seemed to us that the priorities of senior officers were, in order:

- that the funeral should pass off without violent incident or serious disorder;
- that the funeral should pass off without any of the more provocative symbology associated with paramilitary funerals;
- and that – a perhaps distant third – there should be no serious breach of the Regulations.’<sup>8</sup>

‘We are, in some respects and to a limited extent, critical of the PSNI actions in the following section. In particular, whereas it is easy to understand why compliance with the Regulations might not have been the PSNI’s highest priority, it doesn’t follow that there is not more it could have done.’<sup>9</sup>

‘The most significant criticism is of the pre-funeral engagement, which did not, in our view, match the best examples we have seen in other police services. Although the level and amount of engagement were commendable, the PSNI did not cover the 4Es as thoroughly as it might have done. There was a degree of informality in the PSNI dealings with organisers that, in the unique circumstances of Northern Ireland, is easily understood and, perhaps, forgivable: senior officers are bound to have regular contact with a relatively small cohort of politicians and community leaders from across the political spectrum. But this comes with potential disadvantages. During engagement with funeral organisers, the PSNI should have more formally adopted the 4Es approach. It could have – and should have – done more to explain the Regulations (as best it could), to encourage compliance and to advise of the potential consequences if the Regulations were breached. This would have made clear what the police expected of the organisers and attendees. We have also criticised some procedures, especially record-keeping, that should be improved in future engagement.’<sup>10</sup>

The report by HMICFRS, was itself the subject of a number of criticisms by politicians and journalists.<sup>11</sup>

This Report and the events it covers is particularly relevant for human rights purposes and because the PSNI’s approach to this funeral appears to have been substantially different to that taken to the Black Lives Matter protest three weeks before, on 6 June 2020. Perhaps, therefore, it is surprising, that this comparison is not referred to in the HMICFRS report.

On 26 May 2021 the Police Ombudsman announced that she has commenced an investigation into a complaint she has received from a member of the public who was involved in a ‘Black Lives Matter’ protest at Guildhall Square, Derry/Londonderry, on Saturday 6 June 2020.

8 Page 71.

9 Page 71.

10 Page 72.

11 For instance, being the main subject for discussion over several days after publication on the ‘Nolan Show’ on BBC Radio Ulster.

The complaint involves allegations of inconsistencies in the policing approach to engagement and enforcement at the Black Lives Matter protest when compared with the funeral of Bobby Storey. The complainant alleges that the inconsistencies amount to race discrimination. The investigation will focus on matters related to the engagement of the PSNI with the organisers of the Black Lives Matter protest in Guildhall Square, Derry/Londonderry in advance of the event. The investigation will examine if this engagement was consistent with the PSNI's approach to the organisers of Bobby Storey's funeral. The investigation will also examine the PSNI strategy, policies and decision-making around the two events in light of this complaint.

## **CONFIDENCE IN PSNI FROM SECTORS AND ORGANISATIONS**

It is important to consider how police interpretation and enforcement of the Regulations can affect public confidence in the PSNI and how this may differ across different communities. It is also important to consider if the policing of specific issues throughout lockdown has affected confidence, such as the policing of Black Lives Matter protests and significant gatherings such as funerals and beaches. Following the policing of such events, it was apparent that public confidence had been impacted upon because of the perception that the policing of events differed.

The use of the four Es of 'Engage, Explain, Encourage and Enforcement' as set out by the College of Policing and the Chief Constable seemed to work well as it was promoted effectively by the PSNI and was well known by the public.

The lack of clarity around the meaning of the Regulations and subsequent amendments and guidelines is likely to have had a significant impact on how well the public consider PSNI to have policed during lockdown. In the early days of the pandemic the PSNI were criticised over their handling of new powers to enforce the lockdown, with some arguing they are going beyond what the legislation allows. This led to senior officers calling for greater clarity from the Department of Health on the Regulations, while recognising the very difficult circumstances within which the Regulations were drafted. PSNI recognised the impact its actions had on public confidence.

The majority of external stakeholders have reported a positive experience of policing during COVID. A number of PCSPs were very complimentary about the policing response to COVID and noted the effort by local police to signpost vulnerable individuals to appropriate agencies during COVID for a range of services, e.g. food banks, housing, etc. However, some local communities noted disappointment with the changes to the deployment of neighbourhood teams during COVID and the negative impact that this has had on confidence. It will remain important for PSNI and PCSPs to listen to local communities and to communicate these plans for policing effectively.

## **OTHER ENQUIRIES, REPORTS AND RECOMMENDATIONS**

### **The Police Ombudsman for Northern Ireland: An investigation into Policing Policy and Practice of Protests in Northern Ireland**

In the summer of 2020 the Police Ombudsman used her section 60A powers (Police (Northern Ireland) Act 1998) for the first time to investigate ‘a current practice or policy’ rather than an issue of conduct by a police officer. This investigation concerned the protests that happened in the first half of June 2020. She concluded:

‘Although the overarching PSNI approach to the policing of the events on 6 and 13 June were similar and based on the Four Es, the PSNI practices for policing of 6 June [the Black Lives Matter protest] were substantially different from 13 June.’

She made four recommendations:

- 1.** I recommend that the PSNI consider adopting a Human Rights Based Approach to policing of protests based on the four principles; Participation, Empowerment, Equality and Non-Discrimination and Accountability.
- 2.** I recommend that underpinning this approach to protests, the PSNI develop human rights based assessments evidenced the identification of relevant rights, balancing competing rights and risks to include appropriate measures to address PSNI’s obligations and mitigate the identified risks.
- 3.** Consistent with a similar recommendation by the Northern Ireland Policing Board, I recommend the PSNI review the enforcement Notices issued on 6 June 2020, acknowledge errors and commit to redress for those individuals affected.
- 4.** I recommend that the Chief Constable periodically reports to the Northern Ireland Policing Board on progress in his public commitment to commission strategic engagement with Black, Asian and Minority Ethnic Communities of Northern Ireland.

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## 3.2 TRAINING AND PSNI HUMAN RIGHTS AWARENESS

1. FOREWORD

2. EXECUTIVE SUMMARY

3. REPORT CHAPTERS

4. APPENDICES

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 to new and existing officers. During 2020/21 it has proved challenging to monitor the training delivered by PSNI due to the pandemic and the impact the related restrictions have had on travel and attending training. That said, the Board has continued its engagement with the human rights lead in the Police College which has provided the Board with a level of oversight.

It was noted in last year's Annual Report that the PSNI Human Rights Training Advisor had built capacity and understanding of human rights across a range of training. Their role 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 in order 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).

The outworkings of such assurance was evidenced in only one recommendation being made relating to training in last year's report and more specifically, research by Dr Richard Martin on public order training. In response to this recommendation PSNI advised that the human rights training advisor has reviewed and amended the human rights and use of force lessons for bronze and silver command courses and is now involved in the delivery of the programme.

During 2020/21 the College advisor carried out a number of human rights audits in the following areas: Tactical Training; Foundation Training; Investigative Training; Learning Technologies Unit; Custody; and developed a Human Rights and Decision Making Training package. Details of the human rights findings are set out below.



## **Tactical Training**

Tactical Training provides training to operational and student officers in a variety of specialisms ranging from public order policing, search, Personal Safety Programme and firearms. It is heavily influenced by the National Decision Model which affects decisions regarding use of force (including the use of firearms and less lethal options) and the use of public order policing tactics and command related decisions. The audit was designed to assess if the 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 and to identify areas for development.

A range of training courses was considered as part of this audit, such as; the use of Taser, use of restraints, public order, use of force, acute behavioural disorder and the use of spit and bite guard online module, to name a few. The audit found that understanding of human rights obligations within the theory elements of the training programmes was observed in the learning outcomes and course documentation and further evidenced in discussions with training staff. It was found that the courses did contain relevant sections on human rights compliance linked to compliance with the National Decision Making Model and that the course inputs seek to develop learner knowledge and understanding of Articles 2, 3 and 8 of the ECHR, section 3 Criminal Law Act 1967, Article 4 PSNI Code of Ethics and service policy as set out in PSNI Manual of Policy, Procedure and Guidance on Conflict Management. It further aims to equip officers in methods of communication and the lawfulness and tactical options associated with police use of force.

Regarding spit and bite guards specifically and their wider roll-out to front-line uniformed officers in designated positions in January 2021, the Board is aware that prior to use, all officers are required to complete a compulsory CLASSIS online training package detailing the use and deployment of a Spit and Bite Guard and the possible medical implications relating to their use.

### **RECOMMENDATION 1**

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.

## **Foundation Training**

The Foundation Training Programme prepares student officers for entry as warranted police officers through a 21-week training programme which provides an Advanced Diploma in Policing. The programme is moving towards a degree qualification in the near future. Learning within the programme is focused upon the application of police powers in accordance with relevant legislation, codes of practice and multi-agency operating procedures and is delivered within 6 distinct topics areas, namely; Foundations of Policing, Criminal Justice System, Investigative Skills, Road Policing, Public Protection and Safety and Officer Safety and Wellbeing. Within these topic areas, students are trained on subjects ranging from powers of arrest, entry and search; understanding of criminal offences including common road policing 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 PSP. As a consequence of this, human rights considerations are required to be understood and applied throughout Foundation Training in order to prepare student and probationer officers for the demands of operational policing.

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. The review of Foundation Training took the form of a snapshot review of a number of lesson plans, documents and assessment schemes as well as ongoing discussions with police trainers involved in the assessment and delivery of lessons. Lessons plans reviewed included; Vulnerability, Policing with Children and Young People, Human Trafficking, Human Rights, Witness Assessment and Classification, Justice and Security, Terrorism Stop and Search Powers, Domestic Abuse, Hate Crime, Arrest and Article 34 Search Practical & Trauma Informed Practice and Adverse Childhood Experiences.

The College has advised the Board that there has been sustained developments in integrating human rights as a key theme within the Foundation programme with a continued development of conversation and communication inputs and the recognition of the impact of Trauma Informed Practice and Adverse Childhood Experiences on officer communication strategies. The Board recognises the attempt to assist officers to understand the vulnerability which victims/suspects and witnesses may present with, particularly in the context of encountering with children, vulnerability and domestic abuse. It is encouraging that training staff approached during the review had a good understanding of their human rights obligations and sought to provide appropriate and timely prompts to student officers in an effort to model good practice and strive for human rights compliance in areas ranging from use of force, stop and search encounters and dealing with vulnerability.

## **Investigative Training**

Investigative Training delivers a range of nationally accredited and bespoke courses to assist officers in delivering professional, ethical and effective investigations. This covers areas within; the Initial Crime Investigators Development Programme, the Investigative Supervisor Development Programme, the Management of Serious and Complex Investigations Development Programme and the Specialist Child Abuse Investigation Development Programme. Courses relating to the work of Public Protection Branch are also covered.

Investigative practices undertaken by PSNI will involve interaction and engagement with the Human Rights Act, primarily, in relation to compliance with Article 2 (right to life – positive obligations), Article 3 (freedom from torture and degrading treatment– positive obligations), Article 6 (right to a fair trial) and Article 8 (right to privacy). As a consequence of this, human rights considerations are required to be understood and applied throughout investigative training packages in order to prepare officers for the demands of operational policing.

The review took the form of a snapshot review of a number of lesson plans, documents and assessment schemes as well as ongoing discussions with police trainers involved in the assessment and delivery of lessons. Lesson plans reviewed included; Interviewing Vulnerable & Intimidated Witnesses, Police Only Achieving Best Evidence (ABE), Joint Investigative Interviewing with a Child and with an Adult. In addition, this work has been complemented by review work conducted by the College Advisor in completing the training needs analysis report required by the Gillen Training Group.

The Advisor notes that the training content relating to ABE seeks to assist officers to identify the various types of abuse which may be experienced by victims and equips officers through a variety of paper-based and role-play exercises to consider methods of communication, appropriate interview techniques and considerations relating to consent, special measures, capacity and human rights. Information on special measures relevant to interviewing and witness testimony was also provided. The Joint Protocol training (Adult & Child) is heavily focused upon the welfare and protection needs of victims of abuse with a particular focus on the preparation for, and conduct of Pre-Interview Assessments and interviews under the ABE framework. Assessments for human rights standards vary depending upon the training course. Current assessments include examinations, roleplays, suspect/witness interviews and assessed and developmental practical exercises which will include rights-based decision-making or the identification of a rights-issue. The review found that courses contain job specific content relating to risk assessment on vulnerability and sufficient controls to assess vulnerable witnesses and that controls are in place to mitigate risk of unethical behaviour/oppressive interview conduct.

### **Learning Technologies Unit (LTU)**

The LTU in the Police College delivers a range of technology focused training services within the areas of Immersive Learning, On-Line Training and ICT Training. This content includes the use and management of police information systems (e.g. NICHE), mobile devices and radio. Whilst much of the content delivered by the unit is technical in nature and relates to the appropriate use of equipment and information systems; elements of the unit's training, in particular within the area of call handling, dispatcher Foundation training, course specific HYDRA inputs (immersive learning) and body worn video, will involve interaction and engagement with the Human Rights Act, primarily, in relation to compliance with Article 2 (right to life) and Article 8 (right to privacy) and vulnerability.

The review took the form of a snapshot review of a number of lesson plans, documents and assessment schemes as well as ongoing discussions with police trainers involved in the assessment and delivery of lessons. Lesson plans reviewed courses in areas such as: Assaults; Child Sexual Exploitation, Domestic Abuse, Dropped Calls, Firearms MTA, Hate Crime, Missing Persons, Modern Slavery, THRIVE, Critical Incidents, Vulnerability, Call Grading, National Decision Model, Incident Coordination Centre Silver Firearms Incidents, Incident Coordination Centre Kidnap.

It was found that the dispatch/call handling courses contain relevant sections on human rights compliance linked to NDM models and foundation elements provide grounding to offences and engagement with victims e.g. Child Sexual Exploitation/human trafficking. It was also found that specific human rights content was delivered as stand-alone content within dispatch/call handling.

### **Custody Training**

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. It is also essential that custody training, whether aimed at custody sergeants performing the role in a substantive or backfill capacity, custody constables and Civilian Detention Officers {CDOs}, equips staff to recognise their legal and 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.

Use of police custody will necessarily involve interaction and engagement with the Human Rights Act, 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). The review took the form of a snapshot review of a number of lesson plans, documents and assessment schemes as well as ongoing discussions with police trainers involved in the assessment and delivery of lessons. Lesson plans reviewed included: Autism; Risks in the Suite; Preventing Deaths in Custody; Independent Custody Visitor; Human Rights (Collaborative Working); Risk Assessment; and Rights, Care Plan Pre-release Risk Assessment.

The following themes were identified as part of this review: Training emphasised that detention should be appropriate, authorised and last no longer than is necessary; emphasising that rights relating to PACE and the PACE Codes of Practice should be adhered to; and that officers and staff should take account of human rights and vulnerability needs. The training also emphasised that detainees should have access to health and social care services appropriate to their physical and mental health needs, emphasising the continuing risks posed by vulnerability and offered a number of packages including Applied Suicide Intervention Skills Training {ASIST} to help staff to identify vulnerability and mitigate its possible consequences. The advisor notes that the trainers evidenced good understanding of human rights obligations/vulnerability/risk assessment considerations evidenced by discussions during monthly governance meetings and lesson observation. It was further noted that courses contain relevant sections on Human Rights compliance and that NICHE inputs were heavily focused on the safe management of detainees and the management of detainee vulnerability (e.g. use of risk assessment, pre-release risk assessment and referral sheet). Finally the course inputs sought to equip officers/staff to provide for the safe management of detainees in police custody.

In conclusion across all of the reviews the College advisor recommends that amendments to existing course inputs/new course commissioning (which are of a non-technical nature unrelated to the usage of equipment) be completed using the human rights screening tool. As new senior officers can only be appointed to the PSNI once they complete the senior command course delivered by the College of Policing, the Human Rights Advisor will consider the human rights elements of the course.

### **Human Rights Awareness within the PSNI's Officers and Staff**

In previous Human Rights Annual Reports, a section was included regarding the awareness of human rights amongst PSNI officers. To assess this, the Human Rights Advisors, in 2004, devised a human rights questionnaire with the assistance of the PSNI Human Rights Champion, who was an ACC.

The 2004 questionnaire was comprised of 17 questions, the first ten being designed to gauge basic human rights knowledge within the PSNI. Each of the ten questions was multiple choice, with four possible answers: one right, one nearly right, one clearly wrong and one nearly wrong. This allowed the then Human Rights Advisor to evaluate not only the number of right answers, but also how far wrong officers were when they failed to provide the right answer, with a view to cross-referencing the results to issues of training, policy etc.

Questions 11-15 were open ended questions intended to gauge police officers attitudes to human rights more generally. There were no right or wrong answers. They dealt with how officers perceived their own human rights knowledge, how useful they found their training, and how they dealt with human rights issues when they arose in their day to day policing.

Finally, the questionnaire, although anonymous, asked the officers responding to indicate their rank and length of service. The questionnaire was sent out as a joint initiative between the Board and the PSNI. An accompanying letter from the Chief Constable urged all officers to complete the questionnaire with as full a response as possible.

The findings are reported in the Human Rights Annual Report 2005 (see Chapter 12, page 144 onwards). Patten (para 17.1) noted that;

‘The culture and ethos of an organisation include both the way in which it sees itself and manages itself and the way in which it sees and interacts with its clients and others outside the organisations’ (Patten, paragraph 17.1).’

#### **RECOMMENDATION 2**

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.

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## 3.3 POLICY

### POLICY IN THE PSNI

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 detailed guidance that they provide to officers.<sup>12</sup>

At the highest level is ‘Corporate Policy’ which lists PSNI’s services and high-level corporate decisions. Secondly, there is the ‘Service Policy’ listed below:

- Armed Policing Policy
- Corporate Communications Policy
- Counter Terrorism Policy
- Criminal Justice Policy
- Custody Policy
- Emergency Planning Policy
- Environmental Management
- Finance Policy
- Health and Safety Policy
- Human Resources Policy
- Information Management Policy
- Intelligence Management Policy
- Investigations Policy
- Keeping People Safe through Policing with the Community Policy
- Organisational Security Policy
- Police Search Policy
- Policing the Roads Policy
- Professional Standards Policy
- Public Safety and Public Order Policy
- Risk Management and Governance Policy
- Specialist Support to Investigations
- Training, Leadership and Development Policy
- Vulnerability Policy

Service Policy is described as being “principles to govern the organisation”. For example, the document entitled ‘Investigations Policy’ starts as follows:

<sup>12</sup> [https://www.psnipolice.uk/advice\\_information/our-publications/corporate-policy/](https://www.psnipolice.uk/advice_information/our-publications/corporate-policy/)

‘Where an offence has been committed, police officers in the Police Service of Northern Ireland (PSNI) have a statutory duty under Section 32 of the Police (Northern Ireland) Act 2000 to take measures to bring offenders to justice. Police are primarily responsible for determining what measures should be taken in each case.

Investigators will follow the Code of Practice to the Criminal Procedure and Investigations Act (1996) as well as guidance set out in the PSNI Code of Ethics for Police Investigations and the College of Policing Authorised Professional Practice for Investigation, for example. More complex investigations require investigators with appropriate range of specialist skills, experience and training. The investigation should have the ability to deal with the full range of serious criminality presented. Specialist investigators will follow specific national manuals of guidance where appropriate.’

This is helpful, but there is no mention of any human rights issues or how they are reflected in this Investigations policy.

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.” Only a very few of these mention human rights or, if they do, have enough detail to understand how human rights impact on police policy. One good example of integrating human rights is contained within the Service Instruction entitled ‘Threats to Life’ and this should be considered and replicated to other policies.

Fourthly, there are three ‘Service Procedures’ on sick pay, alcohol misuse and policing with children and young people. The last of these is very detailed and 46 pages long and includes a summary of the United Nations Convention on the Rights of the Child.

Lastly, there is a link to the detailed Conflict Management Model, which sets out guidance on the use of force by police officers:

‘The purpose of this manual is to facilitate an understanding and to provide practical guidance concerning the use of force by police officers. It is intended to follow the policy, procedure and guidelines promulgated to forces by the National Police Chiefs Council (NPCC).’

This manual has a full chapter at the beginning on the legal and human rights basis for the use of force.

Combined, all of these types/levels of policy documents should inform every officer or staff member what principles they must embrace, what procedure they must follow and what standards are expected of them. Crucially for the Board, they provide a measure by which police practice can be monitored and assessed. As part of the human rights monitoring framework, the Board evaluates the extent to which particular police policies ensure operational compliance with human rights standards.



However, the PSNI have a practical and sensible process for dealing with new Service Instructions and have an ‘Author Toolkit’ and ‘Quality Assurance Form’. The Author Toolkit is currently under review and section 3 of the Quality Assurance Form relates to Human Rights / United Nations Convention on the Rights of the Child (UNCRC). PSNI are now working with the Board’s Human Rights Advisor to consider a more comprehensive means of capturing human rights considerations in the toolkit and assurance form and the other policy materials more widely.

One important change in approach last year was that the Board requested the PSNI to ensure that all of its policies and procedures set out clearly any human rights issues that are relevant and to publish those policies and procedures. The PSNI was also asked to undertake a similar approach to new and, particularly, controversial operational and policy matters. Recommendation two of last year’s Annual Report 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.’

This recommendation was accepted by the PSNI:

‘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 Board members and officials for specific comment. Examples include the use of Drones and Stop and Search.’

### **RECOMMENDATION 3**

Given the delay in taking action on Recommendation 2 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.

As reported in previous Human Rights Annual Reports, the Board has consistently advocated for the publication of all PSNI policies on its website. For all police action to be human rights compliant it must have a lawful basis which includes the requirement that it is accessible to those whom the police interact with. Unfortunately, the PSNI has more to do to promote a proper level of transparency for its policies.

All police services across the United Kingdom are expected to publish their written policies, protocols and procedures.<sup>13</sup> It is accepted that some documents should not be published, for example, if publication is likely to impact adversely upon operational activity or if the information is classified. However, even if a policy document contains classified information which cannot be published, a summary of the policy with the restricted information redacted from it can, and should, be published. These documents should be published in formats that enable persons with disabilities equal access to the information.<sup>14</sup>

## BIOMETRIC RETENTION

As reported last year, the Grand Chamber of the European Court of Human Rights (ECtHR) decided, in the 2008, the case of *S and Marper v UK*, challenging the blanket policy of retaining indefinitely the DNA samples, profiles and fingerprints (referred to collectively as ‘biometric material’) of all people who have been arrested, but not convicted of an offence. The Court found that this policy did not comply with the right to respect for private and family life (Article 8). In response to the *Marper* judgment the Northern Ireland Assembly introduced a new legislative framework for the retention and destruction of biometric material - the Criminal Justice Act (Northern Ireland) 2013. There was, however, a delay in the new framework coming into operation, but as an interim measure PSNI established a Biometric Retention/Disposal Ratification Committee which met regularly to discuss applications for individuals requesting that their biometric materials be destroyed and relevant records and databases amended to reflect this.

In January 2019 the Northern Ireland Human Rights Commission reported that it had settled a case taken against PSNI on DNA retention.<sup>15</sup> As a result the PSNI agreed to produce a formal public policy on the retention of biometric data within 12 months. The policy was designed to take into account human rights and to provide guidance to the public on how they can find out if their DNA or fingerprints have been retained, why this is so, and how they can challenge the decision if necessary.

In the continued absence of legislation, the PSNI’s proposal was that its new Service Instruction would come into force in April 2020 and would be modelled on the provisions of the Criminal Justice (Northern Ireland) Act 2013 (the CJA), although that Act had still not yet come into force. In accordance with proposals from the NIO, the PSNI intended to take a digital and hard copy “snapshot” of the undeleted fingerprints and DNA databases and pass this over to the proposed Historical Investigations Unit (HIU).<sup>16</sup> The plan being, that separate legislation would restrict access to this snapshot, making it only available to the proposed HIU’s investigations.<sup>17</sup>

13 The Information Commissioner’s Office has produced guidance for police services on the types of information that they should publish: [https://ico.org.uk/media/for-organisations/documents/1280/definition\\_document\\_for\\_police\\_forces.pdf](https://ico.org.uk/media/for-organisations/documents/1280/definition_document_for_police_forces.pdf)

14 As required by for example the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), articles 2, 9 and 21

15 9th January 2019, <https://nihrc.org/news/detail/human-rights-commission-secures-settlement-in-dna-fingerprint-retention-cas>

16 This was intended to mitigate the risk posed to historical enquiries by the deletion of material as a result of CJA commencement.

17 The Northern Ireland (Stormont House Agreement) Bill.

The draft Service Instruction and draft Guidance were driven by the positive desire to make the biometric retention regime more human rights compliant and, substantially, to reduce the numbers of people who have their data retained.

In February 2019 the ECtHR gave its judgment in a case challenging the retention policies of the PSNI (and of police services across the UK). The Court was particularly helpful in its judgment in giving guidance as to how a compliant system in the UK might be structured in the future.<sup>18</sup> The keys to lawful retention appear to be:

- To take account of the domestic rules on the threshold for convictions being “spent”;
- To ensure that the new regime takes account of the seriousness of the offence and any continuing need to retain the biometric material for policing and criminal reasons;<sup>19</sup>
- A real process of review to allow individuals to seek deletion of their data, including taking into account possible changes in their personality (and presumably the likelihood of committing further offences);
- Taking into account the age of the person when he or she was convicted and the length of time between the offence and the end of retention period; and
- Noting that the new separate regime for the deletion of photographs in the UK allows deletion after six years for people convicted of less serious recordable offences.

A consultation was held by the Department of Justice between July and August 2020 on new proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland. The Department proposed policy changes in five key areas, each of these are summarised below and these were largely confirmed in its report in October 2020.<sup>20</sup>

The Department proposed legislative amendments to replace the indefinite retention elements of the CJA with maximum periods of retention for convictions based on the seriousness of the offence and the age of the offender, as below:

- 75 years retention period for DNA and fingerprints for all convictions associated with serious violent, sexual and terrorism offences (“qualifying offences”)
- 50 years retention period for adult convictions for recordable offences that do not fall within the serious category; and
- 25 years retention period for 2 or more juvenile non-serious convictions which do not involve a custodial sentence of more than 5 years (an under 18 conviction for a non-serious offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).

The Department proposed to make provision within the Act for a regulation-making power that will enable the Department to set out clearly in secondary legislation a detailed review mechanism that will apply to all material falling within the 75/50/25 year’s maximum retention periods.

18 See paras. 94 to 96.

19 It might be argued that retaining biometric data is of no help in dealing with offenders who drink and drive.

20 A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in Northern Ireland: Summary of Responses.

They envisage that the Regulations will include:

- Detail on the review periods;
- The criteria to be applied;
- Who will conduct the review;
- How it will be conducted;
- How individuals can request a review of their retained data.

The Department proposed to amend the Act to enable DNA and fingerprints that are taken under PACE NI in connection with an offence in Northern Ireland to be retained on the basis of a conviction for a recordable offence committed in a country or territory outside the United Kingdom.

It was proposed that the relevant material would be retained under a simplified version of the retention model for convicted persons that is set out in the first policy proposal. This would involve a maximum retention period of 50 years for adult convictions and 25 years for under 18 convictions for offences committed outside the UK. The Department do not propose to use the concept of qualifying offences as they are unique to the UK biometrics legislation and it would be a complex exercise to attempt to map serious offences committed in other countries to the list set out in Northern Ireland legislation.

The Department proposed to amend CJA to enable the DNA and fingerprints taken in connection with an offence that has been ‘left on books’ by the court to be retained for a period of 12 months from the date in which the judge consents for the charge to be ‘left on books’ – this refers to the scenario where the PPS makes a case to the court to not proceed with a particular charge but for it to be ‘left on books’. The judge may then decide at a later date, possibly as a result of a further criminal action, to resurrect the charge and continue with criminal proceedings in relation to this offence.

In effect, if DNA and fingerprints are taken in connection with an offence which is subject to an order by a judge to be ‘left on books’ and there is no other basis under the Criminal Justice Act for the material to be retained (for example, a previous conviction) then the biometric material must be destroyed. This proposal will ensure that material is not destroyed until a sufficient time period has lapsed to indicate that the charge is unlikely to be resurrected by the court.

The Department proposed to make provision within CJA to widen the scope of the Northern Ireland Commissioner for the Retention of Biometric Material (the Commissioner) to provide independent statutory oversight of the acquisition, retention, use and disposal of biometric material in accordance with Article 63B to 63R of PACE NI. The Department also wishes to broaden that scope to include keeping under review existing, emerging and future biometrics for use by the PSNI and other public bodies for law enforcement purposes.

Under the current provisions of Schedule 2 of CJA, the Commissioner's sole function was to consider applications from the PSNI for the retention of DNA and fingerprints from persons arrested, but not charged with a serious offence and where so called 'prescribed circumstances' apply. This was to be an exception to the overall retention architecture and was opposed by some MLA Members when the 2013 Act was considered by the Assembly. The retention of biometric material by the PSNI of a person not convicted of an offence is unlikely to comply with Article 8.

The Department proposed to amend CJA to require the NI Commissioner to report annually, and also as necessary to them and for the Department to publish and lay reports in the Assembly. This reflects the wider statutory role of the Commissioner for the retention and use of biometric material in England and Wales.

All these proposals are due to be set out in a forthcoming Justice (Miscellaneous Provisions) Bill but it may take six months after the Bill is passed by the Assembly for it to come into force and to allow the Assembly to agree a variety of necessary Regulations.

## RETENTION FOR LEGACY CASES

In the Gaughran case, the UK government made a particular submission in relation to the need to keep biometric data to enable the authorities to use that data to investigate the significant numbers of deaths during the Troubles that have not yet been properly investigated.<sup>21</sup> As set out above, the intention was to take a "snapshot" of the complete database before any deletions occur, (the deletions necessary as a result of S and Marper) but to restrict access to this snapshot to those investigating these deaths from the past. The UK has continuing investigatory obligations in these so-called McKerr group of cases.<sup>22</sup> In those cases the Court found violations of the investigatory duty under Article 2 and these cases are still subject to the supervision of the Committee of Ministers.<sup>23</sup> However, this particular plea to retain the "snapshot" was rejected in Gaughran v UK, albeit that the Court accepted that it was not for them to decide this point, but stating the principle that:

"... in the context of unlawful killings the Court has underlined that the police must discharge their duties in a manner which is compatible with the rights and freedoms of other individuals. Indeed, without respect for the requisite proportionality visàvis the legitimate aims assigned to such mechanisms, their advantages would be outweighed by the serious breaches which they would cause to the rights and freedoms which States must guarantee under the Convention to persons under their jurisdiction."<sup>24</sup>

21 See Schedule 8 of the Draft Northern Ireland (Stormont House Agreement) Bill

22 McKerr v UK (2001).

23 See the Department for the Execution of Judgments of the European Court of Human Rights, UK Country report on these cases, [https://hudoc.exec.coe.int/eng#{"EXECIdentifier":\["004-2202"\]}](https://hudoc.exec.coe.int/eng#{)

24 Para. 93 and see Osman v UK (1998).

It appears likely from media reports that the Stormont House Agreement proposals for dealing with legacy investigations may not go ahead and the UK government included a proposal in the Queen's Speech on 11 May 2021 to deal with legacy issues in Northern Ireland. It is not clear what impact this will have on the retention of the 'snapshot'.

Given the fact that PSNI are having to continue to operate a system that is unlawful with all the risks of litigation that this involves, the only way of avoiding the PSNI continuing to violate the Human Rights Act is for the Assembly to change the law. The retention of 'legacy snapshot' will also need to be supported by legislation and will need to comply with the standards imposed by the European Convention on Human Rights.

## **AIRCRAFT AND PRIVACY**

The PSNI have the use of three helicopters and two fixed wing aircraft. They now also have the use of twelve operational new Small Unmanned Aircraft – now known as the Unmanned Aircraft System (usually also known as drones). The PSNI now have a wide choice of aircraft and requests and tasking for any of them comes through same process.

The drones have 30 mins endurance and high definition cameras with heat sensitive capability. The PSNI have significant numbers of extra batteries that can ensure continued use (subject to landing for exchange). Civil Aviation Authority rules require line of sight by operator of the drone when it is use.

The drones obviously need to be driven to the place where they will be launched and used. The drones are not allowed to fly over crowds but the cameras are sufficiently powerful to use from a distance. Their main use is likely to be used for search and rescue and supporting other operations, including searching for suspects.

Legislation on the use of drones both for the PSNI and members of the public is set out in the Air Navigation Order Amendment Act 2020. Each use of aerial surveillance requires an authorisation and the parameters of each use are included in the individual Surveillance Authority, granted under the Regulation of Investigatory Powers Act (RIPA).

The Human Rights Advisor monitored the use of new drones during the previous year and gave feedback on the draft Service Instruction which has now been published. There is also a Privacy Impact Assessment to go alongside the Service Instruction and the Human Rights Advisor will be reviewing its content in due course. However, there is no overarching policy governing the use of all the aerial platforms for surveillance.

### **RECOMMENDATION 4**

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.

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## 3.4 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. 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.

### SOCIAL MEDIA

The Detail, an online newspaper, raised questions about how the PSNI monitored social media but it was not clear whether the collection and retention of this material was only a function for the Communications Branch or was also accessible for surveillance, investigation and criminal justice purposes.<sup>25</sup> This obviously raises questions of privacy and data protection. Police officers and staff lawfully access the internet for policing purposes, such as the prevention and detection of crime. The NPCC have issued guidance on the subject. PSNI has issued a directive to help officers/staff decide whether a proposed activity requires authorisation under RIPA.

#### RECOMMENDATION 5

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.

### TECHNOLOGY

The PSNI has recently purchased a CCTV Behavioural Analytics System. This is designed to speed up the identification of activities and behaviour of suspects and victims where the PSNI are presented with very substantial hours of CCTV material. It is more common now that incidents will be captured by a number of cameras and all the material needs to be considered. The technology is used to recognise people already identified and is not designed to identify individuals from members of the public. It is not a facial recognition system as has been used by police services in other jurisdictions. The Executive also confirmed that 'there is currently no facial recognition technology being used within the Criminal Justice system in Northern Ireland.'<sup>26</sup>

25 The Detail, 5 February 2021.

26 Question AQW 18603/17-22, 10 May 2021.

In South Wales there was a challenge to the ‘...lawfulness of the use of live automated facial recognition technology (“AFR”) by the South Wales Police Force (“SWP”) in an ongoing trial using a system called AFR Locate. AFR Locate involves the deployment of surveillance cameras to capture digital images of members of the public, which are then processed and compared with digital images of persons on a watchlist compiled by SWP for the purpose of the deployment...

AFR is a way of assessing whether two facial images depict the same person. A digital photograph of a person’s face is taken and processed to extract biometric data (i.e. measurements of the facial features). That data is then compared with facial biometric data from images contained in a database.’<sup>27</sup>

The Court of Appeal concluded that:

- ‘1. The Respondent’s use of Live Automated Facial Recognition technology on 21 December 2017 and 27 March 2018 and on an ongoing basis, which engaged Article 8(1) of the European Convention on Human Rights, was not in accordance with the law for the purposes of Article 8(2).
2. As a consequence of the declaration set out in paragraph 1 above, in respect of the Respondent’s ongoing use of Live Automated Facial Recognition technology, its Data Protection Impact Assessment did not comply with section 64(3)(b) and (c) of the Data Protection Act 2018.
3. The Respondent did not comply with the Public Sector Equality Duty in section 149 of the Equality Act 2010 prior to or in the course of its use of Live Automated Facial Recognition technology on 21 December 2017 and 27 March 2018 and on an ongoing basis.’<sup>28</sup>

The College of Policing published in May 2021 a consultation document on the use of facial recognition systems for the police service setting out many of the legal and human rights issues called - ‘Live facial recognition: consultation’.

#### **RECOMMENDATION 6**

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.

27 Paras 1 and 8, R (Bridges) v The Chief Constable of the South Wales Police and The Secretary of State for the Home Department, 11 August 2020.

28 Para 210.



## LEGACY

The Historical Enquiries Team (HET) was established by the PSNI in September 2005 to examine the deaths attributable to the security situation in Northern Ireland between 1968 and 1998. Following a review and a highly critical report by Her Majesty's Inspectorate of Constabulary in 2014/15 and further reviews and consideration by the Policing Board (which include a concern about Article 2 and the requirement for independence) the PSNI created the Legacy Investigations Branch (LIB) to investigate deaths from the past. The LIB brought together a number of different parts of the PSNI who were, up to 2015, conducting reviews and investigations in historic cases. The LIB's remit is to review those cases not concluded by the HET and to conduct investigations into cases which present evidential opportunities. LIB's role is primarily to investigate homicide and security forces related deaths arising from the Northern Ireland 'Troubles' between 1969 and 2004. LIB are also responsible for unsolved 'non-Troubles' related deaths between 1969 and 2004. In December 2014, HET closed, and their caseload was passed to the LIB.

LIB has seventy-five staff, with 75% of them having no history of working for the RUC. In March of 2021 they reported to the Board that they are dealing with some 250 civil actions and judicial reviews and 100 pre-action claims. Between January 2015 and May 2019, LIB completed 13 single victim reviews resulting in the issue of five family reports. The LIB actively engages directly with families and their representatives to provide them with as much information as possible and co-operates with other statutory bodies, such as coronial inquests, to provide them with contemporarily generated materials to support their work. The Branch is also tasked with reviewing the wanted status of those who were previously considered by the 'on-the-runs' scheme.

Reviews into the historic cases are conducted by the LIB as criminal justice reviews. This means that the review team will examine the original investigation to identify opportunities to bring offenders to justice. If any evidential opportunities are found the case will be forwarded to one of the LIB investigation teams for further investigation. LIB actively engages directly with families and their representatives to provide them with information and a written report once the review and any investigation is over. It also co-operates with other statutory bodies, such as coroners, to provide them with materials to support their work.

In 2020 the PSNI produced three pieces of draft guidance; Family Guidance Document Conflict of Interest Policy Document and Family Engagement Strategy and the Human Rights Advisor, on behalf of the Board provided comments. The LIB has a 'Case Sequencing Model'<sup>29</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. Therefore, 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'.<sup>30</sup>

29 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>

30 In February 2021, the media reported that the case sequencing model was subject to a legal challenge <https://www.irishnews.com/news/northernirelandnews/2021/02/25/news/psni-legal-challenge-launched-by-brother-of-man-alleged-to-have-been-shot-by-alleged-uvf-killer-alan-oliver-2234945/>

## Stormont House Agreement

The Stormont House Agreement of 2014 proposed a series of different procedures and institutions to deal with the issues from the past and in 2018 the Northern Ireland Office consulted on the draft legislation needed to establish a Historical Investigations Unit (HIU). It was proposed that the HIU be established as an independent institution to investigate all the ‘Troubles-related deaths’. This would include those from the HET, the LIB and the parallel historical cases from the Police Ombudsman and would include Troubles-related deaths from 1998 to March 2004. However, in March 2020 the Northern Ireland Office appeared to change its approach and stated that a new:

“... body will oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one...”

“The Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past. Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible - though family reports would still be provided to the victims’ loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process.”<sup>31</sup>

A report by academics from Queen’s University and staff from the Committee for the Administration of Justice have produced a useful and detailed assessment of the new proposal’s compliance with human rights.<sup>32</sup>

However, in July 2021 the UK government decided to propose a new policy,<sup>33</sup> 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...’ There appears to be universal opposition to this proposal from within Northern Ireland and many families of those who died during the Troubles have expressed their real concerns. This proposal, if it is likely to be implemented, will need to be considered in more detail in the next Annual Report. However, 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.

31 Northern Ireland Office, Press Statement ‘Addressing Northern Ireland Legacy Issues’ 18 March 2020  
<https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues>

32 Committee on the Administration of Justice, ‘Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis Of Proposals On Dealing With The Past In Northern Ireland’  
<https://s3-eu-west-1.amazonaws.com/caj.org.uk/2020/04/09093700/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf>

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

## **Human Rights and Legacy Investigations<sup>34</sup>**

Effective review and investigation procedures must be in place regarding injuries and/or deaths resulting from the use of force or firearms by police officers and other state agents.

“An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.” (Husayn v Poland (2014))

An effective official independent investigation is required whenever an individual is killed as a result of force being used by an agent of the state or if a police officer may have contributed to the loss of life in some way. That is to say, when it is arguable that there has been a breach of Article 2 of the ECHR (*Anguelova v Bulgaria* (2002)). It is not necessary for a state agent or police officer to be directly involved in the death to trigger this independent investigation (*Menson v UK* (2003)). For instance, the ECtHR considered that in a case of prolonged domestic abuse of a mother and daughter, which had led to the mother’s death, and where the authorities had failed to protect her the obligation under Article 2 for an independent investigation applied (*Opuz v Turkey* (2009)). The investigation must be prompt, thorough, impartial (*Brecknell v UK* (2008)), initiated by authorities even if no complaint is made, transparent (*Edwards v UK* (2002), *Ramsahai v Netherlands* (2007)), and thorough so as to ensure accountability and responsibility (*Anguelova v Bulgaria* (2002)). This obligation continues to apply even in difficult security conditions and all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (*Al Skeini and others v United Kingdom* (2011)).

The requirement for independence means that it is necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This requires a lack of hierarchical, institutional or practical connections, such as where the investigator belongs to the same police force as those under investigation (*Shanaghan v UK* (2001)).

“For an investigation into alleged unlawful killing by State agents to be effective, it may be generally regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but a practical independence.” (*Jordan v UK* (2001)).

The investigation must involve an assessment of the organisation and planning (if any) of the operation during which lethal force was used. The training, instructions and communications of those who used lethal force and those who lay behind the operation are relevant to that assessment (*McCann v UK* (1995)).

<sup>34</sup> This section is largely repeated from the previous Human Rights Annual Report but has been repeated because the unresolved issues remain the same.

An effective official investigation requires the appropriate authorities to secure all the relevant evidence concerning the incident causing death and to analyse the cause of death (*Anguelova v Bulgaria* (2002)); it also requires a degree of public and independent scrutiny and the involvement of the family of the deceased in the procedure to the extent necessary to safeguard their legitimate interests (*Anguelova v Bulgaria* (2002)).

The duty to investigate suspicious deaths can arise even where there is no suggestion of any state involvement in causing death either deliberately or by omission (*Menson v UK* (2003)); the form of the investigation will vary with the circumstances, but must always be prompt, rigorous and impartial (*Menson v UK* (2003)); in order to be effective, the investigation should be conducted by individuals independent of the alleged perpetrators. The duty to investigate is a continuing one (*Re McKerr* (2003) NI 117).

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

There have been a considerable number of cases in the courts in Northern Ireland, the House of Lords and Supreme Court and the European Court of Human Rights over the last few decades dealing with challenges based on Article 2.<sup>35</sup>

In the case of *Brecknell v UK* the European Court of Human Rights in 2004 stated that “*the PSNI was institutionally distinct from its predecessor [RUC] even if, necessarily, it inherited officers and resources.*”<sup>36</sup>

In 2019 *McQuillan*<sup>37</sup> judgment, the Court of Appeal in Northern Ireland however concluded that the LIB had not demonstrated that it had practical independence in respect of the conduct of legacy investigations for the purposes of Article 2 of the Convention.

“[199] Maguire J concluded that there was a real possibility of bias in both the RUC investigation and the HET investigation. That real possibility of bias requires clear practical arrangements being put in place so as to secure the capacity of the investigation to be independent. It is a feature of this case that the Chief Constable has not set out the practical arrangements which he proposes to put in place to carry out any further review or if credible evidence exists any further investigation. This is an obvious case calling for arrangements such as those in *Hackett* or *Kelly* so that a senior police officer from another police force would be responsible for the investigation reporting to the Chief Constable who is accountable to the Policing Board. Absent any statement by or on behalf of the Chief Constable as to what arrangements will be put in place the only conclusion available is that the further review or investigation by the LIB has not been demonstrated to have the *capacity* to satisfy the Article 2 requirement of practical independence.”<sup>38</sup>

35 Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland*, (OUP 2010) Pg. 231

36 At para 76.

37 19 March 2019. See also Barnard, Court of Appeal, 5th July 2019

38 At para 199.

This case was heard by the Supreme Court in June of 2021 and judgment is likely before the end of the year. In the meantime, pending the judgment, PSNI will need to put in place measures to try to demonstrate its practical independence. The Court of Appeal has indicated that one option would be to appoint officers from outside of the PSNI to run the investigations.<sup>39</sup> This has been an approach that appears to have been successful in other cases, for instance, in the investigations “surrounding an alleged individual codenamed Stakeknife”, Operation Kenova.<sup>40</sup> However, it should be noted that the Chief Constable has already discussed this issue with the Board and advised of the difficulty in securing outside assistance from senior officers with sufficient experience who are willing to take on this role.

It should also be noted that there are very many cases pending an Article 2 type of inquiry. Some of these continue to be subject to litigation in the higher courts and challenges to PSNI, first, on the basis of promises made (legitimate expectation) even in the context of statements made at meetings of the Board. Secondly, in relation to the extent to which this duty has already been complied with or is said to be no longer a duty because of the time that has expired.<sup>41</sup>

Following the Supreme Court judgment February 2019 finding that there had not been an Article 2 compliant inquiry, the Secretary of State for Northern Ireland nevertheless decided not to hold a public inquiry into the murder of Pat Finucane.<sup>42</sup> One of the reasons stated for this decision was that there were still opportunities for further investigation of the case by the PSNI. The case remained and remains with the LIB although the Chief Constable, at the time of the announcement by the Secretary of State stated that ‘It is our view that there are currently no new lines of inquiry. We now need to decide if a further review is merited given all the previous investigations in this case.’

In March 2021, the Council of Europe, following the judgment of the European Court of Human Rights in 2003,<sup>43</sup> decided to reopen the case as a result of the decision by the Secretary of State not to hold a public inquiry.<sup>44</sup>

### RECOMMENDATION 7

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.

39 See Hackett v UK

40 Led by Jon Boutcher, previously the Chief Constable of Bedfordshire, <https://www.opkenova.co.uk>. It is worth noting that the previous Human Rights Advisor to the Policing Board, Alyson Kilpatrick, has advised that the approach taken by Mr Boutcher is compliant with Article 2, Opinion dated February 2020.

41 For example, Finucane, Supreme Court, 27 February 2019 and Barnard, Court of Appeal, 5th July 2019

42 30 November 2020.

43 Finucane v UK, 1 October 2003.

44 12 March 2021, Committee of Ministers 1398th meeting 9-11 March 2021, <https://www.bbc.co.uk/news/uk-northern-ireland-56370608>.

## **PUBLIC ORDER**

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### **Parades in July 2020**

As a result of COVID-19 the Orange Order cancelled its usual parades in July but individual bands marched around their local area supported by small crowds. There were also a number of bonfires with consequential public order issues. The Human Rights Advisor spent some time monitoring the PSNI's actions from the Gold and Silver commands in Belfast and travelling around with PSNI Officers in police vehicles.

The public order issues began on the night of Friday 10 July 2020. North Queen Street, Belfast was closed for a period on that night to allow debris to be cleared and there were two reports of criminal damage caused to two vehicles. Over the course of Friday evening, a piece of furniture was also set on fire in the middle of North Queen Street.

Petrol bombs and stones were thrown at the police in North Belfast on Saturday 11. Officers were attacked in the North Queen Street area near the New Lodge flats and a small fire was started in the middle of the road. Officers dressed in public order uniform carried out searches of the area on Saturday, but were targeted along with police vehicles.

Many bonfires were lit across Northern Ireland late on Saturday 11 July but the number of gatherings were significantly smaller than previous years. While the majority passed off without incident, some were the source of community tension where the bonfires are built close to nationalist areas. A number of bonfires in East Belfast were cleared with the co-operation of the community.

There was a bonfire built at Adam Street, Belfast near to the Duncairn Gardens peace line, for the first time in nine years. In the previous two months there were requests for the PSNI to ensure the removal of the bonfire. The Department for Communities Minister Carál Ní Chuilín sought a judicial review of the PSNI decision not to have the bonfire removed. The case being heard in court late on the Saturday night but eventually being refused. This case required the PSNI to put significant police resources on standby for early the following morning to ensure it was ready to deal with the consequences if the court required them to take action.

There were a number of late requests to the Parades Commission for permission to hold parades, some refused and some too late to be decided and police officers had then to decide how these should be dealt with. The Human Rights Advisor sat with the Silver Commander for Belfast on the evening of 11 July as she took him through some of her decision making and policy logs.

The Belfast Telegraph reported that there had been a surge in the number of bonfires being organised by loyalists following the West Belfast funeral of former IRA member Bobby Storey on June 30 2020. Some bonfires included messages mocking Bobby Storey along with tricolour flags that were burned. Pictures also emerged in social media of an anti-Black Lives Matter placard at Whitehill bonfire in Bangor. PSNI investigated a separate loyalist banner as a hate crime because it ridiculed the funeral of Bobby Storey.

Overall, the PSNI appeared to act properly that evening taking into account the key human rights principles and making proportionate decisions.<sup>45</sup> There was, however, one gap in the understanding of how the Coronavirus Regulations and the Human Rights Act needed to be reconciled. The restrictions in the Regulations was taken by police officers (and leading politicians) as the ‘last word’ on what was or was not allowed. This is not quite accurate as the Human Rights Act applies despite other legislation, particularly, secondary legislation, such as these Regulations.<sup>46</sup> Thus, for instance, the right to assemble or protest can only be banned if such a restriction complies with Articles 10 and 11 of the ECHR. In the context of the provisions of the Regulations a key issue is likely to be whether the event be held without creating a significant danger of the transmission of the virus. This will be important if the organisers of the event intend (and are likely to succeed with) measures, including social-distancing, that will significantly reduce the possible transmission of the virus despite the proposed ‘gathering’. In practice, many of the decisions made by the PSNI, on the 11 July would probably not have been any different. However, a deeper understanding of the law and being able to explain this more nuanced understanding might have enabled a few organisers to have complied with the law more easily.

The Human Rights Advisor also attended the annual review of public order with a senior officer and a number of officers, including inspectors and trainers (and Police Federation representatives) and the debrief co-ordinators. One key issue raised was that some Public Order Unit Level 2 officers may have lacked experience because they did not get together frequently for training. Ironically the higher levels of public order issues in Northern Ireland in the past would have ensured they did have this experience.

It was reported during the year that the PSNI had used the ancient common law offence of Unlawful Assembly in dealing with a public order event. The use of this vague provision (abolished in England and Wales many years ago) raises some human rights issues that need consideration.

### **RECOMMENDATION 8**

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.<sup>47</sup> Consideration should also be given to the use of the Terrorism Act in such cases, perhaps by consulting the Independent Reviewer of Terrorism Legislation.

45 The Human Rights Advisor obviously only witnessed a sample of the many events that occurred and from the PSNI vantage point.

46 *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. The Supreme Court found that there is “nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA.”

47 The PSNI have sufficient powers under the Public Order (Northern Ireland) Order 1987, articles 3, 9, 18, 19, 20, 21, 22 and 23A.

## Loyalist Action in March 2021

Over 100 police officers were hurt in late March and early April, possibly the worst public disorder seen for many years and the PSNI fired a number of Attenuated Energy Projectiles (AEPs) and used a water cannon for the first time in six years. The BBC reported that 18 people had been arrested and 15 charged after crowds of predominantly loyalist youths attacked lines of riot police officers and vehicles with bricks, fireworks and petrol bombs.<sup>48</sup>

Violence involving gangs of youths started on 29 March in a loyalist area of Londonderry/Derry, the trigger appearing to be the Northern Ireland Protocol to the EU trade agreement and the restrictions imposed on trade between Great Britain and Northern Ireland. A second trigger concerned the decision by the Public Prosecution Service 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 fighting 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 in April 2021, the review of its use (and the use of AEPs) will be dealt with in the next Human Rights Annual Report.

## Other Developments

HMICFRS produced a thematic report during the year called Getting the Balance Right? An Inspection of How Effectively the Police Deal with Protests<sup>49</sup>, in this it was suggested: that:

‘Having reviewed the evidence, our conclusion is that the police do not strike the right balance on every occasion. The balance may tip too readily in favour of protesters when – as is often the case – the police do not accurately assess the level of disruption caused, or likely to be caused, by a protest.

These and other observations led us to conclude that a modest reset of the scales is needed. To help achieve it, our report includes four areas for improvement and 12 recommendations...’

The first recommendation is that action should be taken ‘equipping police commanders with up to date, accessible guidance and a greater understanding of human rights law’.

A second important and interesting development concerned a decision of the High Court dealing with the extent to which the Coronavirus Regulations restricted protest and assemblies. This case concerned the ‘Reclaim our Streets’ vigil in London following the murder Sarah Everard.

48 <https://www.bbc.co.uk/news/uk-northern-ireland-56664378>

49 <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests.pdf>



In the case of Leigh and others v the Commissioner of Police for the Metropolis, 12 March 2021, the High Court was asked to consider the Metropolitan Police's restriction on this protest which had been organised very quickly. The judge described the reason for the vigil as follows:

'The claimants wish to hold a static, socially distanced, hour-long vigil on the common. They propose that location because it is directly relevant to the victim. Following announcements on 10 March, the claimants, along with a number of other women, set up Reclaim These Streets, an informal group seeking to channel the collective grief, outrage and sadness that they all share.'

Counsel for the Metropolitan Police stated:

'Mr Thomas, who appeared at very short notice, candidly and rightly accepted that if a police force has a policy which imposes a blanket prohibition on protest irrespective of the specific circumstances and irrespective of the application of Articles 10 and 11, then that would be unlawful.'

These extracts above are from the interim judgment and it is understood that the issues in the cases will continued be argued out and a reasoned judgment will be given in due course.

### **'No Stone Unturned' – Arrest of Two Journalists**

A documentary was made about the unsolved case of six murders in Loughinisland in 1994. The film 'No Stone Unturned' was premiered in September 2017. A draft of a OPONI 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 Office of the Police Ombudsman (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. The detailed judgment (published 10 July 2020) ends as follows:

'We wish to make it clear, however, that on the basis of the material that has been provided to us we see no overriding requirement in the public interest that would have justified an interference with the protection of journalistic sources in this case.'

The judgment sets out the importance, in the context of freedom of expression, of the need to provide particular protection to journalists, their sources and the material that they hold and quotes from the important judgments in *Goodwin v UK* (1996):

‘The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.’<sup>50</sup>

A key protection is that:

‘Given that the warrant permits the interference with private property and is obtained *ex parte*, it is incumbent on the applicant to make full and frank disclosure to the court and to ensure in particular that any material which is potentially adverse to the application is brought to the attention of the judge... and the applicant must “put on his defence hat and ask himself, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge”.

This obligation of full and frank disclosure necessarily includes a duty not to mislead the judge in any material way...’<sup>51</sup>

The High Court identified a number of problems with the information provided to the judge who signed the search warrant:

‘the judge was not advised that Article 10 Convention rights were engaged, nor was he provided with any of the relevant jurisprudence nor was it made clear to him that a warrant such as this sought could only be justified by an overriding requirement in the public interest. This issue was absolutely fundamental to whether or not a warrant should be issued and the failure to address it means that we can have no confidence that the trial judge applied the right test.’<sup>52</sup>

50 Para 39 of the *Goodwin* judgment, set out in para 20 of High Court judgment.

51 Para 22, quoting para 26 of the judgment *R (Application of Mills) v Sussex Police*, Southwark Crown Court [2014] EWHC 2523 (Admin).

52 Para. 43.

The PSNI settled the case agreeing to destroy all forensic samples linked to the case including photographs, fingerprints and DNA. Durham Constabulary and the PSNI had also agreed to delete all original copies, downloads and extracts of the material they took from the journalists. The PSNI had to pay compensation which is subject to confidentiality. The Durham Police are due to produce a final written report to the Chief Constable of the PSNI on the investigation.

In February 2021 the PSNI initiated a lessons learned review by Senior Counsel and the Board and Human Rights Advisor contributed to the terms of reference, which include issues of freedom of expression and the role of journalists. The Board has been provided with updates on the review during the course of 2021.

## STOP AND SEARCH

Stop and search is an important tool for the PSNI and, if used properly, can reduce crime, keep people safe and identify offenders. However, 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? By condensing the challenge by the Board in this way, it is hoped that the PSNI could respond by explaining its overall leadership approach to stop and search, and analyse how the use of these powers aligns with its strategic priorities and objectives.

### Purpose of Stop and Search

Understanding how stop and search is used is important because it has the potential to damage public trust and confidence in the police, particularly if its use is perceived as not justified.<sup>53</sup> So it is vital that these powers are used fairly and appropriately in all cases, and that the police can demonstrate this to the public. The Board has long been concerned about the PSNI's transparency around its use of stop and search.<sup>54</sup> It is not disputed that it is an important police power, however when misapplied evidence shows that it can be counter-productive.<sup>55</sup>

As summarised recently by Her Majesty's Inspector of Constabulary Fire and Rescue Service (HMICFRS):

*The use of these powers can be inflammatory if not carried out carefully and fairly. The damage that apparent or perceived unfairness inflicts on community relations could potentially outweigh any increase in public safety from the police activity, especially if the emphasis is on lower-level offending. The resultant lack of trust between the police and some communities can prevent these communities from providing information to the police when a crime is committed, contributing to a "wall of silence". This makes it much harder for policing to be intelligence-led.<sup>56</sup>*

53 <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>

54 See the Human Rights Thematic Review (2013), Human Rights Annual Reports and Performance Committee briefings and correspondence.

55 <https://www.gov.uk/government/speeches/stop-and-search-comprehensive-package-of-reform-for-police-stop-and-search-powers>

56 <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>

In seeking to protect the rights of the majority, the police at times must interfere with certain individual rights. However, they are only permitted to do so if the infringement was provided by law and necessary to achieve a legitimate aim. In circumstances where there is a victim, the police may have positive obligations to use powers to intervene (clearly justifying the necessity of a lawful interference). However, the use of stop and search is not typically directly victim-led and officers have a wide discretion to apply these intrusive powers. Therefore it is crucial that police services are able to analyse, understand and explain to the public how and why they are being used. Doing so will demonstrate compatibility with human rights and equality law, and reassure the public that there is genuine accountability for police actions. It is for these reasons that the Board and the Human Rights Advisors have regularly advocated for improved recording, monitoring and analysis of these powers under the following areas:

**1) To ensure the service remains transparent and accountable**

Transparency requires data to be of sufficient quality to permit analysis of trends or patterns, otherwise police services cannot reliably demonstrate whether powers are being used in a fair, non-discriminatory and lawful way. Community background monitoring, limited data and analysis on outcomes and disproportionate use against children and young people.

**2) To improve public understanding on how and why the powers are used**

The stated objectives of stop and search are undermined if there is a public perception that the powers are being used unfairly. Those who feel they have been unjustifiably targeted are less likely to trust the police and co-operate with them when they have a problem.<sup>57</sup> It is vital that the public has access to reliable data and information on stop and search. There is no overall strategy to stop and search, it is not clear what service objectives are, and this has led to growing public concern.

**3) To support a more intelligence-led and targeted approach to stop and search, and improve the ‘stop-to-outcome’ ratio**

Evidence shows that stop and search has a very weak and inconsistent relationship with crime, therefore its effectiveness as a deterrent is not proven.<sup>58</sup> Its effectiveness as an investigatory power can be established by whether the object of the stop and search is connected to the outcome (ex. arrest rate and ‘find rate’ - how often the item being searched for is found).<sup>59</sup> A good ‘stop-to-outcome’ ratio would demonstrate that the exercise of these powers is fair and rational, which could improve public trust over their use. There is a high volume of stops and low outcomes, as well as a lack of data and analysis on benefits vs impact on public confidence.

57 Equality Commission [https://www.equalityhumanrights.com/sites/default/files/ehrc\\_stop\\_and\\_search\\_report.pdf](https://www.equalityhumanrights.com/sites/default/files/ehrc_stop_and_search_report.pdf)

58 Home Office (2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/508661/stop-search-operation-blunt-2.pdf#page=3](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508661/stop-search-operation-blunt-2.pdf#page=3)

59 Home Office, ‘Best Use of Stop and Search Scheme’ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346922/Best\\_Use\\_of\\_Stop\\_and\\_Search\\_Scheme\\_v3.0\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/346922/Best_Use_of_Stop_and_Search_Scheme_v3.0_v2.pdf)

## DETAIL AND STATISTICS<sup>60</sup>

### Trends: High volumes, low outcomes

During the 12 months between 1 April 2020 and 31 March 2021<sup>61</sup>, PSNI stopped and searched/questioned 26,590 persons, 4% more than the previous year. This increase follows 4 consecutive annual decreases however, 2020/21 saw the second lowest number of stops since 2007/08. 72% of stops were conducted under the Misuse of Drugs Act (arrest rate 5%) and 13% of stops were conducted under PACE (arrest rate 15%). 14% of stops were conducted under the Justice and Security Act Section 24 (arrest rate 1%) and 2% under the Justice and Security Act Section 21 (arrest rate less than 1%).

The number of stop and searches increased under the Misuse of Drugs Act (by 16%) and PACE (by 4%) compared to the previous year. Conversely, the number of stops decreased under the Justice and Security Act Section 24 (by 22%) and Section 21 (by 54%). Counter terrorism powers accounted for 16% of all stops and were at their lowest levels in 13 years. 6% of stops resulted in an arrest. An additional 14% resulted in another form of outcome, e.g. Community Resolution Notice. 11% (2,996) of those stopped were aged 17 and under. Of these, 2 out of every 3 (66%) were stopped and searched under the Misuse of Drugs Act. 87% of those stopped were male, while 47% were aged 18 to 25.

In practice, the number of stops went up under PACE and the Misuse of Drugs Act but the 'success rate' went down from the previous year and consequently significantly more people (largely young people) are likely to have left the encounter with a negative impression of PSNI.

The stop and search rate in Belfast is 19 persons per 1,000 population with an arrest rate of 8%. The district with the highest rate is Mid and East Antrim with 20 persons with an arrest rate of 4%, while the rate in Ards and North Down is 4 persons per 1000 population (the lowest district) with an arrest rate of 6%.

### RECOMMENDATION 9

- 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 referred to updated statistics for the period April 2019 – March 2020, recording that during this 12 month period PSNI stopped and search 10 persons per 1,000 population, which is the same rate in England as a whole (PSNI figure excludes stops under Justice and Security Act and Terrorism Act for comparative purposes).

<sup>60</sup> We wish to thank Dr John Topping for his assistance on stop and search.

<sup>61</sup> <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/stop-and-search-statistics/2021/q4/psni-stop-and-search-report-2021.pdf>

Nevertheless, the PSNI's arrest rate during the same period is the second lowest recorded nationally at 9%, while England have a 13% arrest rate. While it is useful to exclude JSA and TACT stops for comparative purposes, it must be borne in mind that the overall national figure does not accurately reflect the picture of stop and search as experienced in communities. If JSA and TACT legislation were included the PSNI's overall rate of stop and search would be 14 persons per 1,000 population, with an overall arrest rate of 7%. However, by only focusing on the general 'per 1000 of population' figure it also ignores the in-district variations across Northern Ireland, where 6 of the 11 districts have higher rates than the England and Wales average.

Of course, an arrest is only one possible indicator of a positive outcome following a stop and search; other positive outcomes recorded are a Community Resolution, report to the PPS or a Penalty Notice for Disorder. During April 2020 – March 2021, 6% stop and searches in Northern Ireland resulted in an arrest, while an additional 14% resulted in another form of outcome.

Although it is not clear from the PSNI's response or statistical bulletins what offences result in a report being sent to PPS without arrest, or indeed, what action the PPS then take. Secondly, neither an arrest nor a report to the PPS necessarily results in a prosecution let alone a conviction. Moreover, without further breakdown and meaningful analysis of these figures it is questionable whether every outcome should be conflated as positive (see below discussion on monitoring).

The Children's Law Centre (CLC) has raised concerns in relation to the PSNI's Stop and Search report – 1 January 2020 to 31 December 2020,<sup>62</sup> contending that children and young people are being "systematically targeted through the disproportionate use of stop and search".<sup>63</sup> It refers to the fact that children between the age of 13 and 17 make up only 6% of the population but account for 12% of all stop and searches in Northern Ireland.<sup>64</sup> It raised further concerns that the searches appear to be "hugely ineffective", with only 4% of stop and searches of 13 to 17 year olds leading to arrest.

"The practice is disproportionate and ineffective, but it goes even further than that. In areas of high deprivation, the rates are even more worrying and severely undermines children and young people's confidence in the police. In the end, this has a negative impact on the safety and protection of children and young people who make up around 12% of all victims of crime. These young people rely on the police, but the disproportionate and inappropriate use of stop and search powers has the effect of making young people less trusting of police and therefore less likely to turn to them for help, placing them more at risk."

4% of stop and searches of 13 to 17 year olds led to an arrest, the same proportion as stop and searches of 18 to 25 year olds. The arrest rate is higher for most other age groups (8%: 26 – 35 year olds, 9%: 36-45 year olds, 7%: 46 to 55 year olds, 6%: 56 to 65 year olds, 3%: 65+).

62 <https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/stop-and-search-statistics/2020/q3/psni-stop-and-search-report-q3-2021.pdf>

63 <https://childrenslawcentre.org.uk/stop-search-highlights-systematic-targeting-of-children-young-people/>

64 It is not clear what the 'available population' figures for stop and search might be – that is the relative population of children on the street or any evidence of the proportion of younger or older people involved in crime on the streets.

It may be worth noting that 17% of stop and searches of 13 to 17 year olds led to some form of outcome (arrest, community resolution, report to the PPS, penalty notice for disorder). This compares to 22%: 18 to 25 year olds, 21%: 26 to 36 year olds, 20%: 36 to 45 year olds, 14%: 46 to 55 year olds, 11%: 56 to 65 year olds, 6%: 65+).

### 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 or TACT involving children or where an unexpected incident has occurred which might prove controversial.

### Ineffective internal monitoring

The 2017/18 PEEL Legitimacy Inspection recommended that all 43 police forces in England and Wales should be analysing how often the item being searched for is found (the ‘find rate’) for different types of searches, including separating out possession of drugs from supply. They also recommended that forces act on disparities and publish the analyses and results. Inspectors noted that, if forces can’t establish what proportion of their searches are related only to possession, they can’t assess whether those searches align with local and force crime-reduction priorities.<sup>65</sup> While the Inspection did not include the PSNI, this type of public data analysis would be particularly helpful considering the above concerns. And that 65% of those stopped aged 17 and under were stopped under the Misuse of Drugs Act, for which the overall arrest rate is currently only 5%. While other outcomes may have been used, data reflecting whether the object of the search matches the outcome would provide a more comprehensive picture.

The PSNI advise that ‘find rates’ are not published but are considered by the Police Powers Development Group (PPDG). Between April 2020 and June 2020 PSNI advise that 18% of all stop and searches resulted in “an object being found”. Although it is not clear whether that refers to an object simply being uncovered by a search or whether the object found matches the basis for the search. As discussed above, further breakdown is required to assess whether those searches align with local and force crime-reduction priorities. The Board’s Performance Committee additionally queried what leadership objective or Policing Plan Outcome the service is seeking to address through the levels of stop and search seen and no clarification is evident from the PSNI’s response.

The HMICFRS report also considered the negative effect of disproportionate use of police powers across the 43 forces in England and Wales.<sup>66</sup> It highlighted that, despite having more data on the use of police powers at an individual level, police services are still unable to explain why these powers are used in the way that they are.

<sup>65</sup> Ibid, Page 6

<sup>66</sup> <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf>

For instance, HMICFRS found that the most common reason given for the use of stop and search powers is due to suspected drug possession. However, the inspectorate is calling on police leaders to consider whether focusing stop and search on tackling drug possession is the most effective use of the powers. HM Inspector of Constabulary said:

“Police forces must analyse their data and either explain, with evidence, the reasons for disproportionality, or take clear action to address it. The police must be able to show the public that their use of these powers is fair, lawful and appropriate, or they risk losing the trust of the communities they serve.

We know that the proportion of stop and searches that actually find drugs is very low, and the disproportionate use of these powers on BAME people is having a damaging impact on public trust.

We are therefore calling on police leaders to consider if focusing stop and search on drugs possession is an effective use of these powers, and to better explain the reasons for disproportionality. It is clear that now is the time to have an evidence-based national debate.”<sup>67</sup>

### **Culture of Stop and Search**

PSNI indicate that stop and search powers are monitored at District performance meetings by reviewing the number of stop and searches conducted against the number of complaints generated. However, a low number of complaints does not mean that the exercise of these powers is not impacting communities negatively. In fact, the issue here is not about the professional conduct of officers during searches, but about the national body of evidence warning about the negative consequences of overusing stop and search.<sup>68</sup> Furthermore, the reliance by the PSNI on the number of official complaints regarding stop and search has frequently been contested by organisations representing children and young people (CLC, NICCY, Include Youth). These organisations highlight that individuals, particularly young persons, who are repeatedly subjected to stop and search will not feel they have any agency in the complaints system if they feel intimidated and criminalised through the use of these powers.

Dr Topping’s research for the PSNI found that officers felt pressurised to conduct high volumes of searches in response to informal practices rather than formal target-setting (such as emails, “naming and shaming”, praise of those generating the most searches etc.). The Board have been advised that some changes have been made to the Student Officer Training Programme in response to select areas of Dr Topping’s research, it is not clear whether the PSNI have implemented any changes regarding the culture around stop and search at Districts.

67 <https://www.justiceinspectors.gov.uk/hmicfrs/news/news-feed/police-must-show-stop-search-and-use-of-force-is-fair-or-risk-losing-public-trust/>

68 For ex. see: Paul Quinton, College of Policing, Ben Bradford, University of Oxford, Matteo Tiratelli, University of Manchester ‘Does more stop and search mean less crime? Analysis of Metropolitan Police Service panel data, 2004–14’ [https://whatworks.college.police.uk/Research/Documents/SS\\_and\\_crime\\_report.pdf](https://whatworks.college.police.uk/Research/Documents/SS_and_crime_report.pdf)  
Home Office, **Do initiatives involving substantial increases in stop and search reduce crime? Assessing the impact of Operation BLUNT 2** <https://www.gov.uk/government/publications/do-initiatives-involving-substantial-increases-in-stop-and-search-reduce-crime-assessing-the-impact-of-operation-blunt-2>



## 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; and

The Board welcomes the PSNI’s recently formed Stop and Search Working Group regarding children and young people and its survey in partnership with statutory and voluntary organisations. The aim of the survey is to improve the understanding of the impact stop and search has on children and young people. The working group is also planning to hold focus groups with young people as a way to feedback information on stop and search, however the pandemic is likely to bring delays.

## OTHER RECENT DEVELOPMENTS

### Stop and Search Service Instruction

Board Officials have received a copy of the PSNI’s draft Stop and Search Service Instruction and Equality Screening Form. While the development of this Service Instruction is a significant step forward for PSNI it appears to repeat what PSNI officers are already doing or are taught in the Police College. This could be a positive opportunity for the PSNI to be progressive and shift the culture around stop and search in Northern Ireland. For instance, compared to the comprehensive guidance provided in the College of Policing’s Authorised Professional Practice (the APP), the Home Office’s Best Use of Stop and Search Scheme (BUSS) and the detailed Code of Practice produced by Police Scotland, it is questionable whether the PSNI’s approach will have much of an impact and improve public confidence. It is significant that the Court of Appeal has since highlighted the guidance within the Scottish Code of Practice in respect of children and young people, and suggested that consideration should be given to formally incorporating similar guidance to PSNI officers.<sup>69</sup>

1. The provision of the PSNI’s Equality Screening Form for this policy is a good opportunity to find out how the service assesses the impact of its approach to stop and search on different equality groupings. For instance, the Equality Commission for Northern Ireland<sup>70</sup> advises that the four key benefits of equality screening are:
  2. It identifies those policies likely to have an impact on equality of opportunity;
  3. When used appropriately, screening is an analytical tool which helps to draw considerations of equality of opportunity into the policy making process;
  4. Screening is the first of the two methods by which the necessary level “regard” is demonstrated as being paid to the statutory equality goal; and
  5. Screening provides evidence that the decision-maker has paid some regard to the need to promote equality of opportunity, though not necessarily the appropriate level of ‘regard’.

69 Judicial Communications Office, 26 February 2021: <https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Ailise%20Ni%20Mhurchu.pdf>

70 <https://www.equalityni.org/Employers-Service-Providers/Public-Authorities/Section75/Section-75/Screening>

However, the PSNI have provided very limited information and analysis in their screening of this Service Instruction. For instance, the only data-set relied upon in the screening is the PSNI statistical bulletin produced by NISRA. There is no indication that the PSNI has considered the large body of available research (statistics or perception) to assist their understanding of who the policy might affect the most. For instance; the Young Life and Times Survey; data the Office of the Police Ombudsman; Dr John Topping's Continuing a-PACE Research (commissioned by the PSNI); relevant findings of external inspections (HMICFRS PEEL, the Board's Human Rights Annual Reports); comparative findings drawn from national data and research (Home Office, the College of Policing, Police Scotland). In fact, for political opinion, marital status, sexual orientation, and disability the form simply states that PSNI do not currently record these in relation to stop and search. It is therefore concerning that, despite this very limited evidence-based analysis on the impact of this policy, the PSNI conclude that it will have a low impact on 7 out of 9 groupings (with a medium impact on age and gender). Furthermore, no explanations were given to clarify these ratings as it was considered 'Not Applicable' (see Question 4).

In terms of the proposals to reduce any adverse impact on the groups identified, the PSNI discuss officer's use of body worn video during stop and search encounters. While this is useful for monitoring purposes, this does not detail how the service will ensure there is no discrimination in the first instance. For example, detailed guidance on unconscious (implicit) bias, vulnerability and human rights considerations in the policy would promote good practice and mitigate risk. In response to Question 7 on whether the policy needs no further equality investigation, it states "*The PSNI have developed a plan in relation to stop and search*". It then lists a number of internal and external stakeholders involved in this plan (the Board is included), however it does not provide any further information or documentation. This relates to the Boards ongoing frustration over the apparent lack of consolidated approach to stop and search at a leadership level.

Ultimately, the PSNI do not consider that an Equality Impact Assessment (EQIA) is necessary and the policy is screened out. This appears to conflict with the Equality Commission's considerations whereby an EQIA is likely to be necessary;

- where the policy is highly relevant to the promotion of equality of opportunity;
- where it affects a large number of people;
- where it affects fewer people but where its impact on them is likely to be significant;
- where it is a strategic policy or has a significant budget attached; and
- where further assessment provides a valuable opportunity to examine evidence and develop recommendations.

Fundamentally, it is not the Service Instruction, a description of current practice that requires an EQIA type consideration, but the policy itself. For instance, this policy will be applied by a significant number of operational officers using a wide range of legislative provisions against a large number of individuals (28,116 in 2018/19; 25,450 in 2019/20). Moreover, from the lack of data collation and analysis on the impact on all equality groupings, it would appear that EQIA which concerned the policy would provide a valuable opportunity to examine further evidence.

Finally, the screening process should ensure that due regard is given to whether the policy is the most appropriate way of achieving a certain aim, what evidence there is to support that, and if alternative options or appropriate mitigation measures should be taken to lessen equality impacts.

### **The Justice and Security Act Stop and Searches**

The Board instructed Senior Counsel to consider the stop and search authorisations sought and obtained by the PSNI during the period 1 October 2019 to 22 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...

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 also went through the authorisation process and examined a sample authorisation. The process and procedure is thorough and comprehensive. The essential protection of the right to privacy is not however protected by the usual safeguard of reasonable suspicion.

The High Court and the Court of Appeal (which included the Lord Chief Justice) found that the use of the JSA power does not comply with the jurisprudence of the European Court of Human Rights despite similar stop and search provisions not meeting this standard.<sup>71</sup> The Court of Appeal restricted its criticism of the JSA to particular parts of the regime, it must be presumed that the Court accepted that with these changes the regime would be compliant. An application to the European Court of Human Rights will be required to decide whether this approach is correct.

An authorisation under the JSA on 29 July 2020 was signed by an Acting Assistant Chief Constable who did not have the authority to sign it and all stops and searches without reasonable suspicion between 30 July 2020 and 11 August 2020 were unlawful. The Independent Reviewer of JSA, David Seymour, has commented:

- (a) The authorisation passes through a number of hands both in the PSNI and NIO and this document - and this requirement – should have been familiar to all those with responsibility for processing it;
- (b) The authorisation form is in the public domain and has been annexed to all my previous annual reports. So this requirement is not an esoteric point of employment law – it is set out as plainly as it could be just above the place where the document is signed;
- (c) On receipt of the authorisation on 29 July 2020, an NIO official contacted the PSNI and asked what “A/ACC” meant and also asked for the first name of the officer who had signed it because it was unfamiliar to him. Despite this being identified the significance of the signature was not appreciated.

So it would appear that this was a collective and systemic error.<sup>72</sup>

The PSNI took the appropriate steps to correct the error and to apologise to those affected. The Senior Counsel instructed by the Board stated in her report:

‘As I have indicated within the methodology section of this Report, I did specifically view the authorisation signed by Acting Assistant Chief Constable on the 29 of July 2020 to the 11 of August 2020. This was not a properly signed authorisation as the legislation makes clear that it cannot be authorised by an officer acting at the rank of Assistant Chief Constable. It was therefore invalid and any stop and searches which occurred under the Justice and Security Act (NI) 2007 during this period were unlawful. I can confirm to the Policing Board that the actual contents of the authorisation were appropriate and well-reasoned. It did refer to the specific intelligence relied upon with reference to each policing district and the Acting Assistant Chief Constable did set out why in his view the authorisation was necessary and why less intrusive powers were insufficient in all the circumstances.

71 Ramsey, 25 February 2020, see also Gillan v UK, 12 January 2010

72 Para 8.9.

I therefore confirm that this error did not relate to the substance of the application and that the actual contents were in compliance with the requirements of the Justice and Security Act (NI) 2007.’

The case of Ramsey in the Court of Appeal, was considered in the Human Rights Annual report for 2019/2020, the PSNI were required to provide the basis for every stop and search under the JSA. This process has only just started but the Independent Reviewer of the JSA reported in April that:

‘For the record – though this is not very informative - of the 1,385 stops under section 24 (persons and/or vehicles) between 5 May 2020 and 31 July 2020 the recorded basis was “briefing” (49%), “subject’s location” (32%), “subject’s behaviour” (23%) and “incident” (6%).’<sup>73</sup>

It is hoped that better information can be provided in the future.

The Independent Reviewer also commented:

‘6.14 The PSNI are entitled to use reasonable force in the discharge of their powers. The IOPC has recommended that when force (eg handcuffs) is used that fact should be recorded in the stop/search record. This does not happen in Northern Ireland. Instead, whenever a PSNI officer uses force (whether during a stop and search or otherwise) he or she has to complete a Use of Force form on a different standalone system. This form details the force used, the name of the individual on whom the force is used and a brief summary of the incident. Unfortunately, because the PSNI run two independent systems of recording there is no link between them so there is no reliable automated way to identify which stops and searches have involved the use of force (the PSNI are addressing this issue). However, it is clear that the use of force under JSA and TACT stop and search powers is rare.’<sup>74</sup>

#### **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.

<sup>73</sup> Para 5.5. *Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007, Thirteenth Report 1st August 2019 – 31st July 2020.*

<sup>74</sup> Para 6.14

## Recording of Community Background

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. This year PSNI advise that significant work has been carried out in order to achieve a way forward for community background monitoring. It confirms that, after consultation with the Information Commissioners Office, the options currently being considered are:

1. Use of officer perception;
2. Data matching with PSNI main computer (NICHE) and the stop and search database;
3. Consent; and
4. Legislative enactment.

PSNI advise that formal legal advice is being sought to identify the best option, alongside the production of a detailed Data Protection Impact Assessment. The Independent Reviewer recently commented:

‘Given the lack of progress on this subject over the past 7 years, a sceptical observer might view this programme of work as an attempt to “kick the can down the road”. Indeed, it could be argued that this programme of work is unnecessary. All that is required is a separate assessment, after the event, based on intelligence, existing information and officer perception of the individual’s background. This should not be difficult because –

- (a) the PSNI stress that the powers are used, almost exclusively, on an intelligence led basis, against those who present the greatest threat;
- (b) it would be anonymised and generic data – an overarching set of percentages indicating broad categories;
- (c) it would be similar to the information referred to by the Lord Chief Justice in paragraph 26 of his judgment which referred to statistics for the 2013/2014 period in relation to repeat stop and searches - 81% DRs, 7% criminal associations, 3% loyalist associations, 1% interface disorder and 8% unspecified;
- (d) the PSNI’s own security statistics are broken down in this way into Republican/Loyalist categories. For example in the last reporting period the statistics were –
  - Security related deaths – 2 (Rep) 0 (Loy)
  - Shooting incidents – 30 (Rep) 14 (Loy)
  - Bombing incidents – 9 (Rep) 8 (Loy)
  - Casualties of PSA assaults - 16 (Rep) 36 (Loy)
  - Firearms found – 8 (Rep) 0 (Loy)
  - Explosives found (kg) – 1.2 (Rep) 0 (Loy)
  - Rounds of ammunition found – 125 (Rep) 1 (Loy)
  - Arrests under section 41 TACT – 72 (Rep) 8 (Loy)
  - Arrests under section 41 TACT – 8 (Rep) 0 (Loy) and subsequently charged.

So the question inevitably arises of why it would be so difficult to do something similar in relation to those stopped and searched under the JSA. The PSNI say that, although sometimes it is quite easy to assign a particular attribution to an incident, where it is not possible confirmation is sought from the investigating officer. The PSNI have a number of other quality assurance measures to ensure that statistics are accurate and as meaningful as possible. The PSNI say that it would be difficult to apply the same methodology for those who are stopped and searched. The key point, however, is that these security statistics are anonymous and generic and have been compiled without the process described in paragraph 5.7 above having to be undertaken.<sup>175</sup>

### **RECOMMENDATION 13**

The system for recording community background is put in place quickly and, at least, by 1st January 2022.

### **Court of Appeal Judgment – Children and Young People**

In February 2021 the Court of Appeal<sup>176</sup> found that the arrangements put in place for the exercise of stop and search powers under the Justice and Security Act 2007 in respect of children and young persons were in accordance with the law, but that the PSNI had failed to implement the scheme. It noted, however, that the PSNI has now altered its position and for that reason it was not necessary to make a declaration that “quality of law” test had not been met.

The Court considered that the absence of record-keeping regarding what triggered the search prevented appropriate monitoring and supervision of the use of these powers in respect of children and young people. It said this was an area of considerable sensitivity and its importance was recognised in the Code of Practice for the 2007 Act (paragraphs 5.9 to 5.14). There was also well documented research evidence about the difficulties arising from encounters between police and children and young people and the Court said that monitoring and supervising to confirm the proportionate and necessary use of the powers was particularly important in relation to this cohort.

The Court commented that the detailed guidance as to the matters to take into consideration when interacting with young people within the Scottish Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person is particularly helpful to those officers engaged in utilising stop and search powers and said that consideration should be given to formally incorporating similar guidance to PSNI officers. It noted that to some extent this is already happening as a result of the provision of training flowing from the review in 2017. The Court did not accept that the absence of such guidance from the Code gives rise to any unlawfulness commenting that guidance cannot predict every possible scenario:

<sup>75</sup> Para 5.9, *Report of the Independent Reviewer Justice and Security (Northern Ireland) Act 2007, Thirteenth Report 1st August 2019 – 31st July 2020*.

<sup>76</sup> Judicial Communications Office, 26 February 2021: <https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Ailise%20Ni%20Mhurchu.pdf>

“In our view the protections against arbitrary use of the powers in relation to children and young people contained in the 2007 Act, the Code of Practice and Policy Directive PD 13/06 together with the role of the Independent Reviewer provide an adequate basis for the protection of children and young people from the arbitrary use of the stop and search power.

We recognise, however, that until its recent acceptance of the obligations flowing from the legal regime the PSNI did not adequately give effect to all parts of the relevant protective measures.”

Some time ago the Independent Reviewer of the Justice and Security Act recommended 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. The purpose of this recommendation is to aid collective learning and best practice; to improve training; to avoid unnecessary repetition of avoidable mistakes; and put the PSNI in a better position to respond to allegations that children have been stopped and searched unnecessarily. This recommendation is made against the background that there is concern in some quarters about the way children are stopped and searched/questioned in Northern Ireland. It can be the first encounter that a child has with the police and it can have an adverse impact on a young person and reinforce hostile attitudes to the police which may be prevalent in their community. The PSNI have considered this recommendation carefully and concluded that it is not feasible to accept it. Their view is that these powers are “without reasonable suspicion” powers and, accordingly, police officers should not be required to articulate reasons why a particular person should be stopped and searched. In their view it is sufficient under the legislation and the Code of Practice that an individual is told that due to the current threat in the area and to protect public safety a stop and search authorisation has been granted. The PSNI have a number of stop and search governance groups one of which is the Children and Young Persons Forum where stop and search is examined to ensure fair and effective use and, as a result of these meetings, the PSNI are satisfied the powers are being used appropriately.

It is unfortunate that the PSNI did not accept this recommendation at least insofar as it applied to children. Fewer than 200 children are stopped etc. under JSA and TACT each year. It would not have been burdensome and those records would have informed the work of this new PSNI working group and been a recognition that there is an issue which is of concern to many in the community.<sup>77</sup>

PSNI have highlighted that while this recommendation was not accepted, it is worth noting that whilst reasonable grounds are not required when carrying out certain searches under the Justice and Security (NI) Act 2007, appropriate authorisations from senior police must be in place. In addition to this authorisation there must also be a lawful basis to carry out the search.

77 Para 7.10.



This basis must be recorded by the searching officer or officer completing the form PACE 1/ TA. The Origin application allows for the selection of briefing, incident, subject's behaviour and subject's location as the basis of the search. In addition to selecting the basis from the drop down list, officers must also record a short narrative regarding the basis selected. This should be a short rationale as to why that person has been stopped. Officers will be aware that to not fully record this basis, could lead to a breach of the search subject/s right to privacy under Article 8 ECHR.

The Board considers that an internal record of each time a stop and search is carried out where a child is present would be useful.

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## **3.5 COMPLAINTS, DISCIPLINE AND THE CODE OF ETHICS**

1. FOREWORD

2. EXECUTIVE SUMMARY

3. REPORT CHAPTERS

4. APPENDICES

Under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000, the Board must keep itself informed as to the workings of Part VII of the 1998 Act (police complaints and disciplinary proceedings) and monitor any trends or patterns emerging. This work is undertaken on behalf of the Board, by the Performance Committee which oversees the extent to which the service is respecting professional standards of police conduct.

A Professional Standards Monitoring Framework was developed in 2011 which provides the Committee with a structure to undertake their monitoring role and to address broader concerns identified by Members examining data from both the PSNI and the Office of the Police Ombudsman for Northern Ireland (OPONI). In accordance with the Framework, the PSNI provides the Committee with a range of data regarding professional standards. This includes: Discipline and ACU investigations, suspensions and repositioning, police misconduct, matters of complaints and allegations, confidential reporting, the service vetting and information on police staff discipline. The Committee also considers the PSNI Policy Evaluation Group (PEG) Annual Report which sets out learning identified from OPONI policy recommendations. The Committee then reviews information from OPONI regarding trends and patterns in complaints and allegations made to OPONI by members of the public.

This information is used by the Board to challenge PSNI regarding the organisation's performance and to seek further information from the police or OPONI on any identifiable areas of concern. The Board's Human Rights Advisor also reviews all relevant reports, research and recommendations and, where it is considered that a legitimate issue relating to the PSNI's compliance with the Human Rights Act 1998 arises, the Advisor assesses the PSNI's response to it and reports this back to the Committee.

### **PSNI Professional Standards**

PSNI Professional Standards is comprised of two sub-branches, Discipline and Anti-Corruption & Vetting, with a joint purpose, "To engender pride and trust in the integrity of the Police Service of Northern Ireland through the prevention and detection of corruption, dishonesty or unethical behaviour". The Anti-Corruption & Vetting Branch has a duty to prevent and detect wrongdoing and corruption by members of the organisation whilst 'off-duty'<sup>78</sup>. The Discipline Branch is responsible for providing guidance to Districts and Departments in respect of disciplinary matters to ensure that consistent standards are applied. It can also initiate its own criminal or misconduct investigations and refer matters to formal misconduct hearings. The combined work of these branches ensures that police officers and staff who serve the community are accountable, act with integrity and treat others with fairness, courtesy and respect.

<sup>78</sup> The OPONI provides an independent, impartial system for the handling of complaints about the conduct of police officers whilst 'On Duty'.

During the reporting year the Board discussed PSNI's annual report produced by their Professional Standards Department. The Committee met with senior officials from PSNI at the meeting to discuss the updates on professional standards reporting and Members were informed that the level of complaints received during the financial year to date had dropped from the previous financial year mainly due to COVID, especially evidenced during the tighter restrictions in spring 2020. PSNI noted that the Business Plan for 2021/22 is expected to see an overhaul of the current system with a new governance and performance reporting framework, which would also include restructuring of Anti-Corruption intelligence handling processes and a review of Service Vetting Unit.

Below is a summary of the key findings from the 2020/21 PSNI Professional Standards Report.

### **Breaches of the Code of Ethics**

During 2020/2021 there were 259 potential breaches of the Code of Ethics, which is a decrease of 77 breaches in comparison with 2019/20 and lower than each of the six preceding years. The most common breaches related to the following Articles within the Code: Article 7 – Integrity (33.3% in 2019/20) and (44% in 2020/21) which includes matters involving criminal offences such as assault, motoring offences, domestic offences, sexual offences, data protection or theft/fraud; Article 1 - Professional Duty (23.5% in 2019/20) and (23.6% in 2020/21) which relates to issues such as failure to maintain accurate records, inappropriate language/behaviour, inappropriate use of social media, working practices and procedural failures; and Article 2 - Police Investigation (18.5% in 2019/20) and (14.3% in 2020/21) relating to issues such as failure to investigate, failure to update and unprofessional comments. Sixteen alleged breaches of Coronavirus Regulations have been included within these categories and where proved, have resulted in management action.

### **Investigations**

Where a matter requires a formal investigation, it will either be a criminal investigation (conducted by ACU or Discipline Branch or at District level) or a misconduct only investigation (conducted by Discipline Branch). There were 48 criminal investigations in 2020/21, an increase of 4 cases from 2019/20. The five Discipline priority areas in 2020/21 were Assault, Data Breach, Drunk in Charge (DIC), Domestic Offence, and Sexual Offence. The overall number of live and new discipline investigations increased during 2020, but has reduced in 2021 to date.

Recent benchmarking has established that the average time taken to complete a misconduct only investigation is 89 days. If the matter is also being investigated criminally, the average is 120 days. PSNI note that there are a small number of criminal investigations which have taken significantly longer than this and the issues identified have both internal and external influences.

### **Suspension and Repositioning**

There are two forms of duty adjustment available for consideration when officers are under investigation; suspension or repositioning. There were 14 new suspensions in 2019/20 and 27 new suspensions in 2020/21 with 14 suspensions rescinded (43% of the rescinded suspensions were due to the officer being dismissed or required to resign).

Repositioning is an alternative to suspension pending the outcome of an investigation. During 2019/20 27 officers were repositioned with 33 repositioned in 2020/21. There were 23 repositioning's rescinded, 65% of which were due to the misconduct proceedings being concluded. At 31 March 2021, 30 officers were suspended and 37 were repositioned.

### **Misconduct Proceedings**

During 2020/21 there were 30 misconduct meetings, 60% of which resulted in either no further action or management advice, which is not recordable on the officer's record. The report notes that 30% of misconduct meetings resulted in a written warning and 7% resulted in a final written warning (highest sanction available). A PSD investigation is almost twice as likely to result in a written warning/final written warning (70%) than an OPONI investigation (36%). In terms of misconduct hearings, there were nine hearings in total during 2020/21, 55% of which have resulted in officers being required to resign or dismissed from the service. Two officers were reduced in rank under the 2000 Regulations.

### **Complaints and Allegations**

During 2020/21 there were 2,469 complaints and allegations recorded by PSNI. The main types of allegations continue to be in the following three categories: Oppressive Behaviour, Failure in Duty and Incivility, all of which decreased from 2019/20 except for incivility.

### **Anti-Corruption Investigations**

ACU currently has four strategic priorities – Disclosure of Information, Abuse of Position for Sexual Purpose, Misuse of Controlled Substances and Inappropriate Association. In 2020, ACU initiated 22 new investigations, down from 26 in 2019.

The report notes that the Anti-Corruption Unit have identified the following key risks;

- Disclosure of Information: Familial/long standing friendships with criminals; social media vulnerabilities;
- Misuse of Force Systems: Using systems to check self/family/neighbours; browsing high profile incidents;
- Sexual Misconduct: Abuse of position for sexual purpose with vulnerable victims of crime; sexual harassment of colleagues;
- Inappropriate Association: Familial / romantic associations with criminals;
- Drugs: Male officers, in their 20s/30s, less than 15 years of service and linked to socialising habits thereby increasing their personal vulnerability, whilst also potentially damaging public confidence; and
- Vulnerability: Expressing inappropriate views on social media.

## **Confidential Reporting**

During 2020, 110 confidential reports were received, this is broadly consistent with the yearly average (2013-2020) of 105. The main themes reported include: overtime discrepancies; failing to work detailed hours; breaches of Data Protection and inappropriate associations. Matters referred for investigation represent 28% of reporting. These primarily involve DPA, alleged drug use, COVID breaches, abuse of position and inappropriate social media activity. Matters referred to officers' line management relate to issues such as relationships, overtime allocation, business interests and COVID breaches which have occurred outside work.

## **Service Vetting Unit**

In 2020/21 there was a total of 3,105 vetting decisions cleared, 79 rejected and 141 discontinued, all of which decreased from the previous year. Since the ACU referral process commenced in April 2020, 49 individuals have been referred; 34 of which were for inappropriate association, 5 for National Security and 4 for sexual conduct. Other areas of concern were financial, domestic incidents and drugs.

The report notes that the main vetting concerns and challenges are centred on the continued in-service vetting of police officers. PSNI have noted that at present, given the current demand in other areas, the HMIC recommendations for completion of this by November 2021 will not be achieved as there remains approximately 1,400 officers who have not yet been vetted and a further 500 officers whose vetting has expired since commencement of In-Service vetting in 2018.

## **Service Confidence Proceedings**

Service Confidence is not a misconduct process, it is a protective measure that may be put in place when the Police Service loses confidence in an officer, with a view to managing and reducing risk. There are seven officers currently under Service Confidence Proceedings and one officer under consideration for proceedings. Judicial review (in limited capacity) is ongoing in respect of one officer, one appeal has been submitted to the Deputy Chief Constable and a review is still under consideration in respect of one officer. There is also one officer on long term sick leave and is seeking Ill Health Retirement (IHR) and a further officer has been granted an IHR.

## **Criminal Convictions of Police Officers**

During 2020/21 a total of seven officers received a conviction in court or adult caution for; excess speed (two officers), breach of data protection, obstruction, driving without due care and attention, driving with excess alcohol and indecent behaviour. Three of these resulted in management action and one officer resigned. There was no further police action in relation to one officer, and misconduct proceedings are still pending in relation to two officers.

## **Officers leaving the service while under investigation**

Ten officers left the service during 2020/21 whilst under investigation, two suspended officers (who retired or did not have their contract renewed) and eight non-suspended officers (who resigned or received Ill Health Retirement). The suspended officers were an Inspector and a Police Officer part-time, and all the other officers were Constables.

Officers were under investigation for the following offences:

- Viewing pornography on police systems;
- Paying for sexual services;
- Use of racist language;
- Failure to investigate;
- Driving with excess alcohol (two officers);
- Common assault (two officers);
- Failure to disclose criminal convictions; and
- False allegations against colleagues.

### **Chief Constable Referrals**

Under section 55 of the Police (Northern Ireland) Act 1998, there are certain matters not arising out of a public complaint which PSNI either must or may refer to OPONI:

PSNI must refer any matter which appears that conduct of a member of the police service may have resulted in the death of some other person. An example of this would be death in custody, or death following police pursuit.

PSNI may refer any matter which appears to indicate that a member of the police service has, committed a criminal offence; or behaved in a manner which would justify disciplinary proceedings; and it is in the public interest that OPONI should investigate the matter. An example of this would be use of force reported by officers.

In 2020/21, 52 notifications were made to the Police Ombudsman regarding the use of Spit and Bite Guards and 19 notifications were made regarding death following police contact.

## **THE OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND**

The main function of the Police Ombudsman is to provide an independent and impartial service for handling complaints about the conduct of police officers. OPONI investigates complaints from members of the public and issues referred to it by other public bodies. This not only includes police officers and 'designated civilians'<sup>79</sup> within the PSNI, but also officers within the Northern Ireland Airport Constabulary and Belfast Harbour Police and can also investigate complaints about officials within the UK Border Force and officers from the National Crime Agency.

Where a complaint or matter has been investigated by OPONI, it must then determine whether a criminal offence has been committed by a member of the police (Police (Northern Ireland) Act 1998, s.58). If so, OPONI must submit recommendations to the PPS. In cases in which no recommendation is submitted to the PPS, OPONI must consider whether a recommendation should be made for disciplinary proceedings.

<sup>79</sup> 'Designated civilians' are those members of police support staff designated as an officer by the Chief Constable pursuant to section 30 of the Police (Northern Ireland) Act 2003 i.e. investigating officers, detention officers and escort officers.

OPONI's work is critical for facilitating the Board's oversight of police professional standards and accountability. The collaboration of both organisations in monitoring the data arising from police complaints promotes amelioration of police policy and practices through the identification of concerning trends.

## **KEY FINDINGS FROM OFFICE OF POLICE OMBUDSMAN FOR NI ANNUAL STATISTICAL BULLETIN 2020/21**

### **Complaints received by OPONI**

The number of complaints received and matters referred for independent investigations by the Police Ombudsman's Office during 2020/21 was 2,498. This is a 1% decrease from the previous year. The decrease is also a continuation in the downward trend in complaints received over the last number of years.

During 2020/21, the vast majority of complaints (91%) were from members of the public. A further 9% were notifications from police. Less than 1% were matters referred to the Office for an independent investigation from the PSNI or from another organisation or matters in which the Office exercised its power to initiate investigations.

The Police Ombudsman's Office has the remit to investigate complaints about officials from a number of bodies. These include police officers within the PSNI and police officers with the Northern Ireland Airport Constabulary and Belfast Harbour Police. More recently, the remit was extended, for serious incidents only, to include certain Home Office officials in 2014/15 and National Crime Agency Officials from 20 May 2015. During 2020/21, the vast majority of complaints received (99%) continue to be about PSNI officers, this includes both police officers and 'designated civilians' within the Service. Similarly during 2020/21, the majority of allegations received (99%) were made as part of a complaint about the PSNI. The Police Ombudsman's Office received 3,667 allegations during the 2020/21 period. A person who makes a complaint may express a number of different concerns about the exchange with the officer and the OPONI will record this as one complaint broken down into a number of allegations.

### **Complaints Closures**

OPONI closes complaints once it has reached a view on the matter involved, when the complainant and the police officer have reached a level of agreement on the contested matter or when the person who made the complaint no longer wishes to engage with the process. The Office closed more than 2,200 complaints during 2020/21 which is a 12% decrease from the previous year. There are four main stages as to when complaints will be closed;

- Closed following the initial assessment (22%);
- Closed following initial inquiries (31%);
- Resolved informally (6%); and
- Complaints fully investigated (41%).

OPONI found evidence to substantiate all or part of the complaint or identified another concern during the investigation in 12% of these fully investigated complaints during 2020/21.

### **Recommendations made to the Chief Constable**

Following the conclusion of any criminal proceedings or investigations that relate to misconduct matters, OPONI may make a recommendation to the Chief Constable. During 2020/21, OPONI made 63 recommendations (a decrease from 152 in 2019/20) of which 25 (40%) were made recommending that a misconduct meeting take place and 33 (52%) made calling for performance action.

### **Regulation 20 Reports**

Under section 55 of the Police (NI) Act 2000, OPONI may investigate matters about which no complaint has been made by a member of the public (“non-complaint matters”). Such matters can be investigated by OPONI of her own volition or as a result of a referral by the Board, the Department of Justice, and the Secretary of State, the Director of Public Prosecutions or the Chief Constable, in respect of any matter indicating criminality or misconduct by a police officer.

The Chief Constable must refer all discharges of a firearm, an Attenuating Energy Projectile (AEP) or Taser to OPONI for investigation. Any incident in which a person dies either in police custody or shortly following police contact (regardless of whether it is suspected that there was wrongdoing on the part of the police) must also be referred. At the conclusion of an OPONI investigation into non-complaint matters a report, known as a Regulation 20 report, is sent to the Department of Justice, the Policing Board and the Chief Constable. The report outlines the background to the incident under investigation, OPONI’s findings and, where appropriate, recommendations for the Chief Constable.

Since the beginning of 2020, the Board received five Regulation 20 reports from OPONI which related to matters such as: death of a member of the public after a road traffic collision on the M1 motorway;<sup>80</sup> AEP Discharge during Public Disorder, Derry/Londonderry;<sup>81</sup> Road Traffic Collision, M1 Motorway;<sup>82</sup> Unlawful access to information on police computer systems by a police officer;<sup>83</sup> Death of Man following Police Contact;<sup>84</sup>. If OPONI considers it in the public interest she may publish a press statement setting out her findings. A Regulation 20 report is not published as a matter of course, however the Board monitors any adverse findings.

80 Resulting in a misconduct sanction against one officer and three policy recommendations.

81 OPONI was satisfied that the discharge of the AEP was justified and proportionate in the circumstances. No criminal or misconduct issues were identified.

82 Relating to one incident. Resulted in one policy recommendation.

83 Resulted in one disciplinary sanction and one criminal charge.

84 Resulted in no disciplinary sanctions or policy recommendations.



## **Policy Recommendations made to the PSNI by OPONI**

OPONI may make policy and/or disciplinary recommendations to the PSNI following an investigation into a complaint against a police officer or any other matter referred to OPONI under the Police (Northern Ireland) Act 1998.<sup>85</sup> In accordance with a recommendation in the Board's Human Rights Annual Report 2013, PSNI established a Policy Evaluation Group (PEG) specifically for the purpose of considering the implementation of OPONI policy recommendations. The PEG met annually and was attended by representatives from OPONI, PSNI, HMICFRS, CJINI and the Board attending in an observer capacity. During the meetings attendees considered the management of policy recommendations made by OPONI, which are categorised as either 'Strategic, Operational or Areas for Minor Improvement (AFMI)'. The PEG has not met since July 2019; however discussions are ongoing with OPONI to consider how best to monitor the implementation of recommendations in the future.

PSNI have advised that during 2018/19 PSNI Professional Standards developed a database of all policy recommendations made by OPONI which enables the extraction of recommendations relating to different topics.

## **Code of Ethics Review**

Under section 52 of the Police (Northern Ireland) Act 2000, the Board is required to issue and revise, a PSNI Code of Ethics for the purpose of laying down standards of conduct and practice for police officers and making them aware of the rights and obligations arising under the ECHR and the Human Rights Act 1998. All serving police officers within the PSNI are required to comply with the Code and where an allegation of misconduct against a police officer is made, the standards against which the officer will be measured are those contained within the Code.

The original Code was published in 2003, commenced in 2006 and latterly reviewed in 2008. Despite minor revisions in 2015 the content of the Code has not been revisited since. During that time there have been a number of significant developments in the area of police professional standards and misconduct. The Board agreed on 6 February 2020 that the Performance Committee, guided by the Board's Human Rights Advisor, should oversee a review of the Code of Ethics to ensure it adequately reflects and supports the policy, procedure and decision-making of officers in the contemporary policing environment. Before issuing or revising the Code, the Board must consult with a number of named organisations in s.52 (5). Following this, the Board may make further amendments to the draft Code as it may determine, after consultation with the Chief Constable. Therefore, any draft Code must proceed through a number of stages before it is finalised and adopted.

<sup>85</sup> **Police (Northern Ireland) Act 1998, Section 55** sets out matters which may be referred to OPONI by the Board, the Department of Justice, the Secretary of State or the Chief Constable.

Several meetings have taken place between the Human Rights Advisor, Board officials and the PSNI officers responsible for progressing this review. Consideration has been given to recent changes in the legal and social environment, including the use of new technologies and emerging integrity risks. In accordance with section 52 of the Police (Northern Ireland) Act 2000, PSNI submitted a draft revised Code to the Board which was considered at the Performance Committee in March 2020. Following the discussion, Members wrote to PSNI to pursue a number of concerns regarding formatting, terminology and the accessibility of the ethical values framing the decisions and actions of PSNI officers. Concerns were also raised about the transparency of amendments made during this review of the Code and requested that PSNI provide a rationale behind the amendments, along with a narrative setting out the ethical principles.

At the February 2021 Performance Committee PSNI discussed with Members their view that the Code of Ethics should be an aspirational Code that will support the ethical ethos of the organisation whilst continuing to provide the discipline function. The current Code of Ethics from 2008 is considered by many as a code of conduct and the majority interacting with it are involved with investigative conduct. It is anticipated that the new code should have ethical values relatable to all officers. PSNI consider that such a Revised Code of Ethics will require compliance with any PSNI service instruction, guidance and policies providing more accountability for officers including greater latitude for those disciplined or engaged in misconduct hearings. Additionally, this would bring it up-to-date and shift emphasise to more relevant current discipline issues rather than some issues dealt with under the 2008 Code that are infrequent now. This work will continue to progress in 2021 with a view to completing before the end of the year.

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## 3.6 USE OF FORCE

### THE USE OF FORCE AND HUMAN RIGHTS

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 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 vulnerability of those in custody (which starts from the point of arrest) any use of force must be justified by the particular circumstances (including, for instance, the use of handcuffs or other restraints must never be applied without good reason).

Article 3 of the European Convention on Human Rights concerns the prohibition of ill-treatment, including the unjustified use of force by police officers, is an absolute right, cannot be subject to derogation in war or a public emergency and is regarded as one of the Conventions most important rights. This freedom from ill-treatment and the unlawful use of force is contained in all of the major UN treaties, all other regional treaties (in the Americas, Africa etc.) and is protected by its own special treaty – the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It has also resulted in other special treaties allowing international bodies to visit and inspect all places of detention.

However, whilst any unjustified use of force by law enforcement officials is a violation of international human rights law, a crime and a tort, the justification for its use by police officers is considerable. Officers can use force to arrest a person and take them to a police station (or, under the Health Regulations, back to where they are living), to ensure their compliance with lawful orders (including in stop and search encounters) and to allow police officers to protect themselves or others. Very often the use of force by officers against a person occurs on the street and often without independent witnesses and is not always subject to surveillance by Body Worn Video or CCTV.

PSNI have highlighted that generally there has been an increase in the number of assaults on police officers on duty. This has increased from 2,714 in 2018/19 to 2,823 to 2019/20 and then again to 3,020 reported assaults against officers in 2020/21. These include the offences of assault with injury on a constable, assault without injury on a Constable and attempted murder.

The HMICFRS stated in its report on the PSNI in September 2020:<sup>86</sup>

‘The PSNI does not monitor its use of force or stop and search powers closely enough. That means it can’t be confident its officers are always behaving fairly and properly. The service needs to invite better external scrutiny to help it understand whether the public believes it makes appropriate use of these powers. That would help the service make changes to improve its performance.

86 An Inspection of how well the service treats its workforce and the people of Northern Ireland, 10 September 2020.

Most frontline PSNI officers aren't issued with conducted energy devices (CEDs, such as Tasers). Those devices are less lethal than the firearms issued to all PSNI officers for personal protection purposes. Without immediate access to CEDs, frontline PSNI officers who respond to serious incidents involving dangerous people have fewer options available to them to resolve the incident with the minimum use of force.

CEDs could be made available to more officers in the PSNI, but that would attract a high level of interest from communities. So, we recommend that the chief constable consult widely on any proposed changes and communicate the public safety benefits of such an approach, before any changes are made.'

An interim report of the PSNI's response to that report was given to the Policing Board on 1 October 2020, which highlighted that during an internal governance board on 28 July 2020 it was agreed that, whilst an increase in CEDs may be required (the Operational Business Case is currently being developed), that roll out to front line officers was not deemed practical by PSNI at that time and that any uplift would be to Armed Response Unit Officers within already existing Command Protocols. It was noted by the Chief Constable that this remains under active consideration, and will come back to the Board with the final response to this particular recommendation which is awaited by the Board.

#### **RECOMMENDATION 14**

The PSNI should report to the Policing Board on improvements made on its reporting of the use of force and further deployment of 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.

The College of Policing recently analysed the use of force by the police in England and Wales Police use of force: Tactics, Assaults and Safety<sup>87</sup> and produced some interesting results:

'This report presents results from analysis of 45,661 use-of-force records made during 2017/18 in 16 police forces. The analysis aimed to identify whether there were any patterns in the data that might warrant more in-depth investigation using a range of research methods and data sources. Specifically, the analysis looked for factors that were associated with officers being more or less likely to report:

- using particular tactics during incidents where they used force;
- being assaulted and injured during those incidents; and
- that citizens were injured and then hospitalised as a result of the force they used.'<sup>88</sup>

87 [https://whatworks.college.police.uk/Research/Documents/Use\\_of\\_force\\_report.pdf](https://whatworks.college.police.uk/Research/Documents/Use_of_force_report.pdf)

88 *College of Policing, September 2020*, <https://paas-s3-broker-prod-lon-6453d964-1d1a-432a-9260-5e0ba7d2fc51.s3.eu-west-2.amazonaws.com/s3fs-public/2020-09/200818-use-of-force-final-report-1.0.pdf>

## RECOMMENDATION 15

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.

It does not appear that the Board or the Human Rights Advisor has previously reported separately or in greater detail on the use of force although this subject has formed a chapter in all the Human Rights Advisor's Annual Reports and in 2007 there was a report on TASERs. The last Annual Report<sup>89</sup> raised concerns about increases in the use of TASERs and previous reports have raised questions about increases in other uses of force (particularly dog and firearm use) but have only reported the PSNI's own explanation for any increases (or sometimes the fact that no explanation was given).

## FORCE AND THE PSNI

The PSNI currently use the following kinds of force regularly: AEPs (batons rounds), personal batons, irritant spray (PAVA), firearms,<sup>90</sup> police dogs, TASERs, handcuffs, limb restraints, unarmed physical tactics, spit and bite guards, and water cannon. Some of these weapons are categorised by PSNI as 'less lethal options'.

Whilst it is obviously welcome that other options other than the use of lethal force are available, 'less lethal options' were used 84 times in the last year, a 58% increase from the previous year. There are therefore questions about whether these uses were truly 'less lethal options'. Also of concern is the 490 times that firearms were drawn or pointed, raising questions as to how often these situations could have potentially led to the weapon being fired (but also is an important comment on the obvious restraint demonstrated by offences in such stressful situations). In addition, whilst the security position for PSNI officers is different than elsewhere in the UK and the Republic, no other force routinely arms all of its officers.

There are criteria used for judging the risks and security situation and the routine deployment firearms. ACC Roberts, the Firearms Lead for the PSNI, in the context of the Patten Recommendation 65,<sup>91</sup> reported to the Policing Board by letter dated 11 March 2021:

*'Having examined the current security situation my assessment is that we have not yet reached the 'peaceful environment' envisioned by Patten, whereby 'the question of moving towards the desired objective of a routinely unarmed Police Service could be considered.'*

89 <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/human-rights-annual-report-2019-2020.pdf>

90 Drawn or pointed 505 times in 2019/20, no firearms have been discharged since May 2017

91 *A New Beginning: Policing in Northern Ireland: the Report of the Independent Commission on Policing for Northern Ireland, para 8.19, 'We recommend that the question of moving towards the desired objective of a routinely unarmed police service be periodically reviewed in the light of developments in the security environment. We welcome the gradual withdrawal of long arms from police patrols in most parts of Northern Ireland and we hope that this process will also continue wherever possible.'*

*This opinion has been formed due to the real and severe threat against police officers. It also had been informed by the current assessment by the Security Service of the threat to serving police officers. I have, therefore, signed the relevant 'standing authorities' for the carriage of firearms by PSNI officers.'*

This assessment is underlined by the device placed under a police officer's car<sup>92</sup> and an arson attack on the vehicles of a police officer at his home on 29 April 2021.<sup>93</sup>

The PSNI produce a considerable number of statistics but many of them require some further explanation and consideration:

- For instance, the reason cited for the use of baton indicates that the weapon was used 31% [last year's figure is 25%] of the time to 'Prevent Harm to Subject' – rather than to protect the officers or members of the public. An officer may report more than one reason for using their baton. In those incidents in which an officer reported using their baton to prevent harm to the subject, they may also have reported using it to protect themselves or other officers;
- Although the figures for the use of force are broken down by district no comparative proportionate use figures between districts are provided;
- Figures on the age breakdown for children are not explored in the supplied statistics beyond the category of '17 and under'. Figures show that batons were used on children on 8 occasions, irritant spray on 3 occasions, police dogs on 10 occasions, restraints on 499 occasions, spit and bite guards on 8 occasions and TASERs on no occasions, In fact, the details of TASER use on children was only published following a freedom of information request which showed that children as young as 10 were 'red dotted'<sup>94</sup>. It is understood from discussions with PSNI that firearms have been drawn or pointed 23 times at children aged 17 and under, including 5 times for children 12 years and under;
- When asked if PSNI can break down the category of '17 and under', PSNI have stated that although some of these statistics are reported in the internal PSNI use of force statistical publication of which the Policing Board receive a copy, Statistics Branch do not publish this level of disaggregation into the public domain. There are many smaller numbers in this data which may be of a sensitive nature;
- No use of force figures appear to be analysed on the basis of community background or religion; and
- Firearm use (pointed or drawn) is not analysed in terms of age, gender or ethnic minority. It is understood from discussions with PSNI that the largest ethnic groups for firearm usage is 'white', however firearms have been drawn or pointed 20 times at members of the Irish Traveller community, however there are no official statistics provided.

92 <https://www.bbc.co.uk/news/uk-northern-ireland-56814575>

93 <https://www.bbc.co.uk/news/uk-northern-ireland-56929704>

94 Red dotting involves pointing a TASER at a person so that the laser red dot appears on their body, a preliminary warning stage before the TASER is fired. It should be noted that this statistic refers a CED being red dotted against one 10 year old in 2018. The rest of the statistics in this section relate to the time period April 2020 – March 2021.

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

All PSNI decision making, including the decision to use force, is taken in accordance with the National Police Chiefs Council (NPCC) and the National Decision Model (NDM). The NDM is an established approach to managing conflict and it can be applied to spontaneous incidents or planned operations, by an individual or a team of people. The NDM has a central statement of mission and values which recognises the need to protect and respect the human rights of all, surrounded by 5 key steps which should be continually assessed as a situation develops: (i) gather information and intelligence; (ii) assess threat and risk and develop a working strategy; (iii) consider powers and policy; (iv) identify options and contingencies; and (v) take action and review what happened. Any tactical option chosen must be proportionate to the threat faced in any set of circumstances, which includes any decision to use force, be it through use of hands-on restraint techniques or use of a weapon which can encompass the physical, moral and psychological integrity of a person: *Botta v Italy* 26 EHRR 241.

The PSNI has a number of use of force technical aides at its disposal including CS Spray, PAVA irritant spray, Water Cannon, Taser (Conductive Energy Device or CED) and baton rounds (Attenuating Energy Projectiles or AEPs). Use of such weapons is not incompatible with the ECHR provided strict guidelines are applied for their use. In recognition of the very serious and potentially lethal effects of AEP, the threshold that must be met before AEP are used is that of absolute necessity (the test provided for in Article 2).

Before using any of the number of technologies at their disposal, a police officer should identify him/herself and give a clear warning of the intent to use force affording sufficient time for the warning to be observed unless affording time would put the officer or another person at risk of death or serious harm. Even where the use of lethal or potentially lethal force is unavoidable the police must continue to exercise restraint in the use of that force, minimise damage and injury caused, render assistance and medical aid at the earliest opportunity and notify relatives or other persons if a person has been injured or killed.

Mechanisms are in place, both internally and externally, to ensure that PSNI is held to account for all uses of force by its officers. Any incident that involves the use of force by a police officer must be recorded in the police officer’s notebook and reported to the relevant supervisor. Any such incident may be the subject of an OPONI investigation regardless of whether or not a complaint has been made. OPONI will, in every case where death has occurred following contact with the police, investigate the death. Where a firearm, an AEP or a Taser has been discharged, the OPONI will investigate the incident. Where Taser has been drawn or aimed at a subject, but not discharged, the OPONI must be notified, but will usually investigate only if a complaint is made.

At the conclusion of the OPONI investigation, a Regulation 20 report on the investigation is completed. The Board receives a copy of all Regulation 20 reports and considers any findings or recommendations, particularly to identify systemic or frequently occurring issues, contained within them.

Every police officer is responsible personally for his or her decision to use force. If it appears to the PSNI or to the OPONI that force may have been used unlawfully, the police officer involved will be subject to a criminal investigation and may be prosecuted. Obedience to the orders of a supervisor is no defence for unlawful use of force if that police officer knew that the order to use force was unlawful and the officer had a reasonable opportunity to refuse to obey it. Responsibility lies, additionally, with the officer's supervisor who issued the unlawful order.

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 for consideration: AEP; Baton; CS Irritant Spray; PAVA Irritant Spray; Personal Firearms; Police Dog; Taser; 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 OPONI and the 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.

Recommendation 21 of the Policing Board's Human Rights Annual Report (2008) requires the PSNI to, *"provide the Policing Board with statistics on all categories of uses of force recorded on the PSNI electronic use of force monitoring system on a six monthly basis."*

11% of all reports of use of force involved an individual aged under 18 years. 93.5% of these refer to the use of unarmed physical tactics or handcuffing limb restraints. The table below compares uses of force for incidents that occurred between 1 April 2020 and 31 March 2021;



Use of Force	1 April 2019 – 31 March 2020	1 April 2020 – 31 March 2021	% change (c)
AEP Pointed	49	75	53%
AEP Discharged	4	9	125%
<b>AEP Total</b>	<b>53</b>	<b>84</b>	<b>58%</b>
Baton Drawn Only	271	220	-19%
Baton Drawn & Used	117	109	-7%
<b>Baton Total</b>	<b>388</b>	<b>329</b>	<b>-15%</b>
Irritant Spray Drawn Only	186	191	3%
Irritant Spray Used	177	193	9%
<b>Irritant Spray Total</b>	<b>363</b>	<b>384</b>	<b>6%</b>
Firearm Drawn or Pointed	505	490	-3%
Firearm Discharged	0	0	-
<b>Firearm Total</b>	<b>505</b>	<b>490</b>	<b>-3%</b>
<b>Police Dog Used</b>	<b>244</b>	<b>190</b>	<b>-22%</b>
CED Drawn(a)	317	288	-9%
CED Fired(b)	26	24	-8%
<b>CED Total</b>	<b>343</b>	<b>312</b>	<b>-9%</b>
<b>Handcuffs / Limb Restraints</b>	<b>4,348</b>	<b>4,657</b>	<b>7%</b>
<b>Unarmed Physical Tactics</b>	<b>7,189</b>	<b>7,743</b>	<b>8%</b>
<b>Spit and Bite Guard</b>	<b>N/A</b>	<b>112</b>	<b>-</b>
Water Cannon Deployment	0	0	-
Water Cannon Used	0	0	-
<b>Water Cannon Total</b>	<b>0</b>	<b>0</b>	<b>-</b>

(a) Includes drawn, aimed, arced, and red-dotted. (b) Includes drive-stun. (c) % change figures rounded to nearest integer.

## Spit and Bite Guards

A Spit and Bite Guard (SBG) is a breathable, mesh material garment that covers the face and head. They were introduced by the PSNI as a temporary tactical option in response to COVID-19 in March 2020 and were used 112 times during the reporting period. These do constitute a use of force and their use must be recorded as such.

Its use should be assessed using the National Decision Model (NDM) and service policy. Of the 112 members of the public on whom a spit and bite guard was used during the 12 month period 1 April 2020 – 31 March 2021, 101 were male and 11 were female. Males aged 18-29 were the group on which a spit and bite guard was most frequently used. In the majority of the 112 occasions when an officer used a spit and bite guard they stated that it was to protect themselves or other officers. Spitting at or biting police officers is a very unpleasant attack on those merely trying to do their duty and police officers also have human rights<sup>95</sup> and society (and the Chief Constable) has a duty to protect them.<sup>96</sup>

However, SBGs are controversial equipment whose effectiveness in protecting Officers against COVID-19 (or other diseases) is unclear and could only be used by imposing additional restraint on the suspect and creating significant human right issues – and possibly violation of the prohibition against ill-treatment. Please note that, SBGs are also discussed in the Training chapter of this report.

On 1 March 2021 the PSNI undertook a public consultation as part of an Equality Impact Assessment on the proposed introduction of SBGs and the final report of that is awaited. One important point to note from that consultation document (page 33) is the reported breakdown on religion. Of those subject to a SBG 48% reported their religion as Roman Catholic and only 20% as Protestant (13% did not or would not report their religion). The possible reasons for this problematic statistic are not set out and it is hoped that some account of this significant difference is explained and/or subjected to some mitigation measures in the PSNI's proposed next report to the Policing Board.

The PSNI are planning to report to the Policing Board later in 2021 on whether SBGs should continue to be used in the long term and it is expected that the previous recommendations made by the Board will be considered in that report. Therefore, a review of their use and continued deployment will be included in the next Human Rights Annual Report. More information on SBGs and the human rights involved is set out the Human Rights Annual Report for 2019/20 and the Board's COVID-19 thematic report published in November 2020.<sup>97</sup>

95 Spitting or biting of a suspect by an officer would quite rightly be a violation of Article 3 – unacceptable treatment which was degrading and degrading.

96 The Human Rights Advisor has heard personal accounts from officers who have been bitten or spat at and these were harrowing and unpleasant.

97 <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/report-on-the-thematic-review-of-the-policing-responser-to-covid-19.PDF>

## **Conductive Energy Device (Taser)**

The Conductive Energy Device (CED), or Taser as it is more commonly known, is a single shot weapon designed to temporarily incapacitate a subject through the use of an electric current, which temporarily interferes with the body's neuromuscular system. This is one of a range of tactical options available where there is violence or a threat of violence which may escalate to the point where the use of lethal force would be justified.<sup>98</sup> If a Taser is drawn, aimed and/or red-dotted that must be reported, even if it is not subsequently discharged.

There were 312 occasions where CEDs were either drawn or fired between 1 April 2020 and 31 March 2021. On 288 occasions CEDs were drawn (not fired) and on a further 24 occasions CEDs were drawn and fired. The main reason officers gave for using a CED was to protect themselves or protect other officers. During the 12 month period, out of the 24 times a CED was fired on members of the public, 23 of which were used on males. The CED was used (drawn or fired) most often during incidents classified as firearms incidents (267 occasions) and the Armed Response Unit dealt with the vast majority of incidents.

## **YOUNG PEOPLE AND TASERS**

A freedom of information request concerning the use of Tasers on children over the last few years revealed some worrying figures. As children of 10, 12, 13 and 14 years of age were subject to 'red dotting'.

The table below shows the gender and age of the members of public on whom CED was fired between 1 April 2020 and 31 March 2021;

<sup>98</sup> In the 'Review of IOPC cases involving the use of TASER', August 2021, the official police complaints body for England and Wales found examples of TASER being used in unsafe locations and officers had not adequately considered the potential risk of injury. In one quarter of the cases examined, TASER was used for compliance, not protection and officers missed opportunities to de-escalate. There was also increased used on children, vulnerable people with mental health or drug and alcohol issues.

Gender	CED Fired
<b>Male</b>	
17 and under	0
18 – 29	4
30 – 39	5
40 – 49	6
50 – 59	7
60 +	1
<b>Male Total</b>	<b>23</b>
<b>Female</b>	
17 and under	0
18 – 29	0
30 – 39	1
40 – 49	0
50 – 59	0
60 +	0
<b>Female Total</b>	<b>1</b>
<b>Total</b>	<b>24</b>

### Attenuating Energy Projectiles (AEPs)

The AEP has been designed for use as a less lethal option in situations where officers are faced with individual aggressors whether acting on their own or as part of a group. It discharges less-lethal kinetic energy projectiles (impact rounds) and has two purposes. It can be used by a limited number of specifically trained Tactical Support Group (TSG) or public order trained officers in serious public order situations to fire at selected individuals. Secondly, it can be used by a small number of specifically trained firearms officers as a less-lethal option at firearms incidents or non-public order incidents (e.g. suspect wielding a knife or sword).

Officers used AEPs on 84 occasions over the 12 month period 1 April 2020 to 31 March 2021; on 75 occasions it was pointed only and on 9 occasions it was discharged. On the 9 occasions it was discharged a total of 10 AEP rounds were fired. AEPs were only used as a less lethal option during the reporting period and were not used during any public disorder situations. The main reason officers gave for using AEP was to prevent harm to the subject. In regards to the ethnicity of the 9 members of the public on whom AEP was discharged, 7 were white and 2 were Irish Travellers. Of the 84 occasions when AEPs were used officers stated that they used this type of force 93% of the time to prevent harm to the subject.

The Board wrote to OPONI, seeking an update on the outcome of their investigation into the use of AEPs during the recent protests in April 2021 and the following was received on the 27 May 2021:

*“The recent use of AEP discharge has been notified to our Office. This matter is still being reviewed by PONI investigators. Initially it was thought there were 5 discharges, but it now transpires through our enquiries that there was 6. Of these discharges 4 have been defined as strikes and the other 2 as misses.*

*There is currently no public complaint around any of these discharges or strikes. Nor is there any referral from the Chief Constables office.*

*Whilst we continue to review body worn videos from these incidents PONI will keep an open mind as to whether or not the Ombudsman should use her own powers to “call herself in”.*

*PONI will continue to review to determine if there has been any Criminal/Misconduct/Breach of Code of Ethics and determine our investigation strategy post this analysis of data.”*

## **Police Dogs**

All Police dogs are under the control of Operational Support Department and can be used for a variety of purposes. Force is recorded in respect of a dog in the following scenarios:

- When the dog is deployed to achieve control of an immediate threat to the handler, other officers, innocent persons or the dog itself, whether or not the dog bites or causes injury;
- When the dog is deployed to apprehend a fleeing offender/subject, whether or not it bites or causes injury;
- When the dog bites at the direction of the handler and there is no injury; and
- When the dog bites not at the direction of the handler and there is no injury.

Police dog handlers reported using a police dog on 190 occasions against 195 members of the public between 1 April 2020 and 31 March 2021. Males aged 18-29 were the age group on which the dog was most frequently used. Of the 195 persons involved in incidents in which the dog was used, 13 were bitten by the dog. In the majority of cases when an officer used the police dog they stated that they used the dog to protect themselves or to effect arrest.

## Firearms

The Chief Constable has issued standing authority for all officers, so long as he or she has completed the necessary training, to be issued with a personal issue handgun. The PSNI have stated that this standing authority is kept under regular review.<sup>99</sup> Officers are required to report any instance when a personal firearm has been drawn or pointed even if it is not discharged. District Commanders/Heads of Branch ensure that an appropriate number of officers are trained in order to meet locally identified needs, based upon an evaluation of the prevailing security situation and risk assessment. There are also a number of specifically trained firearms officers to deal with pre-planned and spontaneous firearms incidents. These officers are deployed with Heckler & Koch weapons and the ‘Glock’ personal issue handgun, but they also have other less lethal options available (i.e. Taser and AEP).

PSNI reported that no firearms were discharged between April 2020 and 31 March 2021. Before this period, it was last discharged in May 2017. During the 12 months April 2020 to 31 March 2021 the firearm was drawn or pointed on 490 occasions. As previously noted in this chapter, PSNI reported that there has been an increase in the number of assaults on police officers on duty. This has increased from 2,714 in 2018/19 to 2,823 in 2019/20 and then again to 3,020 reported assaults against officers in 2021/21. These include the offences of assault with injury on a constable, assault without injury on a constable and attempted murder. The main reasons given for use of firearms across the last three years has consistently been to protect self (98%, 99%, and 98%) and to protect other officers (94%, 96%, and 96%). There were a further 63 occasions when officers drew their firearms for operational reasons due to a perceived threat when no members of the public were present. The firearm was used most frequently during incidents in dwellings (266 occasions), on roadways (121 occasions) and in gardens or on driveways (60 occasions).

### 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.<sup>100</sup> PSNI should report to the Board on the reasons for the increases in the number of times force has been used.

<sup>99</sup> Recommendation 65 of A New Beginning: Policing in Northern Ireland, Report of the Independent Commission on Policing for Northern Ireland, September 1999 (the Patten Report) stated that “the question of moving towards the desired objective of a routinely unarmed Police Service should be periodically reviewed in the light of developments in the security environment”. PSNI regularly assesses the need for continued carriage of firearms by PSNI officers in the context of the current security situation and reports to the Policing Board in writing on the outcome of its deliberations on an annual basis.

<sup>100</sup> It appears that in England and Wales some kinds of use of force, such as tasers, are eight times more likely to have been used against black people than white. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853204/police-use-of-force-apr2018-mar2019-hosb3319.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853204/police-use-of-force-apr2018-mar2019-hosb3319.pdf) and The Guardian (<https://www.theguardian.com/uk-news/2020/apr/17/rights-groups-quit-uk-police-body-stun-gun-use-bame-people>)

### **Death following police contact**

On 12 March 2021 a coroner delivered his findings into the death of Gerard McMahon who had died following restraint by officers in 2016. The coroner found that the use of force during the restraint was justified but the restraint was poor in terms of technique and criticised the training of officers. He also said that spraying CS spray directly into the deceased face was ‘not just unwarranted but also irresponsible’. The coroner also criticised other aspects of the interaction. Some of the lessons since this death had already been taken forward by PSNI before the coroner’s findings but some of them are still being considered by PSNI.

The Human Rights Advisor is awaiting a detailed response from PSNI in relation to this death and hope to include an interim report in next year’s Annual Report.

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## **3.7 NATIONAL SECURITY AND COVERT POLICING**

### **THE ROLE OF THE POLICING BOARD**

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

In respect of the exercise of specific counter-terrorism powers and security powers, the Performance Committee considers PSNI statistics on police use of stop and search and stop and question powers. The Board also takes account of the work carried out by other relevant oversight authorities. The Performance Committee meets regularly with the Independent Reviewer of Terrorism Legislation, the Independent Reviewer of the Justice and Security Act and the Independent Reviewer of National Security Arrangements in Northern Ireland, but not the Security Service.

Not all covert policing operations will involve a national security element, but national security policing is one area in which covert techniques are frequently deployed. In all circumstances, including where national security is an issue, it is the PSNI which mounts and is responsible for executive policing operations. Therefore, oversight through, for example, the Board is important, but complex. To clarify the oversight arrangements, Annex E to the St. Andrews Agreement was intended to provide a clear line of oversight and accountability following transfer of primacy. It includes a commitment by the British Government in relation to future national security arrangements in Northern Ireland. It was drafted in anticipation of the transfer of responsibility to the Security Services. The UK Government confirmed that it accepted five key principles. Adherence to those principles is crucial to the effective operation of national security arrangements. Those principles are:



1. All Security Service intelligence relating to terrorism in Northern Ireland will be visible to the PSNI;
2. PSNI will be informed of all Security Service counter-terrorist investigations and operations relating to Northern Ireland;
3. Security Service intelligence will be disseminated within PSNI according to the current PSNI dissemination policy, and using police procedures;
4. The great majority of national security CHIS in Northern Ireland will continue to be run by PSNI officers under existing police handling protocols; 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.

Annex E to the St. Andrews Agreement states regarding the role of the Board;

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

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 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 every case that material has been provided to the Board's (security vetted) Human Rights Advisor.

<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.

## THE SECURITY SITUATION

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This is a summary of the main findings from the report by His Honour Brian Barker QC, the Independent Reviewer of National Security Arrangements in Northern Ireland, covering the period from 1 January 2020 to 31 December 2020 presented to the Secretary of State for Northern Ireland:

‘2020 was a most difficult year, overtaken by, and then submerged under, the Covid-19 pandemic. It opened with good news: a functioning Executive and Assembly re-emerged after a three-year gap, in parallel with the publication of *New Decade, New Approach*. It closed, still under the shadow of the virus, with the departure of the United Kingdom from the European Union.

The dominant focus faced by the community throughout was to cope with the uncertainties of lockdowns, and the consequences of the unpredictable spread of the pandemic; a combination that led to considerable unforeseen pressures and understandable anxieties in all quarters.

The last visit to Northern Ireland that I was able to make was in February for a Northern Ireland Committee on Protection (NICOP) meeting. The subsequent lockdown, the medical and social emergency and no predictable future pathway made any subsequent planning and conducting of the usual types of personal briefings and interviews impossible. The alternative approach adopted was to receive regular briefings from members of MI5 and PSNI during virtual NICOP meetings.

Dissident Republican activity during the year was somewhat reduced due to enforced life pattern changes and continuing pressure from the security forces, as their leadership took stock. The number of incidents fell slightly compared to 2019. The overall picture in this area, sadly, had changed little. The threat from both dissident republican groups and loyalist paramilitaries remained, and some areas of the community continued to be subject not only to terrorist activities but also to unacceptable criminal acts and attitudes at a level which has almost come to be regarded by many as normal.

Nevertheless, a number of operations were successfully concluded and were marked with high profile court appearances of senior participants and the imposition of significant sentences. A major success was the coordinated arrest in mid-August of ten individuals who have since been charged with a variety of terrorist offences following a long running and carefully co-ordinated joint operation between MI5 and the PSNI. Incarceration of key individuals will be a serious blow to dissident republican operations with the resulting loss of leadership and planning capability.

My meetings with senior members of MI5 and PSNI were restricted to virtual contact through secure links in the latter part of the year. It was apparent that the many extra health and operative difficulties faced by MI5 since April, in order to continue to function at the expected level, had been overcome. Benefits gained from regular meetings at senior level with PSNI and the continuing strides made in overall co-operation with a variety of agencies had led to significant resulting successes in the field. The overall impression was of effective co-operation having gone up a level, as working partnerships were strengthened and respective responsibilities better understood.

The dire circumstances faced by the PSNI on the ground, coping externally with administering changing regulations and internally with infection and shielding, had required a change in posture; but adaptation had been impressive and results and control overall had been encouraging. The decrease in activity had led to a sharp decline in arrests under terrorism legislation, compared with the previous year, but there had been an increase in the recovery of ammunition and explosives. The traditional marching events, following leadership advice and public appeals, were severely curtailed.

I was pleased to note that the Policing Board were able to appoint a new Chair and Vice Chair in April and I look forward to the opportunity of meeting them. In the course of the year the Board published their new Corporate Plan and the new stylised Policing Plan 2020-2025. Their Human Rights Advisor was asked to examine the challenges and response of PSNI to community activity (including Black Lives Matter demonstrations). The conclusions were generally positive given the difficulties, although with some reservations.

The annual statistics published in November for 2019/20 show that the powers of stop and search under section 47a of the Terrorism Act 2000 were not exercised. There were 179 premises searched under warrant under section 37 Schedule 5 of the same Act. There were 128 (down from 146) persons detained under section 41 of the Terrorism Act and 125 (98%) were held for 48 hours or less. 17 persons were charged with a total of 39 offences including two charges of murder, one charge of attempted murder, 15 charges of firearms offences, 8 charges of drug offences and 6 charges of explosive offences.

A total of 26 (down from 34) persons were disposed of by non-jury trial, 18 of whom were found guilty of at least one charge. A total of 13 (down from 17) non-jury trial certificates were issued by the DPP. There was a total of 14 (up from 6) persons convicted in the Crown Court under the Terrorism Act 2000, the Terrorism Act 2006 or the Counter-Terrorism Act 2008. There were 465 (down from 1515) examinations carried out by police officers under Schedule 7 of the Terrorism Act 2000, all of these were examinations of persons, 34 of which resulted in a detention. No compensation or agency payments were made under section 38 schedule 4 of the Justice and Security (NI) Act 2007 where property was broken, destroyed or damaged or other private property rights interfered with.

The extent of my investigations, regrettably, have had to be extensively curtailed. However, in coping with extraordinary difficulties, I have good reason to believe that both MI5 and PSNI have maintained high standards and motivation and have achieved commendable results. The two major Dissident Republican groups undoubtedly suffered severe setbacks in what was a very successful year for the security forces. The danger remained of some sort of reactive show of strength, which fortunately did not materialise; and the minor groups continued to maintain a low profile. Police and prison officers continued to be regarded as legitimate targets and still had to face unacceptable risks. In pockets of the community intimidation continued, and although the figures for paramilitary shootings and beatings dropped, it continued to be concerning.

My conclusions, restricted by the exceptional conditions, in relation to Annex E of the St Andrews Agreement 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 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 top-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 new leadership of the Policing Board is now in place and the Human Rights advisor has been asked to investigate and provide reassurance to the Board. I look forward to a good working relationship with the new HR Advisor.

The Policing Board's Human Rights Advisor has discussed the national security assessment and the role of MI5 with Sir Brian Barker in May of 2021 and plan further discussions in due course.

## **RESPONSIBILITY FOR PROTECTING NATIONAL SECURITY**

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. In monitoring PSNI's compliance with the Human Rights Act 1998 in this regard, the Board relies upon Annex E to the St Andrew's Agreement. Annex E states that the Security Service will participate in briefings to closed sessions of the Board to provide appropriate intelligence background about national security related policing operations. 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.

Regarding the oversight of specific counter-terrorism and security powers, the 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 QC took over as the Independent Reviewer of Terrorism 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 report. Jonathan Hall QC's second Annual Report for (2019) was published in March 2021, and this helpfully contains a separate chapter on Northern Ireland (Chapter 9) raising key issues for the PSNI and for the Board to consider. Jonathan Hall QC commented on the national security arrangements as follows in his report for 2019:

9.15...the treatment of national security matters cannot be separated from its broader legal and operational environment. PSNI, who are principally accountable to the Northern Ireland Policing Board, continue to provide the operational policing response to terrorism. Since 2010, criminal justice in Northern Ireland has been devolved: so criminal procedure, sentencing, prisons and probation are all matters for the devolved legislature and executive (in particular, the Northern Ireland Department of Justice, overseen by the Minister of Justice). To the extent that social policy measures may reduce the recruitment of terrorists or lessen the impact of terrorism, these are all matters for the devolved authorities.

9.16 Discourse between the Northern Ireland Executive and those bodies with responsibility for national security in Northern Ireland is achieved through what are known as security interface meetings. These meetings, which take place on a quarterly basis, are attended by the Minister for Justice, the Northern Ireland Office and MI5 among others.

9.17 There is however less in the way of interaction between the devolved legislature and those responsible for national security in Northern Ireland. Local understanding of national security priorities is relevant:

- Firstly, because terrorism legislation passed by the Westminster Parliament often touches on devolved matters, as illustrated by the Counter-Terrorism and Sentencing Bill, which at the time of writing is being debated in the Westminster Parliament. Although the Westminster Parliament is ultimately free to legislate on a devolved matter such as sentencing, as a matter of convention it will not do so in the absence of a legislative consent motion from the devolved legislature.
- Secondly, because the devolved legislature has competence over matters, particularly those relating to criminal justice, there are huge consequences for how terrorism legislation operates in practice.

9.18 Both these reasons place a premium on elected members of the Assembly having some understanding of terrorism and national security in Northern Ireland, notwithstanding that national security on its own falls outside their legislative competence.

9.19 Standing in the way of greater engagement with elected representatives, and greater public openness, is the legacy of distrust for the institutions of national security, in particular MI5. There are individuals and communities within Northern Ireland who view the security services and the national security apparatus with a strong degree of suspicion, and Dissident Republicans have threatened attacks against politicians for little more than supporting recruitment campaigns to the PSNI.<sup>102</sup>

Jonathan Hall also notes a degree of asymmetry in classifications with only one:

9.23 ...type of violence that is considered “terrorist” or relating to national security: there is no other way to understand the assessment of PSNI and MI5 in 2015 that none of the groups in third category was “planning or conducting terrorist attacks” despite continuing to engage in violent activity including murder. It is a distinction that explains how violence is recorded for statistical purposes. For example, in 2019 the statistics record that there were two deaths “attributable to the security situation”: the murder of Ian Ogle by the Ulster Volunteer Force in January 2019; and the murder of Lyra McKee by the new IRA in April 2019. However, only the murder of Lyra McKee, arising out of shots fired by the new IRA on the police, is regarded as a “national security attack”. Two Independent Reviewers of the Justice and Security (Northern Ireland) Act 2007 have noted this type of classification which is peculiar to Northern Ireland.

102 Paras 9.15 to 9.19, footnotes omitted.

9.24. As a rule of thumb, Dissident Republicans, who reject the Belfast/Good Friday Agreement and are assessed to direct violence against police officers and other emanations of the state, are investigated as terrorists (leading to the term ‘national security terrorists’). The PSNI’s Terrorism Investigation Unit primarily uses Terrorism Act powers in conducting its investigations and, in accordance with the St Andrews Agreement, MI5 has an important intelligence gathering function.

9.25. By contrast, the activities of groups whose violence is assessed to be directed otherwise than at emanations of the state, are considered “paramilitary” and are investigated differently.

9.26. In general, the responsibility for tackling the threat and harm from paramilitarism and organised crime is devolved and rests with the Northern Ireland Executive...

9.38. Accepting, as I do, that Dissident Republicans continue to pose the greatest terrorist threat in terms of their capability and intent, there is still a significant persuasive burden on the authorities in Northern Ireland (or at least one of them) to explain directly to the public why the current division of labour has been adopted. In this way terrorism legislation in Northern Ireland will be used in a way that best commands public confidence; and the use of non-terrorism legislation and measures, which is to be welcomed, is also accepted as a legitimate means of addressing the legacy of violent groups.<sup>103</sup>

#### **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.

Jonathan Hall’s report also very helpfully sets out the details of the use of the Terrorism Act in Northern Ireland and there is little point repeating these here.<sup>104</sup> However, it is worth mentioning his concern over the fact, unlike in Great Britain, the arrest power in section 41 is used very often by the PSNI but results in fewer convictions compared with the proportionate figure for England and Wales. He also raises a particular problem in the PSNI using the Terrorism Act to arrest rather than the ‘normal’ police powers provided by PACE. It is of particular concern because, as he says there are perfectly justifiable reasons for not arresting someone under section 41 of the Terrorism Act 2000, for example if they are young or vulnerable and it would therefore be in their best interests to be released on bail while an investigation is ongoing.<sup>105</sup>

103 Footnotes omitted.  
104 Paras 9.60 onwards.  
105 Para 9.65.

### RECOMMENDATION 18

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.

## THE SECURITY SERVICE

Neither the Policing Board nor the Human Rights Advisor has oversight over MI5 (nor any other Northern Ireland institution). In fact, MI5 is only accountable to politicians – directly to the Home Secretary<sup>106</sup> and to the Security and Intelligence Committee of the Westminster Parliament.<sup>107</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>108</sup> MI5 objectives are as follows:

‘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.

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>109</sup>

MI5’s Covert Human Intelligence Sources (agents or informers) are (like those of PSNI) authorised to commit criminal offences in Northern Ireland. Although the new Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (see below) will require a more formal authorisation process, ‘MI5 maintains internal guidelines which require the ‘authorising officer’ to weigh the harm to the public interest involved in the criminal act against the benefit expected from the information or access the agent will be able to provide, while taking into account the agent’s cover and safety.’<sup>110</sup>

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

107 <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)

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

109 Section 1, the Security Service Act 1989.

110 Para 30, Northern Ireland-related terrorism, Intelligence and Security Committee, October 2020.



The assessment of the need for MI5 to continue its work in Northern Ireland:

‘In 2009, MI5 had planned to reduce resources allocated to Northern Ireland work, but a sudden spike in activity by Dissident Republican (DR) groups meant they had to reverse the decision, saying they had *“had to reinforce in Northern Ireland in order to keep ourselves in a position where we had a reasonable prospect of being able to stop planned attacks.”* This re-prioritisation had a *“disruptive effect”* on MI5’s overall plans. In the Committee’s 2016–2017 Annual Report, we noted that, even with sustained and significant pressure from MI5 and the police, the threat from DRs remained resilient.

42. As at 31 March 2018, allocation of effort on Northern Ireland Related Terrorism accounted for approximately 20% of MI5’s operational and investigative resources. \*\*\*. \*\*\*. We were told that, as HMG reviews its strategic approach to NIRT, there is likely to be greater focus on preventing individuals turning to terrorist activity in order to diminish the flow of new recruits to dissident organisations, which should \*\*\*.

43. MI5’s overarching strategy also reflects this strategic focus on diverting individuals away from becoming involved with terrorist groups, alongside steady suppression of the existing threat by degrading the capabilities of DR groups and disrupting their activities. However, MI5 does not view total suppression as realistic: they *“do not proceed with an assumption that we can continue to drive [NIRT attacks] down to zero. That looks to us to be an undeliverable goal, albeit one we should always strive towards.”*<sup>111</sup>

There is close liaison between MI5 staff and PSNI officers and MI5 will provide substantial intelligence to PSNI which helps to identify criminal activities. MI5 has other objectives however and does not have a duty to investigate crime or to ensure suspects are taken through the criminal justice process. However, it would be a mistake to exaggerate this difference – MI5 has stated that criminal justice outcomes are its ‘preferred course of action whenever achievable’.<sup>112</sup>

Inevitably there is tension given the difference in primary objectives<sup>113</sup> but the Human Rights Advisor has been reassured by PSNI that this tension is dealt with productively and those PSNI officers liaising with MI5 have the support, where necessary, of the Assistant Chief Constable responsible for crime. Those PSNI officers are also content that they have visibility of MI5 operations in NI (including the use of CHIS) and that the regular joint tasking meetings allow any differences to be quickly resolved.

111 Para 41 to 43, footnotes in original text have been removed. The \* in the text indicates that words in the original ISC report to Parliament have been removed before the report was published.

112 Para 21, Northern Ireland-related terrorism, Intelligence and Security Committee, October 2020.

113 The PSNI’s functions are ‘to protect life and property, to preserve order, to prevent the commission of offences’ and ‘where an offence has been committed to take measures to bring the offender to justice’, s. section 32(1), the Police (Northern Ireland) Act 2000.

The Human Rights Advisor met with the Director of the Security Service for Northern Ireland, and some of her staff in September 2021, alongside the relevant ACC and his officers. The Human Rights Advisor was shown material setting out the roles and working together processes and he intends to follow this up with a more detailed analysis of the material later in the autumn of 2021 and to visit premises and meet staff. He also discussed the use and procedures for authorising CHIS, noting that such work is already subject to separate oversight mechanisms.

## **NATIONAL CRIME AGENCY**

The Policing Board was given responsibility for holding the National Crime Agency (NCA) to account when the NCA was established.<sup>114</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>115</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. Discussions with the NCA about more detailed consideration and human rights assurance, particularly in relation to covert activities, started in 2021 and a more detailed report will be produced in due course.

## **COVERT SURVEILLANCE**

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

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

In 2000, the Government introduced the Regulation of Investigatory Powers Act 2000 (RIPA), which had the stated intention to better regulate and make human rights compliant rules on covert activity. RIPA must be interpreted and applied where possible so as to comply with the ECHR. Therefore, even with a regulatory regime which contains a number of safeguards, the requirement to consider the various elements such as proportionality, remains; slavish attention to the technical aspects of RIPA does not guarantee human rights compliance.

<sup>114</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>115</sup> <https://www.nipolicingboard.org.uk/national-crime-agfurfhency>

The police powers governed by RIPA are: the interception of communications (in the course of its transmission by means of a public postal service or public communication system); intrusive surveillance on residential premises and in private vehicles; covert (directed) surveillance; the use of Covert Human Intelligence Sources (CHIS - commonly referred to as police informants, agents and undercover officers); the acquisition of communications data (for example itemised telephone billing and telephone subscriber details); and, the investigation of electronic data protected by encryption. One of the safeguards provided by RIPA is the requirement that covert operations must be subject to an authorisation regime.

### **Investigatory Powers Act 2016**

The Investigatory Powers Act 2016 provided an updated framework for use by the security and intelligence agencies, law enforcement and other public authorities of investigatory powers to obtain communications and communications data.<sup>116</sup> These powers cover the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. The Act also makes the provision relating to the security and intelligence agencies' retention and examination of bulk personal datasets. The Act governs the powers available to the state to obtain communications and communications data. It provides more consistent statutory safeguards and clarifies which powers different public authorities can use and for what purposes. 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 new requirement for Judicial Commissioners to approve the issuing of warrants for the most sensitive and intrusive powers. The Act also created a new Commissioner to oversee the use of all of these 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.

Finally, the Act provides a power for the Secretary of State to require, by notice, communications services providers to retain internet connection records. However, this new Act did not repeal the whole of RIPA and some of the basic provisions of RIPA remain unchanged.

The Investigatory Powers Commissioner's Office (IPCO) conducts annual inspections of PSNI and makes recommendations.

The Human Rights Advisor has reviewed the inspection reports by the Independent Powers Commissioner's Office and noted that, overall, it is positive in respect of PSNI practice and procedure. While there were suggestions for improvement and two formal recommendations, in the view of the Advisor, neither of those recommendations raised issues of human rights compliance. The most recent inspection by ICPO took place on 7-10 June 2021 and the Human Rights Advisor has reviewed the recommendations.

<sup>116</sup> For more information see the Investigatory Powers Commissioner's Office, <https://www.ipco.org.uk/who-we-are/investigatory-powers-commissioner/>. Also Covert Policing, Simon McKay, 2015, OUP (which was written before the 2016 Act), Blackstone's Guide to the Investigatory Powers Act, Simon McKay, 2017, OUP and Covert Investigations, Clive Harfield and Karen Harfield, 5th ed., 2018, Blackstone's Practical Policing.

## **Management and Handling of Covert Human Intelligence Sources (CHIS)**

Covert Human Intelligence Sources (CHIS) or informers, may only be authorised for use in accordance with the Regulation of Investigatory Powers Act 2000 (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.

A relationship is established or maintained for a covert purpose if and only if it is conducted in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the purpose. A relationship is used covertly, and information obtained is disclosed covertly, if and only if, the relationship is used or the information is disclosed in a manner that is calculated to ensure that one of the parties to the relationship is unaware of the use or disclosure in question.

It is fundamentally important that a CHIS is clear on what is and is not authorised at any given time and that all the CHIS's activities are properly risk assessed. The use or conduct of CHIS is a particularly intrusive and high-risk covert technique, requiring dedicated and sufficient resources, oversight and management. For example, all use or conduct must be necessary and proportionate to the intelligence that it seeks to achieve and in compliance with relevant Articles of the ECHR, particularly the right to privacy.<sup>117</sup>

Article 8 of the ECHR includes the right to privacy and the right to a private life, including the right to establish and develop relationships. Any manipulation of a relationship by a public authority therefore will engage Article 8, regardless of whether or not the public authority intends to acquire private information. Importantly though, not everyone providing information will be a CHIS. A member of the public who volunteers information or a professional person who discloses information out of professional or statutory duty will not be a CHIS. Critically, if it is known or suspected that an individual may be vulnerable (including by reason of age), that person should only be authorised to act as a CHIS in the most exceptional circumstances.

<sup>117</sup> See the Undercover Policing Inquiry set up by the Home Secretary <https://www.ucpi.org.uk/about-the-inquiry/>. This Inquiry was in response to independent reviews by Mark Ellison QC, which found “appalling practices in undercover policing”.

A CHIS may also infringe on the Article 8 rights of others. The interference with the private and family life of persons who are not the intended subjects of the CHIS activity is called collateral intrusion. Measures are required wherever practicable, to avoid or minimise interference with the private and family life of those who are not the intended subjects of the CHIS activity. Where collateral intrusion is unavoidable, the activities may still be authorised providing the collateral intrusion is considered proportionate to the aims of the intended intrusion. Any collateral intrusion should be kept to the minimum necessary to achieve the objective of the operation. Applications for authorisations will therefore include an assessment of the risk of any collateral intrusion, and details of any measures taken to limit this, to enable the authorising officer fully to consider the proportionality of the proposed use or conduct of CHIS.

That also means that if the nature or extent of intrusion into the private or family life of any person becomes greater than anticipated in the original authorisation, the authorising officer should immediately review the authorisation and reconsider the proportionality of the operation. Furthermore, authorising officers need to be aware of particular sensitivities in the local community where CHIS are being used and of similar activities being undertaken by other public authorities which could have an impact on the deployment of the CHIS. Consideration should also be given to any adverse impact on community confidence or safety that may result from the use or conduct of CHIS. Confidential information obtained by the use of CHIS is regulated and if the confidential material includes material that is legally privileged a higher threshold again must be met.

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. Authorisations for children are also shorter in duration than for adults.

To ensure proper oversight and management of CHIS, individual officers are appointed as handlers and controllers. When deploying a CHIS the police must always take into account the safety and welfare of the CHIS and the foreseeable consequences to others before authorising their use or conduct. Therefore, a risk assessment will be carried out to determine the risk to the CHIS of any tasking and the likely consequences should the role of the CHIS become known. The ongoing security and welfare of the CHIS, after the cancellation of the authorisation, should also be considered at the outset. Consideration should be given to the management of any requirement to disclose information tending to reveal the existence or identity of a CHIS. In practice, a CHIS handler will be responsible for bringing to the attention of the CHIS controller any concerns about the personal circumstances of the CHIS, insofar as they might affect: the validity of the risk assessment; the conduct of the CHIS; and the safety and welfare of the CHIS. Authorisations are kept under regular review.

The Investigatory Powers Act creates new oversight arrangements through – the Investigatory Powers Commissioner. A complainant may bring a complaint to the Commissioner or to the Investigatory Powers Tribunal but the right to a remedy for breach of an infringement depends upon the person affected by it knowing of the infringement. By the very nature of covert surveillance that is rarely the case.

The ECHR has reiterated that ‘subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively.’<sup>118</sup>

In 2017, PSNI revised and reissued its manual on the management of CHIS. The PSNI also follows, for example, the NPCC guidance. The PSNI manual was provided to the Board’s then Human Rights Advisor who was also provided with accompanying guidance, protocols and Service level Agreements. Additionally, she was briefed by officers on the operation of the same. While the Human Rights Advisor is unable to share secret information or disclose, beyond the Board, confidential information, she briefed the Performance Committee about the arrangements and mechanisms in place to ensure compliance with the Human Rights Act 1998. The PSNI recognise not just the legal parameters but also the necessity to be ethical in all decision making and actions.

The manual is a comprehensive document, which covers, amongst other things: ethics, human rights standards, policing with the community ethos, training as well as the more technical aspects of CHIS management. Risk assessment and procedures for ensuring the management of risk are detailed and carefully considered. The combination of the above documents, training and oversight, including that permitted to the Human Rights Advisor, has created an environment and operational framework which will, so far as it is possible, secure compliance with human rights standards and the general principles set out above.

The Human Rights Advisor has reviewed the last few annual inspection reports and the response to the recommendations made, including being briefed on PSNI CHIS handling issues, directed surveillance and other techniques. The inspections revealed a small number of recommendations and a slightly larger number of suggestions by the IPCO but none were particularly significant and all had been addressed.

118 Weber & Saravia v Germany (2008) 46 EHRR, see also Kennedy v UK (2008).

## 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.

## COVERT HUMAN INTELLIGENCE SOURCES: CRIMINAL CONDUCT AUTHORISATIONS

The Covert Human Intelligence Sources (Criminal Conduct) Act 2021 amends existing legislation - the Regulation of Investigatory Powers Act 2000 (RIPA) - to create a new process of 'Criminal Conduct Authorisations'. This will 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.<sup>119</sup>

Many attempts were made by Conservative, Labour and other MPs to amend the Bill in the Commons, but only a few amendments were eventually agreed. The Act was given Royal Assent on 1 March 2021, but no date has yet been given for implementation.

The following excerpts are taken from the House of Commons briefing paper and debates set out the historical context of the use of covert human intelligence sources;

“Throughout history, those entrusted to uphold the law or safeguard national security have used covert human intelligence to support and progress their activity. From Sir Francis Walsingham’s use of informers to defend the reign of Elizabeth I from internal and external threats, to the deployments by the newly formed detective units of the Metropolitan police in the latter half of the 19th century, to the double-cross system in the second world war, covert human intelligence has always been a vital part of our national security and law enforcement framework.”<sup>120</sup>

“The need for agents of the security and intelligence agencies and law enforcement to engage in criminal conduct has been tacitly accepted for some time. However, as more details of the practice have emerged, there has been concern as to the sufficiency of safeguards that constrain such activity. The Government argue that the obligation on public authorities to act compatibly with the European Convention on Human Rights is sufficient to prevent the powers contained in the Bill being used to authorise serious abuses.”<sup>121</sup>

119 For PSNI this Act will come into force on 15 September 2021, S1 605 of 2021.

120 Minister for Security, Second Reading, debated on Monday 5 October 2020, available at [https://hansard.parliament.uk/commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/commons/2020-10-05/debates/DF29B1ED-6BB3-414A-A65E-53CD4BAB694A/CovertHumanIntelligenceSources(CriminalConduct)Bill)

121 House of Commons, Briefing Paper, Number 9012, 2 October 2020.

“That this may involve participation in criminality is also generally accepted. There are various reasons why this may be necessary, for example, membership of a proscribed group may in itself be an offence; they may need to participate in order to maintain cover, avoid repercussions for refusing to do what is asked of them, or to frustrate the purpose of a conspiracy. They may also need to act in self-defence. An agent acting in this way may lack the requisite mens rea, or guilty mind, to attract criminal liability.”<sup>122</sup>

## **THE THIRD DIRECTION CASE**

Privacy International and Reprieve (and Committee on the Administration of Justice and the Pat Finucane Centre who later joined this case) challenged the Security Service (MI5) on the basis that its ‘third direction’ policy was unlawful and secret. In response to the legal proceedings, the Government published a redacted version of the guidelines. The policy revealed that neither RIPA nor the code of practice authorised CHIS to participate in criminal activity. Instead, the authorisation would be the explanation and justification of the service’s decisions should such criminal activity come under scrutiny by an external body, for example, the police or prosecuting authorities.

In addition, the guidelines noted that the authorisation process and associated records may form the service’s representation to the prosecuting authorities that prosecution is “not in the public interest”.

In December 2019, the Investigatory Powers Tribunal, by a majority 3-2, found that the guidelines did not breach human rights nor grant immunity to those who participated in serious criminal activity. However, the two dissenting opinions to the judgment, found that there was no legal basis for the policy under challenge.

The Court of Appeal, however, unanimously agreed with the majority of the Tribunal and found that the current arrangements were lawful.<sup>123</sup> It is understood that the NGOs in the case are seeking to appeal to the Supreme Court.

Human rights are obviously central to this case but could not be directly made in the case because the case was taken by NGOs and only a ‘victim’ of a human rights violation can take proceedings under the Human Rights Act.

<sup>122</sup> House of Commons, Briefing Paper, Number 9012, 2 October 2020

<sup>123</sup> *Privacy International, Reprieve, Committee on the Administration of Justice and the Pat Finucane Centre v. The Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department, Government Communications Headquarters, Security Service and Secret Intelligence Service*  
<http://www.bailii.org/ew/cases/EWCA/Civ/2021/330.html>



## CONTEXT IN NORTHERN IRELAND

The Act will apply in Northern Ireland and England and Wales (as does RIPA) but the Scottish Government has decided it will not apply in Scotland. The codes and guidance produced by the Home Office (it is a Home Office sponsored Act) will apply in Northern Ireland.<sup>124</sup> There are obviously specific concerns from the past that are relevant and the circumstances in Northern Ireland, especially the murder of Patrick Finucane, have been mentioned frequently during the debates on the Bill. As people will know, Patrick Finucane, a practising lawyer, was murdered in his home in North Belfast. Gunmen from the paramilitary group the Ulster Defence Association reportedly carried out the attack.

In December 2012, Sir Desmond de Silva QC published his findings into a review examining the role played by agents and employees of the state in the murder of Patrick Finucane. Sir Desmond found that the evidence relating to the murder had left him in “no doubt” that agents of the state were “involved in carrying out serious violations of human rights up to and including murder”. However, he also noted that despite the “different strands of involvement by elements of the state”, he was “satisfied” that they were not linked to a state “conspiracy” to murder the lawyer.

Summarising his findings, Sir Desmond also clarified that his review had “not concluded” that the running of agents within terrorist groups was an “illegitimate or unnecessary activity”. In contrast, he stated that the “principal lesson” to be learned from his report was that “agent-running must be carried out within a rigorous framework”. Such a framework would need to be structured to ensure “adequate oversight and accountability”. Concluding, Sir Desmond stated that, “It is essential that the involvement of agents in serious criminal offences can always be reviewed and investigated and that allegations of collusion with terrorist groups are rigorously pursued.”<sup>125</sup>

## ISSUES WITH THE BILL AND ACT

In both the Commons and Lords, as well as more widely, there has been wide acceptance of the necessity to authorise criminal conduct by covert human intelligence sources, but there are some controversial features of the Bill.

### Scotland

Scotland was removed from the Bill’s remit – the Scottish Government withheld consent because of the human rights issues raised by the Bill, concluding:

‘The Scottish Government has been insistent with the UK Government in requiring enhanced independent oversight by the Investigatory Powers Commissioner’s Office at an early stage in the authorisation process to be included in the Bill.’<sup>126</sup>

124 The CHIS Code has been amended to deal with criminal conduct authorisation, see page 35 onward of the draft new Code of January 2021 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/949806/Covert\\_Human\\_Intelligence\\_Sources\\_Draft\\_Revised\\_Code\\_of\\_Practice\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949806/Covert_Human_Intelligence_Sources_Draft_Revised_Code_of_Practice_FINAL.pdf)

125 Parliamentary briefing on the Bill by the House of Lords Library  
<https://lordslibrary.parliament.uk/research-briefings/ln-2020-0124/>

126 Legislative Consent Memorandum, Covert Human Intelligence Sources (Criminal Conduct) Bill,  
[https://www.parliament.scot/S5\\_Bills/SPLCM-S05-48.pdf](https://www.parliament.scot/S5_Bills/SPLCM-S05-48.pdf)

## Reasonable Belief

In the Act the decision to authorise criminal conduct does not include the word ‘reasonable’. Amendments were made to include this word, but were rejected by the Government and the Minister of State for the Home Office stated in the House of Lords:

‘[the amendment] would place on the face of the Bill the requirement that an authorising officer must reasonably believe an authorisation is necessary and proportionate. As I have previously confirmed, it is indeed the case that the belief of the authorising officer should be a reasonable one. The revised code of practice confirms this, and in response to concerns raised by noble Lords, this was further amended to make that clear. However, placing this requirement on the face of the Bill risks casting doubt on whether the belief must be reasonable when that is not specified elsewhere—for example, in Section 29 of Part II of RIPA.’<sup>127</sup>

However, the Government has tried to make this clear in the draft Code of Practice:

“it is expected that the person granting the authorisation should hold a reasonable belief that the authorisation is necessary and proportionate.”<sup>128</sup>

## What Crimes can be authorised?

A particularly important issue, was were the subject of amendments and debates in both Houses of Parliament, concerned the absence of any restriction as to what kinds of crimes could be authorised. The most recent amendment agreed by the House of Lords but rejected by the government (and therefore the House of Commons) would have added the following words to the Bill:

“A criminal conduct authorisation may not authorise any criminal conduct -

1. (a) intentionally causing death or grievous bodily harm to an individual or being reckless as to whether such harm is caused;
2. (b) involving an attempt in any manner to obstruct or pervert the course of justice;
3. (c) amounting to an offence under the Sexual Offences Act 2003, the Sexual Offences (Scotland) Act 2009 or any offence listed in Schedule 3 to the Sexual Offences Act 2003;
4. (d) subjecting an individual to torture or to inhuman or degrading treatment or punishment, within the meaning of Article 3 of Part 1 of Schedule 1 to the Human Rights Act 1998; or
5. (e) depriving a person of their liberty, within the meaning of Article 5 of Part 1 of Schedule 1 to the Human Rights Act 1998.”

<sup>127</sup> 9th February 2021, col.180

<sup>128</sup> Draft Code, para. 6.4.

The government argued:

‘We have discussed at length why this is not workable and risks CHIS testing and harm to the public by enabling the development of wider initiation tests. To be clear, it is the assessment of operational partners that to explicitly rule out rape, for example, would lead to gangs asking potential members to rape people to prove that they are not working on behalf of the state.

Let me once again confirm that the necessity and proportionality tests and the Human Rights Act provide limits to the conduct that can be authorised. An authorisation that is not compatible with the Human Rights Act will not be lawful, and this is clear in the training and guidance of all public authorities.’<sup>129</sup>

### **Criminal Injuries Compensation**

The government eventually accepted arguments that the Bill should make it clear that, despite any authorisation to commit a crime, any victim of such a crime would remain entitled to compensation.<sup>130</sup>

### **Restrictions on authorisations of crimes by children and young people**

As a result of the Parliamentary debates the Act now imposes extra restrictions on any authorisations involving children, vulnerable individuals or victims of modern slavery and requires consultation with parents, guardians or appropriate adults.

### **Ex-post facto notifications to Judicial Commissioners**

There was some external pressure and debate in both Houses to alter the Bill to require judicial authorisations (rather than only by MI5 or police officers themselves) for criminal conduct. This was not successful but eventually it was agreed that every such authorisation would be provided to the Judicial Commissioners once made. The amendment also gave a Judicial Commission, on receipt of the authorisation, the power to cancel that authorisation.

Other issues the subject of amendments by Parliamentarians, but not agreed included:

- Instead of giving complete immunity the Bill should have required prosecutors to take account of the informer’s role before any prosecution is commenced;
- The Bill ‘authorises’ criminal conduct outside of the UK<sup>131</sup>;
- An authorisation can be made not just on the basis of national security or the prevention of serious crime but any crime (no matter how trivial), to prevent disorder (even non-serious disorder) or for the economic well-being of the nation; and
- There is concern that the Act might allow past crimes to be retrospectively authorised.

129 Minister of State for the Home Office, 9th February 2021, col.181.

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131 The Irish Government have recently confirmed that, notwithstanding this Act and any authorisation, crimes committed in the Republic will be investigated and pursued in the usual way [https://www.oireachtas.ie/en/debates/question/2020-11-19/280/#pq\\_280](https://www.oireachtas.ie/en/debates/question/2020-11-19/280/#pq_280)

### **Implications for the PSNI**

The Board wrote to the Chief Constable in December 2020 suggesting discussions should commence in relation to the idea of the PSNI developing its own guidance on the authorisation process and the role of the Board in approving this guidance. This guidance might reassure the public and could impose specific restrictions, controls or guidance to try to deal with, at least some, of the issues raised in Parliament. Careful guidance might also avoid the risk that PSNI will violate human rights law (including of innocent victims), limit the use of children in committing “authorised crimes” and resolve some of the issues resulting from PSNI agents or informers 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). Discussions with the PSNI are continuing.

The PSNI have been very open with the Human Rights Advisor on how it will use the new law and have set out its procedure from him to consider. The PSNI also intend to invite to attend the CCA authorising officers, table-top, training exercise, planned in advance of the new law coming into force in September 2021.

#### **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.

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## **3.8 VICTIMS OF CRIME: VULNERABLE VICTIMS AND VICTIMS HISTORICALLY UNDER PROTECTED**

Victims of crime and potential victims of crimes are entitled to protection from the police and for these crimes to be investigated. Victims of crime have the right to have their privacy and property protected and to be protected from violence and threats to their life.<sup>132</sup> Certain victims of crimes have not always been as well served by police services around the world as they should be and can justifiably claim that their right to be protected has been not been given the priority that it deserves and that this violates the right to be treated fairly (Article 14 of the European Convention on Human Rights). It is the intention that this chapter will focus on these groups and focuses on their right to be protected.

### **DOMESTIC ABUSE**

The Human Rights Advisor made the following recommendation in 2019/20 Annual Report:

“As a result of the proposed new legislation on domestic violence in respect of domestic abuse, harassment, stalking and coercive control, which is to be 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 new powers and the proposed training plan for officers.” [Rec 12].

In response to the recommendation, PSNI has advised the training programme for the new Domestic Abuse and Family Proceedings Bill commencing on 1 November 2021, was launched in March 2021 with the aim of changing how frontline officers and staff understand and respond to domestic abuse, particularly the investigation of the new domestic abuse offence which will criminalise abusive behaviour. The programme aims to raise awareness of the varied forms of domestic abuse, physical and non-physical and provides strategies and skills to improve outcomes for victims. The Human Rights Advisor has reviewed the material and was particularly impressed with its quality.

<sup>132</sup> Obviously, these are not absolute rights and the police service often has to prioritise the most serious crimes.

Following discussion in September 2020 the Performance Committee wrote to the Justice Committee, highlighting their concerns that, ‘... the Bill does not include domestic abuse protection notices (DAPNs) or domestic abuse protection orders (DAPOs)<sup>133</sup>. In benchmarking with England and Wales through police performance monitoring in regards to domestic violence and abuse, the Board understand considerable merit in introducing domestic abuse protection notices and orders,’ and, ‘...Given the considerable merit, the Board would support the introduction of these notices and orders within legislation.’

In response the Justice Committee stated that, ‘...The Justice Committee supports the introduction of DAPN/O’s in Northern Ireland. While appreciating the need to develop the policy in this regard and identify the most appropriate option for Northern Ireland, the Committee is concerned about the length of time Northern Ireland has already been without any form of these protection notices and does not find any reassurance in the fact that legislative provision for such notices is only going to be advanced by the Department of Justice during the progression of the proposed Justice Miscellaneous Provisions Bill. The Committee has therefore agreed to bring forward an amendment to the Domestic Abuse and Family Proceedings Bill at Consideration Stage to place a duty on the Minister to provide for a scheme within 24 months of commencement of this legislation with the aim of ensuring appropriate progress is made in this area.’

The Justice Committee launched a public consultation on 3 December 2020 on proposals to introduce DAPN/Os and it is now understood that Section 27 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 provides that the Department of Justice may, by Regulations, make provision to bring forward steps or measures to protect victims of domestic abuse, including through new DAPN/Os (though not necessarily limited to this) and that such Regulations will need to be laid by the end of 2023.

During 2020/21 through the Policing Plan 2020-2025 and Performance Plan 2020/21, the Policing Board agreed on using the Outcomes Based Accountability (OBA) framework to improve evidence-based monitoring, analysis and evaluation of the PSNI across the Plans which include analysing PSNI performance regarding Domestic Violence and Abuse against the following Measures:

- **1.1.1** - Repeat victimisation rate and report on initiatives to support repeat victims with a focus on victims of (i) Domestic Abuse in 2020/21;
- **1.2.1** - Repeat offending rate and report on initiatives to reduce repeat offenders with a focus on Domestic Abuse in 2020/21; and,
- **2.4.1** - Levels of crime outcomes to identify and respond to areas of concern in outcomes statistics, with a particular focus on domestic abuse in 2020/21.

<sup>133</sup> Domestic abuse protection notices [DAPNs] will provide immediate protection following a domestic abuse incident, while domestic abuse protection orders [DAPOs] from the court will provide flexible, longer-term protection for victims.

As mentioned in the Board's Thematic Review of PSNI's Response to COVID<sup>134</sup>, throughout the lockdown period the PSNI saw an increase in demand for service, including a significant increase in domestic abuse calls. During this period of emergency and increased pressure of policing demand additional services were being provided to those who were most vulnerable.

This year shows the highest financial year figure recorded since 2004/05 for the number of domestic abuse crimes [19,036], an increase of 408 (2.2%) on the previous 12 months and the third highest financial year figure recorded of domestic abuse incidents with 31,196 domestic abuse incidents during the 12 months from 1 April 2020 to 31 March 2021 - a slight decrease of 621 (2%) on the previous 12 months<sup>135</sup>, i.e. incident levels in 2020/21 are one and a half times higher than in 2004/05 and crime levels nearly twice as high.

There were nine murders with a domestic abuse motivation, compared with four during 2019/20. In eight of these murders the victim was female, compared with two female victims in 2019/20. In December 2020 the Department of Justice launched domestic homicide reviews.<sup>136</sup>

24.1% of domestic abuse victims were repeat victims during 2020/21 and experienced 49.1% of all domestic incidents, while 26.2% of all domestic abuse perpetrators were repeat perpetrators. In order to address this, PSNI launched a repeat perpetrator strategy which mirrors the repeat victim strategy and provides support information to perpetrators, ensuring that all criminal justice opportunities are explored. A Public Protection Notice (PPN) was launched in November 2020 which helps better identify high risk victims and enables speedier and more effective information sharing with external partners via an automated referral response.

A new victims callback scheme for all victims of domestic abuse was introduced during the first lockdown delivered by officers/staff who were shielding and to date there have been 13,332 victim callbacks, resulting in 487 additional referrals, 846 follow up actions for investigating officers and 32 new crimes being reported. This scheme is currently being evaluated.

The use of Body Worn Video at domestic abuse calls has increased from 54.7% in March 2020 to 88.2% in March 2021, which is a welcome improvement. This creates additional evidential opportunities and increased potential for criminal justice outcomes.

<sup>134</sup> <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/report-on-the-thematic-review-of-the-policing-responser-to-covid-19.PDF>

<sup>135</sup> [https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/2020-21/q4/domestic-abuse-bulletin-mar\\_21.pdf](https://www.psnipolice.uk/globalassets/inside-the-psni/our-statistics/domestic-abuse-statistics/2020-21/q4/domestic-abuse-bulletin-mar_21.pdf)

<sup>136</sup> If 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 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.

## HATE CRIME

Motivation	Total number of incidents recorded			Total number of crimes recorded		
	Apr'19 to Mar'20	Apr'20 to Mar'21	Change	Apr'19 to Mar'20	Apr'20 to Mar'21	Change
<b>Racist</b>	936	993	57	626	719	93
<b>Homophobic</b>	272	366	94	195	246	51
<b>Sectarian</b>	888	934	46	639	674	35
<b>Disability</b>	99	90	-9	72	58	-14
<b>Faith/Religion</b>	41	39	-2	15	26	11
<b>Transphobic</b>	64	71	7	34	34	0

Increases in the recorded levels of hate abuse should be viewed positively as it is generally understood that this crime type is under-reported. Increased reporting will ensure that a fuller picture of the extent of hate crime in Northern Ireland can be established and the appropriate problem solving measures developed.

Speaking about the increase in hate crime in Northern Ireland, Amnesty NI is reported as saying,

“These hate crime figures continue at worryingly high rates. Overall, there are more than six hate-motivated incidents or crimes reported to the police every day in Northern Ireland.

While the number of incidents motivated by racism has declined slightly in the last year, these figures remain persistently high and exceed the number of such incidents reported to the police back in 2004/05 when statistics began.

The rate of incidents motivated by racism have consistently outstripped those motivated by sectarianism since 2015/2016, despite the relatively small numbers of people in Northern Ireland from ethnic minority backgrounds.

The notable decline in incidents motivated by sectarianism since records began is a welcome long-term trend, with the number of incidents halved since 2005/06. However, that is still 888 incidents too many, with every occasion causing someone to feel fear and intimidation.

The frequency of homophobic hate crime in Northern Ireland remains a disturbing long-term trend, while incidents motivated by transphobia have doubled in the last year – a very worrying development which must be addressed by the police and the wider community.”



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 service ensures that repeat hate crime victims are identified and offered the appropriate support locally<sup>137</sup>.

In December 2020 the Independent Review into Hate Crime Legislation led by Judge Marrinan was published making a series of recommendations for the criminal justice sector in Northern Ireland. His report recommends a new definition of hate crime;

*“A hate crime may be defined as a criminal act perpetrated against individuals or communities with protected characteristics based on the perpetrator’s hostility, bias, prejudice, bigotry or contempt against the actual or perceived status of the victim or victims.”*

The outcome of the review will be published by the Department of Justice in May 2021 and the Board will consider the impact of its findings with PSNI. The Hate Crime Action Plan for Northern Ireland contains actions for all statutory and voluntary partners covering areas such as: Reducing the Number of Victims; Evidence Base; Increasing Awareness and Understanding; Increasing Reporting; Support for Vulnerable Individuals/Groups; and Legislative Powers/Enforcement.

The Northern Ireland Policing Plan 2020-2025 and the supporting Performance Plan 2020/21 contains the following Measure: *Repeat victimisation rate and report on initiatives to support repeat victims with a focus on victims of (iii) Hate Crime in 2020/21*. Statistics indicate that in the 12 months from 1 April 2020 to 31 March 2021<sup>138</sup> the number of incidents recorded rose across four of the six hate motivations (racist, homophobic, sectarian, and transphobic) when compared with the previous 12 months; the number of crimes recorded increased across four of the six motivations (racist, homophobic, sectarian and faith/religion) when compared with the previous 12 months; both incidents and crimes with a disability motivation showed a decrease with 9 fewer incidents and 14 fewer crimes; and incidents with a homophobic motivation and crimes with a racist motivation showed the largest overall increase (94 incidents and 93 crimes respectively).

PSNI have stated that they recently, ‘...developed a process to automatically extract all repeat victims data for the last 365 days and present the information in Pulse.’ In utilising the data, the PSNI is in the advanced stages of implementing a clear and data driven process, ‘...to identify and target repeat victims of crime,’ and this, ‘...will encourage officers to utilise crime prevention and early intervention techniques, alongside effective problem solving initiatives and toolkits’. The PSNI had previously reported that, ‘...75% of repeat victims have been flagged as having a vulnerability (including mental and physical health, drug and alcohol dependency) which indicates that officers are aware of the victims and the issues they are experiencing.’

137 The Hate Crime Advocacy Scheme has been in operation in Victim Support NI since July 2013 and is funded by the Department of Justice and Police Service of Northern Ireland. The scheme is comprised of a Hate Crime Advocacy Coordinator based in Victim Support NI, and Hate Crime Advocates based in host organisations – Leonard Cheshire Disability (Disability Hate Crime Advocate), Migrant Centre NI (Race Hate Crime Advocates), and The Rainbow Project (LGB&T Hate Crime Advocate).

138 [https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/hate-motivation-statistics/2020-21/q4/hate-motivations-bulletin-mar\\_21.pdf](https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/hate-motivation-statistics/2020-21/q4/hate-motivations-bulletin-mar_21.pdf)

## **Race Hate Crime**

In respect of race hate crime, the figures show that in the 12 months from 1 April 2020 to 31 March 2021, there were higher levels of both racist incidents and crimes recorded when compared with the previous 12 months; there were 993 racist incidents recorded by the PSNI, 57 more than for the previous 12 months; the number of racist crimes recorded by the police was 719, an increase of 93 on the previous 12 months; there were 5 racist incidents and 4 racist crimes per 10,000 population; compared with 5 racists incidents and 3 racist crimes per 10,000 population in the previous 12 months; racist crimes represented 0.8% of all police recorded crime; and there was an increase of 29 in violence against the person offences, while offences of theft, burglary and criminal damage rose by 76. All other offences fell by 12.

In response to an Assembly Question in March 2021, the Justice Minister commented that work was underway within the Department to combat racist hate crimes, as part of wider hate crime actions, and to support victims of all crime, including race hate, through the Victims and Witnesses Strategy. The Minister notes that there needs to be emphasis on preventative actions, focused on societal attitudes and community cohesion and that the Department is in discussion with The Executive Office, which has responsibility for the Racial Equality Strategy and Together: Building a United Community (T:BUC) Strategy aimed at improving good relations, to discuss opportunities to connect and strengthen this work with community safety commitments. The Minister further comments that improving the effectiveness of the criminal justice system is considered necessary as a robust response to enforcement.

During 2019/20, the PPS received 334 files involving hate crime. This was a decrease of 21 on 2018/19 (355). Over one-third (35.3%) of files received during 2019/20 related to racial crimes, a fall from 2018/19 (37.2%) and there were reductions both in the number of files received related to racial crimes (down 14 to 118) and sectarian crimes (down 19 to 91). The updated 2020/21 figures from the PPS will be available in September 2021.

## **Homophobic Hate Crime**

Homophobic motivated incidents and crimes generally increased between 2006/07 and 2015/16. Incidents and crimes fell below the 2015/16 level for the period between 2016/17 and 2019/20. There was a sharp increase in the number of homophobic motivated incidents and crimes in 2020/21, with both rising to the highest level recorded since the data series began in 2004/05. In the 12 months from 1 April 2020 to 31 March 2021, there were 366 homophobic incidents recorded by PSNI, 94 more than the previous 12 months. Of these, there were 162 incidents which did not involve a crime (i.e. incidents where the circumstances did not amount to an offence being committed). The remaining 204 incidents involved one or more crimes (amounting to 246 homophobic crimes in total, which is an increase of 51 on the previous 12 months.). Around two out of every five incidents recorded in this time period did not result in a crime being recorded. There were 2 homophobic incidents and 1 homophobic crime per 10,000 population. Homophobic crimes represented 0.3% of all police recorded crime. The number of violence against the person offences rose by 46, theft, burglary & criminal damage offences increased by 3, and all other offences rose by 2.

## **Sectarian Hate Crime**

The number of sectarian crimes was at its lowest in 2017/18 and has since increased each year to 2020/21, with 2020/21 being the fourth lowest level in the data series showing a decrease of 54% when compared with the highest level which was recorded in 2005/06. In 12 months from 1 April 2020 to 31 March 2021 there were 934 sectarian incidents recorded by the PSNI, a rise of 46 when compared with the previous 12 months and the number of sectarian crimes recorded by the police rose to 674, an increase of 35 on the previous 12 months, there were 5 sectarian incidents and 4 sectarian crimes per 10,000 population, compared with 5 sectarian incidents and 3 sectarian crimes per 10,000 population recorded in the previous 12 months. Sectarian crimes represented 0.7% of all police recorded crime.

## **CHILD SEXUAL ABUSE AND EXPLOITATION (CSAE)**

The Northern Ireland Policing Plan 2020-2025 and Performance Plan 2020/21 measures PSNI's performance in this area and recent figures indicate that sexual offences against children have reduced over the last year; however this is assessed as being linked to the reduction of child abuse referrals during lockdown associated with the pandemic with referrals reducing by 60%, it is worth noting that referrals have now returned to pre-COVID levels.

During 2020/21 13.8% (775) of child victims are repeat victims and 8.3% of all repeat victims are children. Work is ongoing to establish repeat victimisation rates for sexual offences against children, and a new repeat victimisation process has been devised, with Early Intervention and Crime Prevention Branch; which includes a toolkit designed for children. This will assist District Policing identify repeat victims of crime, who are children, and intervene early to prevent further victimisation. A PSNI review of sexual offence investigations shows that 24% of victims do not support police action, rising to 33.4% for violence against the person offences. Work is ongoing through the Children at Risk Action Plan to address issues relating to the child's journey through the criminal justice system, including an Achieving Best Evidence (ABE) pilot focusing on a cadre of dedicated detectives to conduct all child interviews. Work has commenced through PSNI strategic analysts to understand attrition rates through offences connected to CSAE. Furthermore, CSAE detectives are working with Victim Support to identify how PSNI can work collaboratively with the Child Independent Sexual Violence Advocates (CHISVA) in order to try and reduce the attrition rates for CSAE children withdrawing from the criminal justice process as victims.

A vulnerability working group has been established across PSNI which, primarily using support hubs as the conduit, generates and manages preventative actions regarding children in addition to other vulnerable groups. For children at risk of CSAE, these actions are focused on offenders with Child Abduction Warning Notice/Risk of Sexual Harm Order/ Sexual Offences Prevention Order restrictions to ensure compliance with conditions; those who are on bail for child abuse offences; and supportive actions concerning children at risk. An e-learning package has been created by Public Protection Branch detectives for front line officers including response police, call-handlers, detectives and custody staff aiming to raise awareness of CSAE and assists in the operational response to it.

In police performance monitoring, linkages are made between children who are missing and those children most at risk of becoming a victim of child sexual abuse and exploitation. A 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.

## **OLDER PEOPLE**

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As part of Judge Marrinan’s Review of the hate crime legislation in Northern Ireland it was announced in December 2020 that the review should include age-related offences. This has been welcomed by the Commissioner for Older People in Northern Ireland who stated that *“The recommendation by Judge Marrinan to include age as a category of hate crime, is a step closer to ensuring justice is served for older people who have been the targeted victims of crime”*.

In their recent response to the consultation on the ‘Adult Safeguarding Bill for Northern Ireland, the Commissioner notes that presently there is no specific statutory ‘duty’ to make enquiries or conduct investigations to safeguard adults at risk, other than when a suspected crime is reported to PSNI. They further note that while the PSNI has a duty to investigate reports of criminal conduct under relevant existing legislative powers, this does not apply to all adult safeguarding cases as not all abuse against older people at risk would be classed as criminal conduct. The Commissioner holds that a duty to respond to suspected abuse should use the language ‘duty to investigate’ rather than ‘duty to make follow up enquiries’. The rationale for opting for this language is that ‘follow up enquiries’ places a low expectation on the responding body. They are of the view that throughout the safeguarding process, all relevant organisations should be bound by a legislative duty to cooperate with each other in order to best protect an older person at risk of harm or abuse.

Since January 2020, the PSNI Economic Crime Unit (ECU) has been investigating a series of over 200 fraud offences targeting older and vulnerable people, with offenders representing themselves as police officers. Victims, who have had money or jewellery stolen, were placed in fear by the offenders who often threatened them with arrest or searches as a method of discouraging them from contacting friends or family. It is worth noting that in 2021/22 all 11 PCSPs are delivering projects and initiatives that are intended to support older people with a cumulative value of all projects being £367,664 which represents just over 8% of the overall PCSP budget. The initiatives range from providing security equipment to the home, raising awareness to supporting older people by offering advice and support to combat isolation and feelings of vulnerability.

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## 3.9 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>139</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 and the Criminal Justice Inspection Northern Ireland (CJINI) and the Regulation Quality and Improvement Authority (RQIA), and the Policing Board's Independent Custody Visiting Scheme are part of the system of protections included within the UK government's system for compliance.

During 2020/21, there were 19,689 arrests (compared to 22,607 in the previous year) made under the Police and Criminal Evidence (PACE) Order, 84% of which were males.<sup>140</sup> 24,872 detained persons were processed through custody during the period April 2020 to March 2021. There were 35 persons detained in police custody for more than 24 hours and released without charge, compared to 50 during 2019/20. During 2020/21, there were 20 applications to Magistrates Courts for warrants of further detention, in relation to 18 individuals. Three of these applications were for 24 hours or less, 4 were for between 25 and 35 hours and the other 13 were for a period of 36 hours. Of the 20 applications to Magistrates Courts for warrants of further detention, 2 of these were for a second warrant of further detention. Of the 18 persons subject to a warrant of further detention, 3 spent less than 24 hours under its authority, while 13 spent between 24 hours and 36 hours and the remaining 2 people were detained over 36 hours under the authority of these warrants. A total of 13 these people were subsequently charged.

139 Association for the Prevention of Torture, *Police custody: Risks and safeguards*, APT website, online at: [www.apr.ch/en/police-custody-risks-and-safeguards/](http://www.apr.ch/en/police-custody-risks-and-safeguards/).

140 PSNI, *Police and Criminal Evidence (PACE) Order Statistics April 2020 – 31st March 2021*, available at: <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-and-criminal-evidence/2020/pace-statistics-report-2020.21.pdf>

An inspection report published by CJINI in September 2020, the third such inspection, with fieldwork conducted in 2019 assessed PSNI's delivery in this area against the expectations for police custody. The report made 6 Strategic Recommendations, 7 Operational Recommendations and 6 Areas for Improvement, highlighting the complex risks and needs of detainees in police custody in terms of vulnerabilities, intoxication and mental health.<sup>141</sup>

Operational recommendation 1 states that within six months of the publication of this report, the PSNI should address gaps in Section 75 (of the Northern Ireland Act 1998) monitoring of detainees in custody, particularly in relation to community background and sexual orientation. PSNI have discharged this recommendation and noted that collection of Section 75 data is on a voluntary basis only and any extension of such data to include community background or sexual orientation would have human rights implication and would be stepping outside of NPCC guidance.

CJINI noted that another area for improvement is that further examination is needed of the reasons for arrest and detention in custody of Irish Travellers and people of Black ethnicities would be beneficial to see if any improvements in practice can be identified. PSNI have noted that they will commission a review of the arrest records of Irish Travellers and people of Black ethnicities, in order to create a review group of individuals who represent these groups with the view to identify potential areas for improvement within the process. Further exploratory work needs to be done in this area with PSNI.

## **INDEPENDENT CUSTODY VISITING SCHEME**

The Board is responsible for the Independent Custody Visiting Scheme to make, and keep under review, arrangements for designated places of detention to be visited by lay visitors. Independent Custody Visitors (ICVs) are 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 30 ICVs with a mixed composition of gender, age and community backgrounds based in 3 Custody Visiting Teams regionally across Northern Ireland. 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.

<sup>141</sup> <https://www.cjini.org/getdoc/a0ba2d4e-816c-4364-b3b1-7ed7316db21d/Police-Custody-E-book-Summary-Sept20-TAGGED.aspx>

As with many other organisations the pandemic, particularly in the initial stages, impacted on the work of the Policing Board, which included the operation of the Custody Visiting Scheme. Custody Suites operate within a challenging environment and there is no doubt that these challenges increased for all involved when the pandemic was declared last March. Due to the risks involved, the Board initially suspended the Custody Visiting Scheme.

Throughout the suspension of the ICV Scheme officials had ongoing, frequent collaboration with Stakeholders including the Independent Custody Visiting Association (ICVA), the National Preventative Mechanism (NPM), The National Experts Forum and the Terrorism Network via video conferencing and emails. Board Officials were also in weekly contact with PSNI to obtain information and provide remote monitoring to allow for any key concerns to be raised.

Following assurances from the PSNI that ICVs would have full access to Personal Protective Equipment (PPE) in order to mitigate the risk of spreading the infection within the Custody Suites, it was agreed by the Board to reinstate the Scheme and face to face visits recommenced in May 2020.

When Custody Visiting recommenced the number of operational Custody Suites had increased from four, when the pandemic was declared in March, to six and by early June, seven suites were fully operational. A COVID suite was also set up in Musgrave, Belfast for those detainees who were confirmed as being at risk of the infection. While the numbers of ICVs undertaking visits initially reduced when the Scheme was reinstated, face to face visits continued throughout the reporting year. The Board was also able to induct thirteen new ICVs in September 2020 which had a very positive impact on the number of visits undertaken across all suites.

To capture the key challenges that faced the PSNI in complying with human rights in its response to the COVID-19 pandemic, the Board undertook a thematic review which was published in October 2020.<sup>142</sup> This review included a chapter on the 'Management of Custody' and the evidence indicates that, across this first period of the pandemic emergency, the PSNI's performance was generally positive. In particular, those consulted pointed to the PSNI's response to vulnerable people, its innovative collaborative working with other partners and its management of its custody suites as being a particularly positive experience.

Following on from the period covered by the Thematic the PSNI has reported that virtual courts have placed extra administrative burdens on PSNI officers and staff. Essentially detainees are held longer in PSNI cells as the court processes are worked through remotely. This in turn impacts on PSNI cell availability as detainees remain in Custody for a longer, which means those cells cannot be used for new detainees. An issue was also raised by ICVs as to how they should deal with detainees awaiting transport to prison following a Virtual Remand Hearing. Advice was sought from ICVA and they provided guidance in the form of a checklist of questions which the ICVs could ask these detainees. This process was then agreed with PSNI and the guidance provided to ICVs.

<sup>142</sup> <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/report-on-the-thematic-review-of-the-policing-responser-to-covid-19.PDF>

In May 2020, the Board responded to the Department of Justice consultation on ‘The Use of Live Links<sup>143</sup> for Police Detention/Interviews’. The proposed amendments to the legislation will enable video-conferencing technology referred to as ‘live links’ to be used by police for a number of custody functions. These functions include the extension of detention by both police and the courts, and police interviews with a suspect.

The Department is also proposing to use this legislative opportunity to make some minor amendments within PACE to replace any references to ‘video-conferencing’ with ‘live link’.<sup>144</sup> In regards to the consultation and its impact on the Independent Custody Visiting Scheme, within the review of police detention on the use of live link technology for extension of PACE detention by a Superintendent or above, or by the Courts, the Board issued the response that Independent Custody Visitors in their oversight role currently monitor detention times and will be instructed to monitor this closely during their visits to ensure the new procedures are not causing delays for detainees in custody. In regards to the use of live link technology for Police interviews with suspects, the Board responded that if the proposals were extended to include Detainees arrested under the Terrorism Act, the Policing Board would want assurances that Independent Custody Visitors would continue to be able to observe Police interviews via CCTV for Detainees who have given permission.

To ensure ICVs remain confident and capable in their roles, the Board aims to deliver two training sessions each year. Despite the limitations on training and recognition events, due to the restrictions, ICVs took part in virtual focus groups to help inform the Board’s ‘Thematic Review of the Policing Response to Covid-19, attended online resilience training sessions during July/August 2020 and Mental Health Awareness training during March 2021. In addition, guidance was also provided to all ICVs on how to speak with those detainees in custody who were being held for Virtual Remand Hearings.

As mentioned PSNI advised that 24,872 detained persons were processed through custody during the period April 2020 to March 2021 with a total of 1,160 detainees at the time of the ICV visits. There were a total of 438 visits made by ICVs across Northern Ireland between April 2020 and March 2021. There were 1,160 detainees held at the time of the 419 valid visits, of which ICVs saw 541 detainees (47%). The length of visits ranged from 10 minutes to 1 hour 35 minutes, with the average length of time spent on a visit being 32 minutes. The most common reasons for detainees not being seen was ‘asleep’ (58%). In a normal reporting year these figures would be compared with the previous year, however due to the pandemic it would not be beneficial to compare figures. However to evidence the impact COVID-19 has had on the ability to undertake Custody Visits the number of valid visits undertaken in 2019/20 was 503, which is a 17% reduction.

143 Live links have been used for ICVs across other parts of the UK, however in Northern Ireland ICVs continued with face to face visits in line with the guidance ICVA, and agreed procedures regarding the provision of PPE by PSNI.

144 It is important to note that other jurisdictions have stated that the use of live links have been problematic and the use of this the measure in any given case must serve a legitimate aim and the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6. (Marcello Viola v. Italy, §§63-67; Sakhnovskiy v. Russia [GC], § 98)



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 an 8% reduction in unsatisfactory visits, as of the total of valid visits 2% of which were classified as unsatisfactory and 98% were satisfactory.

There were 40 visits made to detainees held under the Terrorism Act 2000 (TACT). There were 57 detainees held during this period, compared to 64 in the previous year, ICVs saw 24 (42%) detainees, compared to 15 (23%) in the previous year. 0 TACT visits were classified as unsatisfactory, compared to 31% (15) TACT visits classified as unsatisfactory in the previous year. 25 detainees gave permission for their Custody Records to be checked by ICVs meaning that 44% of Custody Records were checked compared to 27% in 2019/2020. There was zero TACT visits were classified as unsatisfactory, compared to 31% (15) TACT visits classified as unsatisfactory in the previous 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.

It is encouraging that despite the challenges of the pandemic 864 records had been checked. Based on the number of detainees held, this equates to 74% a figure consistent with the previous two years.

# APPENDIX A: HUMAN RIGHTS MONITORING FRAMEWORK

## OUR MANDATE<sup>145</sup>

The Northern Ireland Policing Board (Policing 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 secure that the police are efficient and effective (s.3(2)). In carrying out those functions, the Board is under 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 requires the Policing Board's Annual Report to include an assessment of the performance of the police in complying with the Human Rights Act 1998.

As a public authority the Police Service of Northern Ireland (PSNI) has the primary legal responsibility for practical compliance with human rights (section 6 of the Human Rights Act 1998). The legal advice and compliance function lies with and must be embedded within the PSNI itself and the PSNI is required to assess its own policies and operations for their compliance with human rights and make any necessary adjustments.

The Policing Board, as the mechanism established for police accountability for Northern Ireland, will then independently monitor the PSNI's compliance with the Human Rights Act 1998, the European Convention on Human Rights and other relevant human rights instruments. Other human rights instruments will be used to supplement that jurisprudence where necessary (a process that the European Court of Human Rights itself recognises as legitimate).

As to the level of scrutiny, the monitoring process will keep 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 examine the PSNI's compliance with its obligations under the Human Rights Act 1998 at all levels. This will include close 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.

<sup>145</sup> This section, the 'Revised Human Rights Monitoring Framework' and 'Human Rights Legal Framework and Standards' are updated versions of the Monitoring Framework first agreed by the Board in 2003. These new versions were agreed by the Board in July 2021 following discussions with a number of key stakeholders. The published report can be found online at <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/human-rights-monitoring-framework.pdf>

The monitoring carried out by the Policing Board recognises that other processes are already in place which, in one way or another, measure the performance of the PSNI (particularly those dealing specifically with human rights). The Policing Board is required to have regard to the need to co-ordinate its activities with those of other statutory bodies, and to co-operate with such authorities (s.3(4)(d) of the Police (Northern Ireland) Act 2000). It is not intended that, in carrying out its functions under s.3(3)(b)(ii) of the Police (Northern Ireland) Act 2000, the Policing Board should replicate the work of these bodies. Instead the Policing Board will obtain and review the reports, research and recommendations of these bodies where they touch on PSNI human rights issues and, where the Policing Board's Human Rights Advisors consider that a legitimate issue relating to the PSNI's compliance with the Human Rights Act 1998 arises, assess the PSNI's response to them.

The Policing Board recognises that there is an overlap between the statutory duty of the PSNI to have due regard to the need to promote equality of opportunity under s.75 of the Northern Ireland Act 1998 and the non-discrimination provisions of the European Convention of Human Rights. In addition, the Policing Board is under a statutory duty to include in its annual report an assessment of the extent to which the membership of the police and the police support staff is representative of the community of Northern Ireland (s.57(2)(f) of the Police (Northern Ireland) Act 2000).

Since the beginning of the system of human rights monitoring by the Policing Board one of the criteria that has been important has been not to attempt to assess compliance retrospectively – issues of compliance before the Policing Board was created. However, this does not mean that actions taken by PSNI since that time, albeit in relation to cases from the past should be ignored. This approach has allowed the Policing Board to consider how the PSNI has investigated 'legacy' cases and the extent to which its approach complies with Article 2 of the European Convention of Human Rights, particularly the duty have independent investigations following a death.

## **OUR APPROACH**

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The Policing Board has in the past and will continue to employ an expert Human Rights Advisor to assist it with its monitoring duty. This expert is employed as an independent consultant allowing them to give independent advice to the Policing Board and to ensure that all of their human rights assessments and any consequential recommendations are robust. The PSNI has always allowed these Advisors to access all of its documents and materials and to observe any police procedures or actions that they have requested. In turn, this requires the Advisor to obtain the highest level of security clearance and to respect confidentiality, privacy and the PSNI's (and MI5's) rules and security protocols. As a result, the Advisor has been able to delve more deeply into policing processes, particularly sensitive and secret processes, that the Members of the Policing Board cannot review themselves and to write reports, make recommendations and in other ways reassure the Policing Board that all parts of the PSNI's operations are subject to the robust accountability required by the Police (Northern Ireland) Act 2000.

The Human Rights Advisor will be responsible for implementing the Board's Human Rights Monitoring Framework. The framework uses four structural indicators to assess the adequacy and effectiveness of the PSNI's implementation and enforcement of human rights standards through its internal governance mechanisms. As below;

1. Practical Policing
2. Policy
3. Training and Human Rights Culture
4. Complaints and Adherence to the Code of Ethics

These core indicators set the foundations for measuring the PSNI's efforts to implement its human rights commitments throughout its policies, planning and practice. Each year, the Human Rights Advisor will identify specific themes to be examined through this framework. The themes will be identified using the following criteria;

- National/local issue has emerged in the area of policing
- Environmental scanning using police performance, reports of other key stakeholder bodies
- New policy or equipment introduced
- Request from the Board or PSNI
- Engagement with key stakeholder groups
- Emerging governmental legal or policy developments within the UK or elsewhere

## **STRUCTURAL INDICATORS**

### **PRACTICAL POLICING**

The primary measure of human rights compliance, in our view, is found in the lawfulness or otherwise of operational decisions taken by police officers on the ground. For agreed themes the Board will examine the working arrangements put in place by the PSNI to ensure that its actual practice is human rights compliant and that any guidance contained in the Service Instructions is followed. This will include an examination of the extent to which officers seek and obtain specialist human rights advice where necessary. In this regard, the Policing Board will consider the working relationship between officers and the PSNI lawyers.

The Policing Board's Human Rights Advisor will monitor the planning and observe the execution of selected operations. They will also conduct an after-the-event paper audit of other operations and examine any other matters brought to their attention during the monitoring exercise. Where failings or weaknesses are identified, the Policing Board will examine the PSNI's response to those failings or weaknesses. Recent examples might include the analysis of the PSNI's response to one of the Apprentice Boys bands in the parades on 10 August 2019 (see the Human Rights Annual Report for 2019/2020, page 64)<sup>146</sup> or the analysis of the PSNI's response to the Black Lives Matter protest on 6 June 2020 (Thematic Review of the Policing Response to COVID-19, 2020, page 42).<sup>147</sup>

<sup>146</sup> <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/human-rights-annual-report-2019-2020.pdf>

<sup>147</sup> <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/report-on-the-thematic-review-of-the-policing-responser-to-covid-19.PDF>

## **POLICY**

The PSNI provides policy, guidance and Service Instructions to police officers to ensure that the planning and execution of their operations are human rights compliant. The aim of these documents is to ensure that decision-making addresses the key elements of legality, legitimate objectives, necessity and proportionality. In monitoring the performance of the PSNI in complying with Human Rights in specific agreed areas, the Advisor will consider the specific police policy, guidance or service instruction, evaluate the extent to which the policy ensures operational compliance with human rights and the extent to which the PSNI has systems in place to ensure the policy delivers this operational compliance.

It is understood that in some cases the fine detail of the human rights assessment may not be able to be published for security and other reasons and it is recommended that in such cases the Board's Human Rights Advisor will review the more detailed material and, where possible, report to and reassure the Board on compliance.

The Policing Board will also review, when required, the training currently given to policy drafters to equip them with the necessary skills to audit policies for human rights compliance and study the arrangements put in place by the PSNI to ensure that its policies comply with the Human Rights Act 1998. This will include an examination of the extent to which policy drafters seek and obtain specialist advice where necessary, including with the involvement of PSNI lawyers. The Policing Board will also consider the mechanisms in place for the periodic review of policies where human rights standards develop.

## **TRAINING AND HUMAN RIGHTS CULTURE**

The culture and ethos of an organisation include both the way in which it sees itself and manages itself internally and the way in which it sees and interacts with its clients and others outside the organisation (Patten, para.17.1). The promotion of human rights awareness of PSNI officers at all levels is vital not only to facilitate the development of a tangible human rights culture within the PSNI, but also to demonstrate the PSNI's commitment to the human rights agenda in its dealings with others external to the organisation.

The Policing Board will monitor how the PSNI disseminates information regarding human rights and their adequacy in supporting the development of a tangible human rights culture. In response to Patten Recommendation 5, which stated that awareness of human rights issues and respect for human rights in the performance of duty should be an important element in the appraisal of individuals in the police service.

The Patten Report recognised that “training was one of the keys to instilling a human rights-based approach into both new recruits and experienced police personnel” and specifically recommended training in the “fundamental principles and standards of human rights and the practical implications for policing” (para.4.9). It also recommended that all members of the police service should be instructed in the implications for policing of the Human Rights Act 1998, and the wider context of the European Convention on Human Rights and the Universal Declaration of Human Rights (para.16.21).

The Policing Board will liaise closely with PSNI training staff, evaluate the training material used for PSNI human rights training across agreed themes for (i) student officers, (ii) other officers (including senior officers) and (iii) policy makers. These themes will generally be agreed at the start of the year by the Policing Board although it is likely that other themes will emerge during the year.

The PSNI and training staff have always welcomed the Policing Board's assurance roles in the training process and, although the Policing Board will, on occasion, make unannounced visits to check the nature of the actual training, this is not likely to be an effective use of resources. The Board will however evaluate the PSNI's own arrangements for monitoring the actual delivery of human rights training. The Policing Board, where appropriate, will consult with others including subject matter experts and community based groups on the efficacy and relevance of this training to assess the ramifications and potential impact on different communities.

### **COMPLAINTS AND ADHERENCE TO THE CODE OF ETHICS**

Under s.52(1) of the Police (Northern Ireland) Act 2000, the Policing Board is required to issue a Code of Ethics laying down standards of conduct and practice for police officers and making them aware of the rights and obligations arising under the Human Rights Act 1998. The first Code of Ethics was published in 2003. It includes international human rights standards drawn from the European Convention on Human Rights and other relevant human rights instruments and has been reviewed every few years and a new draft is likely to be subject to consultation in 2021.

Police officers are required to carry out their duties in accordance with the Code of Ethics, which applies to all members of the PSNI, whether on or off duty regardless of rank, and all members of the PSNI Reserve, whether part-time or full-time.

Article 1.1 of the Code of Ethics requires that all PSNI officers protect human dignity and uphold the human rights of all person as enshrined in the European

Convention of Human Rights and other relevant international instruments. Where the Code of Ethics conflicts with an instruction, policy or guideline of the PSNI, officers must comply with the Code of Ethics (Preamble to Code of Ethics, para (k)).

The effectiveness of the Code of Ethics is assessed by the Policing Board by monitoring and evaluating PSNI human rights training, complaints, discipline and civil actions against the PSNI, and human rights awareness in the PSNI. The Policing Board will also examine the steps taken by the Chief Constable to ensure that all officers have read and understood the Code of Ethics (s.52(9) of the Police (Northern Ireland) Act 2000.

The Office of the Police Ombudsman for Northern Ireland (OPONI) and the PSNI provide periodic statistics with some explanatory information to the Performance Committee. OPONI also provides Regulation 20 Reports to the Board, summarising the findings of all investigations.

These are helpful to enable the Board to measure the PSNI's compliance with the Human Rights Act 1998 in relation to the incidents they cover. However, in addition to this, the Board will ensure that where those reports disclose any systemic or policy issues which are of concern in relation to human rights compliance they will be raised with the PSNI and recommendations will be made.

Where matters are resolved formally – whether in the Courts, by the Police Ombudsman or internally – the Policing Board will monitor the response of the PSNI to any adverse findings. This will include follow up of individual findings.

The Policing Board will publish an annual assessment of the PSNI's compliance with its human rights obligations, which will highlight good policing practice and areas in which practice could be improved with specific recommendations.

## **LEGAL FRAMEWORK OF HUMAN RIGHTS MONITORING**

### **GENERAL PRINCIPLES OF HUMAN RIGHTS AND POLICING**

“The main purposes of the police in a democratic society governed by the rule of law are:

- to maintain public tranquillity and law and order in society;
- to protect and respect the individual's fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights;
- to prevent and combat crime;
- to detect crime;
- to provide assistance and service functions to the public”<sup>148</sup>

In the performance of their duties, police officers should respect and protect human dignity and maintain and uphold the human rights of all persons. [Code of Ethics for the PSNI (“PSNI Code of Ethics”), Article 1.3] (UN Code of Conduct, Article 2).

Those rights include the right to life, the prohibition on torture, inhuman or degrading treatment and punishment, freedom from slavery, the right to liberty, the right to a fair trial, the right to privacy, freedom of thought, religion, expression, association and assembly and the prohibition on discrimination (ECHR Articles 2 to 14) and the right to peaceful possession of property, to vote and to education (ECHR, Articles 1, 2 and 3 of Protocol 1).

The right to life, the prohibition on torture, inhuman or degrading treatment and punishment and slavery are absolute rights, which means that they cannot be restricted even where, it might be argued, the restriction is in the public interest. Both are, of course, subject to some exceptions – for instance, the justified use of force, including lethal force.

<sup>148</sup> The European Convention on Human Rights and Policing: A handbook for police officers and other law enforcement officials, Council of Europe, 2013.

The right to liberty, and the right to a fair trial contain both general and specific rights and some of these are subject to some particular specific limitations set out in the articles themselves.

The right to privacy, family life, home and correspondence, freedom of thought, religion, expression, association and assembly, peaceful possession of property and the prohibition on discrimination are qualified rights, which means that they can be restricted, but only where such restriction is for a legitimate reason and is also necessary and proportionate. In some circumstances no restriction can be justified – the right to belief (but the manifestation of belief can be restricted) – and, some types of discrimination can ever rarely be justified.

Relevant in assessing whether a restriction is proportionate is the question of whether the same objective could be achieved by less restrictive alternatives.

Police officers should act with integrity, impartiality and dignity. Police officers should refrain from and vigorously oppose all acts of corruption [PSNI Code of Ethics, Articles 1.3, 7.5] (European Declaration on the Police, A2; Recommendation (2001) 10 on the European Code of Police Ethics (“European Code of Police Ethics”), Articles 44, 46; UN Code of Conduct, Article 7).

A police officer should carry out orders properly issued by his/her superior, but s/he shall refrain from carrying out any order he or she knows, or ought to know, is unlawful [PSNI Code of Ethics, Article 1.5] (European Code of Police Ethics, Article 39; European Declaration on the Police, A4).

Police officers should receive thorough general training, professional training and in-service training, as well as appropriate instruction, in social problems, human rights and in particular the ECHR (European Declaration on the Police, Article B3, European Code of Police Ethics, Article 26).

Police officers should enjoy the same human rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law and in conformity with the ECHR (European Code of Ethics, Article 31). Police officers subject to an investigation into their behaviour should be treated fairly and the investigation and any subsequent disciplinary action dealt with promptly. A police officer’s employment disputes, as agents of the state, are, however, generally excluded from the right to a fair trial and the need for promptness provided by Article 6 of the ECHR (Vilho Eskelinen and Others v Finland (2007)).



## **EQUALITY/NON-DISCRIMINATION**

Police officers have an over-arching obligation in relation to non-discrimination and should not discriminate (or aid or incite others to discriminate) on any grounds including race, colour, sex, gender and gender identity, sexual orientation, disability, age, language, religion, political or other opinion, national or social origin, property, birth or other status [**PSNI Code of Ethics, Article 6.2**] (UDHR, Article 2; ICCPR Article 26; ECHR Article 14 (and the jurisprudence of the European Court of Human Rights interpreting this Article); CERD Article 5; CEDAW Article 2; UNCRC Article 2; CRPD, Article 4; Convention relating to the Status of Refugees, Article 3; Convention relating to the Status of Stateless Persons, Article 3; Northern Ireland Act 1998, s76, United Nations Principles for Older Persons 1991 Articles 17 and 18 ).

The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights (European Framework Convention for the Protection of National Minorities, Article 1) and discrimination based on belonging to a national minority is also prohibited by this Convention (European Framework Convention for the Protection of National Minorities, Article 4.1).

No one should be subject to discrimination on the grounds of religion or other belief (Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief, Article 2(1)).

The United Nations Principles for Older People (1991) promote the fundamental right that older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status. As recognised by research commissioned by the Commissioner for Older People in 2019 *Crime and Justice: The Experience of Older People*, older people must be able to participate fully in the criminal justice process to have their voices heard and their experiences recognised.

Police officers, when dealing with people with disabilities (whether as victims of crimes, suspects, defendants or witnesses), shall take into account the positive duty to ensure that there is reasonable adjustment for people with disabilities and shall recognise:

- (a) the right to equal recognition by the law;
- (b) access to justice;
- (c) freedom from exploitation, violence and abuse; and
- (d) the right to live independently.

Any difference in treatment must be justified and proportionate (CRPD, Articles 5, 3, 16, and 19).

Furthermore, these principles are reflected in more detailed anti-discrimination domestic laws for Northern Ireland (see the Equality Commission's list of those laws [www.equalityni.org/Legislation](http://www.equalityni.org/Legislation)). At the time of writing there are possible proposals to create other hate crimes which increase the protection for some groups.

Studies previously commissioned by the policing board, notably research conducted by Katy Radford et al on Policing, Accountability and the Black and Minority Ethnic Communities in Northern Ireland has highlighted many of the problems experienced with the police were related to the quality of service.

Although these reports were initially published in 2006, the Ethnic Minority Policing association are of the view that communities would attest to the fact that little has changed. These problems include: a perceived failure by the police to take respondents seriously, unsatisfactory service, failing to keep respondents informed of progress or to follow up a call and victim blaming. They also have stated that there appeared to be a lack of empathy among some police officers towards their community. Just under a third said that police officers had been rude or impolite to them and a fifth said that the police had discriminated against them because of their ethnic origin. About one in ten reported experiencing problems caused by language such as a lack of interpreters and of translated material.

Although perceptions were mostly favourable over half of respondents regarded the police as helpful, acceptable, professional and there for their protection.

Respondents who had had contact with the police were most likely to view the police negatively and less likely to say the police were helpful, fair or for their protection. Respondents who had had contact with the PSNI were more likely to say the police were racist. Irish Travellers had the most negative perceptions about the PSNI.

Race Hate crime remains at an unacceptably high level and proportionately affects people from Ethnic Minority backgrounds more than any other grouping.

Although those in focus groups felt vulnerable to racist attack, it appears that it is unusual for victims of 'low level' racism, such as verbal abuse, to report to the police as some victims appear to face verbal abuse on a daily basis. There was also a belief that young people from minority ethnic groups are not engaging with the PSNI in any way. While visits from community police officers are welcomed by community groups, there was a widespread belief that there is a need for more policing work 'on the ground' among ethnic minorities.

Currently the number of police officers from Black and Minority Ethnic groups fall short of the numbers required to ensure that the police is truly reflective of the community it serves. The 2021 Census will give greater clarity this issue.<sup>149</sup>

## **PROTECTING THE PUBLIC AND VICTIMS OF CRIME**

Victims of crime should be treated with compassion and respect for their dignity [PSNI Code of Ethics, Article 2.1]. They are entitled to access the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 4).

Police officers should provide the necessary support, assistance and information to victims without discrimination (European Code of Ethics, Article 52).

Certain victims, including children and other vulnerable individuals are entitled to special protection (*Stubbings v UK* (1996)). Being a victim of crime can exacerbate feelings of emotional, psychological, physical harm and financial loss for older people. To reduce the impact of crime older people, are entitled to protection and immediate practical and emotional support to reduce the impact of the crime. Victims of trafficking (Article 4, the prohibition against slavery) also require support and the authorities need to be careful how they are dealt once they are caught up in the criminal justice system (see the guidance provided by the Council of Europe's Convention on Action against Trafficking in Human Beings and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, the guidance provided by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Council of Europe Convention on preventing and combating violence against women and domestic violence).

Victims should be informed of the timing and progress of the investigation of their cases and subsequent proceedings [PSNI Code of Ethics, Article 2.1] (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 6).

In certain circumstances, for instance, when there is a real and immediate risk to life, the police are under an obligation to take preventative operational measures to protect individuals whose lives are at risk from the criminal acts of others (*Osman v UK* (1998)).

Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the police (*Osman v UK* (1998) and *Van Colle v UK* (2012)).

<sup>149</sup> Members of ACSONI [African and Caribbean Support Organisation Northern Ireland] met with the Chair of the Policing Board to discuss concerns raised by members of the BAME community on 23rd March 2021. As a result of the meeting it was noted that the Chair will contact ACSONI again in relation the actions that the Board will pursue, and speak with the Justice Minister about BAME representation on the Policing Board. It was also noted that the Chair will arrange a future meeting which, among other things, will address the issue of systemic racism and the PSNI.

What is required of the police is therefore that they take all steps that could reasonably be expected of them to avoid a real and immediate risk to life about which they know or ought to have known (*Osman v UK* (1998)).

This obligation can also arise where the risk to life does not come from the criminal acts of others; for, example, it can extend to an obligation to take reasonable steps to prevent self-imposed risks to life (e.g. suicide) (*Keenan v UK* (2001)).

Failing to pass on important information concerning a risk to an individual's life to the appropriate person or body can breach this obligation (*Edwards v UK* (1992)). However, the police also have duties to protect that derive direct from the UK's own common law. Now, where a third party such as a pedestrian is injured as a result of a negligent arrest on the street by a police officer, the police are liable where that injury was a foreseeable consequence of the police's actions (see the Supreme Court case of *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4).

The police and criminal justice authorities also have responsibility for protecting victims of crime involving violence, including domestic violence and violence against minorities, older people and vulnerable people (for instance: domestic violence, *Opuz v Turkey* (2009); abuse of children, *Z and Others v UK* (2001); and the protection of LGBTI communities, *Identoba and Others v Georgia* (2015) etc.).

## **HUMAN RIGHTS STANDARDS IN POLICING**

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### **USE OF FORCE**

#### **Basic Provisions**

Every human being has the inherent right to life (UDHR Article 3; ICCPR Article 6; ECHR Article 2; European Code of Police Ethics, Article 35)

Torture, cruel, inhuman or degrading treatment or punishment is prohibited absolutely [PSNI Code of Ethics, Article 1.4] (UDHR Article 5; ICCPR Article 7; CAT Article 2(1); CRC Article 37(a); ECHR Article 3; UN Body of Principles, Principle 6; UN Code of Conduct for Law Enforcement Officials Article 5; European Declaration on the Police, Article A3; European Code of Police Ethics, Article 36).

Torture includes deliberate inhuman treatment causing very serious and cruel suffering (*Ireland v UK* (1978)) which has a purpose, such as the obtaining of information or confession, or the infliction of punishment (*The Greek Case* (1969); *Aksoy v Turkey* (1996)). Rape, violence used as a punishment, threats of torture and other extreme forms of ill-treatment by a law enforcement officer of a detained person will also constitute torture (*Aydin v Turkey* (1996); *Cestaro v Italy* (2015); *Gafgen v Germany* (2010); *Mikheyev v Russia*; *Selmouni v France* (1999); *Virabyan v Armenia* (2012)).

Treatment/punishment will be inhuman if it 'causes intense physical or mental suffering.' It is less severe than torture but can include threats of torture and the infliction of psychological harm (*Ireland v UK* (1978)).

Treatment or punishment will be degrading if it arouses in the victim a feeling of fear, anguish and inferiority capable of debasing him or her and breaking his or her physical or moral resistance (Ireland v UK (1978)); but only if it reaches a particular level of severity.

Arbitrary or abusive use of force by police officers is never acceptable (European Code of Police Ethics, Article 37) and is punishable as a criminal offence (assault).

Deprivation of life will not constitute a breach of ECHR Article 2 if, but only if, it results from the use of force which is no more than absolutely necessary and is strictly proportionate:

- (i)** in self-defence or in defence of any others where there is an imminent threat of death or serious injury (Wolfgram v Germany (1986); Diaz Ruano v Spain (1994));
- (ii)** in order to effect a lawful arrest or to prevent the escape of a person lawfully detained (a person presenting a danger to life or of serious injury) (Farrell v UK (1982) and (1984); Kelly v UK (1993); or
- (iii)** in action lawfully taken for the purpose of quelling a riot or insurrection (ECHR Article 2; McCann v UK EHRR (1995)).

Exceptional circumstances, such as internal political instability or any other public emergency, cannot be invoked to justify any departure from these basic principles (Principles on the Use of Force, Principle 8).

The PSNI Manual of Policy, Procedure and Guidance on Conflict Management states:

“1.9 Lethal force may be used only where it is absolutely necessary to do so, in pursuit of a specified aim. Article 2 of the ECHR makes reference to 3 specified aims. However, in United Kingdom law, a deprivation of life may only be justified if it is absolutely necessary for the protection of the lives of others. The other aims (to quell a riot or insurrection or to prevent the escape of a detainee) may not, of themselves, be used as a justification for the use of lethal force.

1.10 There is a requirement of strict proportionality between (a) the objective and (b) the force used to achieve it. The person using the force must honestly believe that it is absolutely necessary to use lethal or potentially lethal force to avert a real and immediate risk to the lives of themselves, and/or others. An honestly held belief may subsequently be shown to have been mistaken, but this will not, of itself, render the deprivation of life in violation of Article 2 of the ECHR”.

Written reports must be made on the use of plastic baton rounds and firearms.

The use of baton rounds ('Attenuated Energy Projectiles') by police officers must satisfy the criteria for the use of force laid down in the Criminal Law Act (Northern Ireland) 1967 as well as the more rigorous test under the Human Rights Act 1998 that potentially lethal force must be "no more than absolutely necessary" and must in any event be proportionate to the achievement of the purpose for which it is permitted to be used.

Complaints from members of the public about the use of force by the police can be investigated in the ordinary way by the Police Ombudsman (Police (Northern Ireland) Act 1998, s.52).

### **Justification for the Use of Force**

If it is possible to do so, police officers should apply non-violent means before resorting to the use of force and firearms. Force and firearms may only be used when necessary (i.e. where other means would be ineffective or stand no chance of achieving the intended result) and to the minimum extent required to obtain a legitimate objective. [PSNI Code, Article 4.1] (European Code of Police Ethics, Article 37; UN Code of Conduct for Law Enforcement Officials, Article 3; UN Principles on the Use of Force, Principles 4 and 13; McCann v UK (1995)).

Force can be used to effect an arrest, but it must always be necessary and proportionate (Raninen v Finland (1997)).

Handcuffing is legitimate, but only where justified as necessary and proportionate in the particular circumstances and having assessed the risk posed by the detained person (Raninen v Finland (1997)).

Police officers should not use force against persons in custody or detention except where necessary for the maintenance of security and order within the institution or when personal safety is threatened [PSNI Code of Ethics, Article 5.2] (UN Principles on the Use of Force, Principle 15).

In regards to police officers using force against individuals with vulnerabilities or mental health issues, Article 130 of the Mental Health (NI) Order 1986 provides the legal basis for police officers who find a person in a public place who appears to be suffering from a mental disorder or is in immediate need of care or control. In such cases, an officer may, if they think it necessary to do so in the interests of that person or for the protection of other persons, use force to remove that person to a place of safety. This does not require the officer to reach an exact diagnosis, but simply to decide reasonably and in good faith whether or not a person exhibits behaviour suggestive of Mental Disorder.

In addition, under The Mental Capacity Act 2005 the restraint of a person who lacks capacity must be in the person's best interests. The MCA 2005 does not unreasonably interfere with the operational discretion of the police, or makes practical policing impossible. It requires no more than police officers to take such reasonable, practical and appropriate steps to make changes to the practice or procedure in order to ensure best interests are considered (ZH v Commissioner of the Police for the Metropolis [2012] EWHC 604).

Research conducted by the IPCC (Independent Police Complaints Commission) into police use of force highlighted concerns that individuals with mental health conditions who might display erratic behaviours could be incorrectly seen as an offender with the police response being dependent on the behaviour they observed and how the individual responds to communication techniques. It was suggested that training was required on how to approach and use force in incidences with vulnerable members of the community.<sup>150</sup>

The College of Policing noted that a number of national reports have been written in response to ongoing issues in the care and management of people with mental ill health and vulnerabilities and those with learning disabilities or difficulties. The primary themes highlighted throughout the reports are a requirement for all police officers and operational staff to have de-escalation skills and an understanding of the dangers of using force or restraint techniques with vulnerable people.<sup>151</sup>

### **Use of Firearms**

The use of firearms is considered an extreme measure (UN Code of Conduct, Commentary on Article 3).

“States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria ... In particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny.” (Gorovenky and Bugara v Ukraine (2012))

Firearms should only be used against persons where their use is strictly proportionate:

- (i)** in self-defence; or in defence of others against the imminent threat of death or serious injury; or
- (ii)** to prevent the perpetuation of a particularly serious crime involving great threat to life; or
- (iii)** to arrest a person presenting a danger to life or of serious injury and who is resisting authority; or
- (iv)** to prevent his or her escape.

Before firearms are employed, police officers should identify themselves and give clear warning of their intent to use firearms, affording sufficient time for the warning to be observed, unless to do so would place the law enforcement officer at risk or create a risk of death or serious harm to other persons [PSNI Code of Ethics, Article 4.5] (UN Principles on the Use of Force, Principle 10).

150 [https://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/BMRB\\_use\\_of\\_force\\_report.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/BMRB_use_of_force_report.pdf)

151 College of Policing, Mental Health Introduction and Strategic considerations, 2016

Whenever the use of firearms is unavoidable, police officers should:

1. Exercise restraint in such use, acting in proportion to the seriousness of the offence and the legitimate objective to be achieved;
2. Minimise damage and injury and respect and preserve human life;
3. Render assistance and medical aid to any injured or affected persons at the earliest opportunity;
4. Notify relatives or close friends of injured or affected persons at the earliest opportunity. [PSNI Code of Ethics, Article 4.3] (UN Principles on the Use of Force, Principle 5).

### **Internal Procedures and Investigations following the Use of Force**

Police training at all levels should include practical training on the use of force and the limits with regard to established human rights principles (European Code of Police Ethics, Article 29).

Effective reporting and review procedures should be put in place regarding injuries and/or deaths resulting from the use of force and firearms by police officers. In cases of death and serious injury, a detailed report should be sent to the competent authorities (UN Principles on the Use of Force, Principles 6 and 22).

“An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.” (Husayn v Poland (2014))

In addition, an effective official independent investigation is required whenever an individual is killed as a result of force being used by an agent of the state or if a police officer may have contributed to the loss of life in some way. That is to say, when it is arguable that there has been a breach of Article 2 of the ECHR (Anguelova v Bulgaria (2002)).

It is not necessary for a state agent or police officer to be directly involved in the death to trigger this independent investigation (Menson v UK (2003)). For instance, the ECtHR considered that in a case of prolonged domestic abuse of a mother and daughter, which had led to the mother's death, and where the authorities had failed to protect her, the obligation under Article 2 for an independent applied (Opuz v Turkey (2009)).

The investigation must be prompt, thorough, impartial (Brecknell v UK (2008)), initiated by authorities even if no complaint is made, transparent (Edwards v UK (2002), Ramsahai v Netherlands (2007)), and thorough so as to ensure accountability and responsibility (Anguelova v Bulgaria (2002)).



This obligation continues to apply even in difficult security conditions and all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (*Al Skeini and others v United Kingdom* (2011)).

The requirement for independence means that it is necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This requires a lack of hierarchical, institutional or practical connections, such as where the investigator belongs to the same police force as those under investigation (*Shanaghan v UK* (2001)).

“For an investigation into alleged unlawful killing by State agents to be effective, it may be generally regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but a practical independence.” (*Jordan v UK* (2001)).

Currently the precise way in which the principle of practical independence applies to PSNI investigations in legacy cases has been the subject of litigation in the Court of Appeal (*McQuillan*, 19 March 2019) and is to be heard in the Supreme Court shortly.

The volume of work is not a basis for failure to investigate promptly and ‘where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers, it is incumbent on the authorities to respond actively and with reasonable expedition’ (para. 107, *Mahmut v Turkey* (2000)).

The investigation must involve an assessment of the organisation and planning (if any) of the operation during which lethal force was used. The training, instructions and communications of those who used lethal force and those who lay behind the operation are relevant to that assessment (*McCann v UK* (1995)).

An effective official investigation requires the appropriate authorities to secure all the relevant evidence concerning the incident causing death and to analyse the cause of death (*Anguelova v Bulgaria* (2002)); it also requires a degree of public and independent scrutiny and the involvement of the family of the deceased in the procedure to the extent necessary to safeguard their legitimate interests (*Anguelova v Bulgaria* (2002)).

The duty to investigate suspicious deaths can arise even where there is no suggestion of any state involvement in causing death either deliberately or by omission (*Menson v UK* (2003)); the form of the investigation will vary with the circumstances, but must always be prompt, rigorous and impartial (*Menson v UK* (2003)); in order to be effective, the investigation should be conducted by individuals independent of the alleged perpetrators.

The duty to investigate is a continuing one (*Re McKerr* [2003] NI 117).

Both Articles 2 and 3 of the ECHR impose positive obligations to protect the substantive rights protected by these articles – whoever is the likely perpetrator. This positive duty requires states to investigate allegations of torture, inhuman or degrading treatment or punishment or deaths that may have occurred in breach of the Convention where such treatment may have been caused by the police or other law enforcement officials and the duty to investigate will occur when police officers allegedly use excessive force or unnecessarily inflict serious injuries.

There is therefore also a parallel obligation arising from Article 3 of the ECHR to carry out an effective independent investigation into credible claims that a person has been ill-treated, or when the authorities have reasonable grounds to suspect that there has been serious ill-treatment by the police or other agents of the State (*Gafgen v Germany* (2010)).

The investigating authorities must also commence an investigation if victims provide evidence that they were injured at the time of release from custody although they were healthy at the time that they were taken into custody. The burden is on the detaining authorities (for instance, the police) to provide a plausible explanation as to how those injuries were sustained.

## **PUBLIC ORDER AND FREE SPEECH**

Everyone has the right to freedom of peaceful assembly and of association (UDHR Article 20; ICCPR Articles 21 and 22; ECHR Article 11; CERD Article 5(d)(ix)). The authorities have a positive duty to take reasonable and appropriate measures to ensure the peaceful conduct of assemblies (*Kudrevicius v Lithuania* (2015)). Everyone also has the right to freedom of speech (UDHR Article 19; ICCPR Article 19; ECHR Article 10).

These are qualified rights; they can be restricted, but only where a restriction is lawful, legitimate, necessary and proportionate. Any restrictions based on risks must be balanced against the rights. The Court has found that the ‘mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralizing the threat of violent clashes’ (*Faber v Hungary* (2012)).

### **Freedom of Expression**

The right to freedom of expression, has been described by the European Court of Human Rights as ‘one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.’ The right applies not only to ideas that are favourably received, but also to ideas that may shock or offend certain sections of the population (*Handyside v the United Kingdom* (1976)).

Freedom of expression covers: books, cartoons, placards, posters, the internet, radio, and works of art. Opinions are covered by Article 10, for example criticism of police officers, political figures and challenges to religious beliefs.

Article 10 also imposes positive duties on the police to protect expression. For instance, in case where a newspaper and its staff, had been subjected to intimidation and violence, resulting in a number of deaths. The failure of the authorities, despite requests by the newspaper, to take any protective steps was a violation of Article 10 (*Ozgur Gundem v Turkey* (2000)).

There are limits on freedom of expression, including those in the Public Order (Northern Ireland) Order 1987 which makes it an offence to stir up hatred or arouse fear in public.<sup>152</sup>

### **Freedom of Assembly**

The right to peaceful assembly is not confined to static meetings; it also covers marches, parades and processions (*Rassemblement Jurassien and Unite Jurassienne v Switzerland* (1979); *Christians Against Racism and Fascism v UK* (1980)).

The purpose of the assembly is irrelevant, so long as it is peaceful. The mere fact that an assembly may result in disorder does not automatically preclude Article 11 protection - peaceful intent is sufficient, even if unintentional disorder results (*Christians Against Racism and Fascism v UK* (1980)). Causing traffic problems as a consequences of a demonstration is conduct which is regarded, in itself, as peaceful, although restrictions to reduce traffic delay may be justified in particular cases.

Being noticed by the public and others is usually a key component of a demonstration or an assembly and it is inevitable that demonstrations will be held where a members of the public congregate and inevitable that the public's activities will be disrupted and there will be traffic delays.

As with free speech under Article 10, an assembly may annoy or give offence, but is nonetheless protected under Article 11 (*Refah Partisi v Turkey* (2002), *Berkman v Russia* (2020)).

In particular, those opposed to official views must find a place for the expression of their views (*Piermont v France* (1995)).

Where there is a threat of disruption or disorder from others, the relevant authorities (including the police) are under a duty to take appropriate steps to protect those who want to exercise their right of peaceful assembly (*Plattform Ärzte Für das Leben v Austria* (1988)).

There is no absolute duty to protect those who want to exercise their right of peaceful assembly: the obligation is to take 'reasonable and appropriate measures', and a fairly wide discretion is left to the authorities responsible for regulating the assembly (*Plattform Ärzte Für das Leben v Austria* (1988)).

<sup>152</sup> Note that in 8(2) 'any discussion or criticism of marriage which concerns the sex of the parties to marriage is not to be taken of itself to be – (a) threatening, abusive or insulting, or (b) intended to stir up hatred or arouse fear.'

A requirement of prior notice or authorisation for a march or meeting is not necessarily a breach of Article 11, so long as the purpose behind the procedure is not to frustrate peaceful assemblies (*Rassemblement Jurassien and Unite Jurassienne v Switzerland* (1979)).

But orders banning meetings and marches are justified only in extreme circumstances, where there is a real danger of disorder that cannot be prevented by other less stringent measures or by the presence of the police (*Christians Against Racism and Fascism v UK* (1980)).

Whilst the Parades Commission have key duties in relation to processions and parades the PSNI also have a power to impose conditions on assemblies that have not been notified to the Commission (*DB v Chief Constable of the PSNI* (2017) Supreme Court).

A prohibition on holding public events at certain locations is not incompatible with Article 11, when it is imposed for security reasons (*Rai and Evans v UK* (2009))

Restrictions on the political activities of police officers, including the right to join political parties, the right of assembly, the right to join a trade union and to strike can be justified under the ECHR on the basis that a politically neutral police force is in the public interest (*Rekvenyi v Hungary* (1999), *Trade Union of the Police in the Slovak Republic v Slovakia* (2012), and *Junta Rectora Del Ertzainen Nazional Elkartasana v Spain* (2015)).

## CRIMINAL INVESTIGATIONS

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### Basic Provisions

Everyone has a right to respect for his/her private and family life, home and correspondence. No one shall be subjected to arbitrary interference with privacy, family, home or correspondence. (UDHR, Article 12; ICCPR, Article 17; ECHR, Article 8).

The police shall only interfere with an individual's right to privacy when necessary and for a legitimate purpose (ECHR, Article 8(2), European Code of Ethics, Article 41); all interferences with an individual's right to privacy must also be proportionate to the legitimate purpose which justifies such interference (ECHR Article 8(2)).

Police investigations shall be objective and fair. They shall be sensitive and adaptable to the special needs of persons, such as children, juveniles, women, older persons, minorities including ethnic minorities and vulnerable persons [PSNI Code of Ethics Article 2.1, 2.2] (European Code of Police Ethics, Article 49).

Collection, storage and use of personal data by the police shall be carried out in accordance with international data protection principles [including the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 and associated Codes of Practice and the PACE (NI) Order 1989] and in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes [PSNI Code of Ethics, Article 3.1] (European Code of Ethics, Article 42).

Matters of a confidential nature in the possession of police officers shall be kept confidential, unless the performance of duty or the needs of justice require otherwise [PSNI Code of Ethics, Article 3.3] (UN Code of Conduct for Law Enforcement Officials, Article 4).

### **Stop and Search**

Any use of a stop and search power, be it for road traffic purposes or counter-terrorism reasons, engages a range of human rights: for example, potentially Article 5 (ECHR) right to liberty and security of the person (because the power to stop and search includes a power to detain the person whilst the stop and search is carried out); Article 8 (ECHR) right to privacy; and, on a broader basis, Article 14 (ECHR) right to freedom from discrimination in the enjoyment of ECHR rights if the power is used disproportionately against one group rather than another.

The Policing Board will be monitoring stop and search statistics to ensure that any disproportionate use of stop and search is highlighted, and addressed.

Therefore the police must ensure that all use is proportionate, justified and is in accordance with the legal framework. The experience of an individual who has been stopped and searched – whether positive or negative - will impact on their perception of the police service. 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 Justice and Security (Northern Ireland) Act 2007 provides the PSNI with additional powers of entry, search and seizure that are not available to other police services in the United Kingdom and, crucially, do not require the police officer have reasonable suspicion before the stop and search power is used. The absence of the need for reasonable suspicion creates challenges for compliance with human rights principles and police officers are required to record the reasons for the action (Gillan and Quinton v UK (2010), Beghal v UK (2019), Re: Ramsey (No 2), (2020)), and Re: Ailise Ni Mhurchu (2021)

## Surveillance

Surveillance is an interference with privacy and therefore must be prescribed by law, necessary and proportionate (*Kopp v Switzerland* (1998))

[PSNI Code of Ethics, Article 3.2]).

Intercepting telephone calls, the use of listening devices, collecting data on an individual's use of the internet and telephones and the use of informers are all forms of surveillance and therefore must also be prescribed by law, necessary and proportionate (*Malone v UK* (1984); *Halford v UK* (1997)); intercepting messages is also a form of surveillance and therefore must also be prescribed by law, necessary and proportionate (*Taylor-Sabori v UK* (2002)); each case must be justified on its own facts.

The use of CCTV cameras, even in public places, can raise privacy issues under Article 8 ECHR and therefore must be prescribed by law, necessary and proportionate (*Peck v UK* (2003)); the use of CCTV cameras includes disclosure of the contents of any images obtained by such use (*Peck v UK* (2003); *Perry v UK* (2003)) and this includes the new technique of facial recognition (*R v (Edward Bridges) v Chief Constable of the South Wales Police* (2020)).

The use of Body Worn Video (BWV) cameras by police officers will be lawful if they are both used and necessary for a particular policing purpose and the material is only kept for as long as necessary to satisfy that purpose. Their use will not be lawful if they are used as part of a pre-planned investigation and without the authorisation required by the Regulation of Investigatory Powers Act.

They are also unlikely to be used lawfully if they are used in private places without special reasons or are used at a time when a person's privacy is particularly important for them (intimate searches etc.) (*Wood v Commissioner of Police for the Metropolis*, Court of Appeal of England and Wales, 21 May 2009 and see the PSNI BWV Privacy Impact Assessment, 2016).

Gathering and retaining information in files (including computer databases) about a particular individual raises privacy issues and therefore must also be prescribed by law, necessary and proportionate, even where the information has not been gathered by an intrusive or covert method (*Rotaru v Romania* (2000)).

There must be proper methods of accountability regarding both the authorisation and the use of police surveillance and other information-gathering and retention activities.

Investigations into allegations of abuse of privacy must be independent (*Govell v UK* (1999)).

## **Informers and Undercover Officers**

It is legitimate for the state to use informers and undercover officers in the investigation of crime (Ludi v Switzerland (1992)). However, the processes for using informers and undercover officers must be regulated by law and proportionate (see the detailed rules for authorisation etc. provided by the Investigatory Powers legislation). Such agents can be authorised to commit crimes and from 2020 will, as a result be given indemnities from prosecution (Covert Human Intelligence Sources (Criminal Conduct) Act 2021) (see also the “Third Direction” case, Privacy International, CAJ and others v Secretary of State for Foreign Affairs and others, Investigatory Powers Tribunal (2019) and Court of Appeal (2021)). However, the Public Prosecution Service is not anyway obliged to prosecute and can take account of the public interest in deciding whether to prosecute in a particular case. It is likely that the more serious the crime undertaken by agents without proper authorisation the more likely it is that there will be a prosecution.

Informers and undercover officers also should not incite an individual to commit a crime s/he would not otherwise commit (Teixeira de Castro v Portugal (1998); R v Looseley [2001] 1 WLR 2060).

When deciding whether conduct amounts to ‘state - created crime’ the question is whether, in all the circumstances, the conduct of the police is so seriously improper as to bring the administration of justice into disrepute (R v Looseley [2001] 1 WLR 2060).

If an individual freely takes advantage of an opportunity to break the law given to him by a police officer, the police officer is not to be regarded as being guilty of ‘entrapment’ (R v Looseley [2001] 1 WLR 2060).

The right to silence cannot be invoked to exclude statements made voluntarily to informers or undercover officers, unless they deliberately manipulate the situation to elicit incriminating evidence; placing an informant in a cell with others with instructions to elicit certain information amounts to deliberate manipulation and thus breaches the right to silence (Allan v UK (2002)).

## **Search and Seizure**

Search and seizure interfere with privacy and the peaceful possession of property (ECHR Article 8 and Article 1 of Protocol 1) and therefore must be prescribed by law, necessary and proportionate [PSNI Code of Ethics, Article 3.2] (Camenzind v Switzerland (1997); Niemietz v Germany (1992)).

The right to privacy can extend to business or work premises (Niemietz v Germany (1992)).

Consent to search and seizure will not be valid unless it is genuine and informed.

## **Fingerprints, Samples and Personal Data**

Taking fingerprints, samples and personal data interferes with privacy and therefore must be prescribed by law, necessary and proportionate (Murray v UK (1994)).

Any consent to the taking of samples must be informed consent.

Retaining fingerprints, samples and other personal data also interferes with privacy and therefore must be prescribed by law, necessary and proportionate (X v Germany (1976); S and Marper v UK (2008); Gaughran v UK (2020))

Retaining fingerprints, samples and personal data of individuals who were charged but who were not subsequently convicted (and do not have any other previous convictions) cannot be justified nor can the retention of the data of those only convicted of non-serious offences (such as drink/drive) (S and Marper v UK (2008); Gaughran v UK (2020)). New legislation designed to comply with recent cases is likely to be agreed by the Assembly in 2020.

## **ARREST AND PRE-TRIAL ISSUES**

### **Basic Provisions**

Everyone has the right to liberty and security of their person. No one shall be subjected to arbitrary arrest or detention (UDHR Articles 3 and 9, ICCPR Article 9(1);

CERD Article 5(b); ECHR Article 5(1)).

Deprivation of liberty of persons shall be as limited as possible and conducted with regard to the dignity, vulnerability and personal needs of each detainee (European Code of Police Ethics, Article 54).

Arrest and detention must be carried out in accordance with the law (ECHR Article 5(1); UN Body of Principles, Principle 2).

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person [PSNI Code of Ethics, Article 5.1] (ICCPR Article 10; CRC Article 37(c); ECHR Article 3; UN Body of Principles, Principle 1; Police and Criminal Evidence (NI) Order 1989 Codes of Practice C-E; Bouyid v Begium (2015)).

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to, the effective control of a judicial or other authority (UN Body of Principles, Principle 4).

The unacknowledged detention of an individual is a breach of the right to liberty. Having assumed control over an individual, it is incumbent on the authorities to account for his/her whereabouts (Kurt v Turkey (1998)).



All money, valuables, clothing and other property belonging to a detainee which he is not allowed to retain shall be placed in safe custody [PSNI Code of Ethics, Article 8.1] Mandela Rules, Rule 67)

### **Reasonable Suspicion**

There must be a reasonable suspicion that an individual has committed a criminal offence (or reasonable suspicion that he or she has been involved in acts of terrorism) before an arrest or the use of general stop and search powers [PSNI Code of Ethics, Article 2.2] (Fox, Campbell and Hartley v UK (1990); European Code of Police Ethics, Article 47).

Having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (Fox, Campbell and Hartley v UK(1990)).

The honesty and good faith of the police officer's suspicion constitute indispensable elements of its reasonableness (Fox, Campbell and Hartley v UK (1990)).

### **Reasons**

Everyone arrested should be informed, in a language s/he understands of the reasons for his/her arrest (ICCPR Article 9(2); ECHR Article 5(2); UN Body of Principles, Principle 10). Simple, non-technical language should be used.

Notification should be at the time of arrest or as soon as practicable thereafter (Fox, Campbell and Hartley v UK (1990)).

Sufficient details should be given to enable the person arrested to know the basis upon which s/he is being held. This should include the facts alleged and the relevant criminal law.

Detained persons should be provided with information on and an explanation of their rights and how to avail themselves of their rights (UN Body of Principles, Principle 13; European Code of Police Ethics, Article 55).

The reasons for the arrest, the time of the arrest, the identity of the police officers concerned and the place of custody of the detained person should be recorded (Mandela Rules, Rule 7(1)) and such record should be communicated to the detained person or his counsel, if any (UN Body of Principles, Principle 12).

Detained persons should be entitled to notify or to require the competent authority to notify members of their family or other appropriate persons of their choice of their arrest, detention or imprisonment (UN Body of Principles, Principle 16(1); European Code of Police Ethics, Article 57).

## External Communication

Communication of a detained person with the outside world, in particular, his/her family and legal representative, should not be denied for more than a matter of days (UN Body of Principles, Principle 15) and shall be allowed under supervision at regular intervals thereafter (Mandela Rules, Rule 58; McVeigh, O'Neill and Evans v UK,(1981)).

## Access to a Lawyer

Everybody should be informed of the right to be assisted by a lawyer upon arrest (UN Basic Principles on the Role of Lawyers, Principle 5).

Access to a lawyer is fundamental and should not be delayed (UN Basic Principles on the Role of Lawyers, Principle 5; Murray v UK (1996), Magee v UK (2002)). However, access to a lawyer can be delayed where there is a proper basis for believing that there is a risk that such access will frustrate the arrest of other suspects (Brennan v UK (2002)) or where there are other exceptional circumstance – for instance for the preservation of life (Ibrahim v UK (2016)).

Communications between a suspect and his/her lawyer should be confidential (S v Switzerland (1991)) and inadmissible as evidence unless they are concerned with a continuing or contemplated crime (UN Body of Principles, Principle 18(5)).

The right of access to a lawyer must be effective – the right is to a private conversation for a reasonable time.

However, there is no right to access to a lawyer before a roadside breath test is administered (Campbell v DPP (2002) EWCA 1314);

## Questioning

No suspects should be subject to violence, threats or methods of interrogation which impair his/her capacity to make decisions or judgements (UN Body of Principles, Principle 21(2)).

All suspects have the right to remain silent during questioning (ICCPR, Article 14(3)(g); Article 40(2)(b)(iv); Funke v France (1993); Saunders v UK (1996)) but adverse inferences can be drawn from silence, so long as they are fair and legitimate (Murray v UK (1996); Condrón v UK (2000); Beckles v UK (2003)); however, appropriate weight must be given to the explanation given by the defendant for exercising his right to silence (Beckles v UK (2002)).

Any force used during interrogation (e.g. slapping and kicking) is inhuman treatment and prohibited (Ribitsch v Austria (1995); Tomasi v France (1992); Bouyid v Belgium (2015)).

The time and place of all interrogations should be recorded (UN HRC General Comment 20; UN Body of Principles, Principle 23(1)).

Registers should be kept of all those in custody, which should be accessible to relatives and friends (UN HRC General Comment 20).

Children and those who appear to “mentally vulnerable” should have an appropriate adult to support them in the police station<sup>153</sup>. Consideration should also be given to providing support for older persons in the police station who may be more likely to have issues with memory recall and failing physical health.

### **The Right to be Brought Promptly before a Court**

Everyone arrested for a criminal offence has the right to be brought promptly before a court (ICCPR Article 9(3); ECHR Article 5(3); CRC Article 40(2) (b)(iii);

UN Body of Principles, Principle 37; Brogan v UK (1998)).

An assessment of ‘promptness’ has to be made in the light of the object and purpose of this requirement, which is to protect the individual against arbitrary interference by the state; the European Court of Human Rights has decided that ordinarily the period of detention before a person is brought before a court should not be longer than four days (Tas v Turkey (2001)).

The court before which a person is brought must have power to order release (Ireland v UK (1978)). Alternatively a detained person may be brought before an officer authorised by law to exercise judicial power (ECHR Article 5(3)). Such an officer must have some of the attributes of a judge: s/he must be independent, impartial and must consider the facts and have power to order release (Schiesser v Switzerland (1979)).

### **Bail**

The general presumption is that those awaiting trial should not be detained but released (ICCPR Article 9(3); ECHR Article 5(3); UN HRC General Comment 8; UN Body of Principles; Principle 39; Tokyo Rules, Rule 6; Wemhoff v Germany (1968)).

Bail may be refused if it is necessary to prevent a person absconding, interfering with the course of justice or for the protection of others, but the reasons must be relevant and sufficient (Stogmuller v Austria (1969); Neumeister v Austria (1968); Tomasi v France (1992); Van Alphen v Netherlands, UN HRC Communication No.305/1988, HRC 1990 Report, Annex IX.M). Bail may be conditional (Wemhoff v Germany (1968)).

Material relevant to the decision whether to grant bail should in principle be disclosed to the suspect, but may be edited to protect the identity of informants (Re Donaldson’s Application for Bail [2003] NI 93).

<sup>153</sup> The Appropriate Adult has an important and positive role while supporting vulnerable people and juveniles in Custody, this includes ensuring that the detained person understands what is happening to him and why. (NI Appropriate Adult Scheme is available throughout NI). <https://www.mindwisenv.org/what-we-do/mindwise-services/criminal-justice/niaas/>

## DETENTION

### Basic Provisions

Torture, inhuman and degrading treatment are prohibited absolutely [PSNI Code of Ethics, Article 1.4] (UDHR Article 5; ICCPR Article 7; CAT Article 2(1); CRC Article 37(a); ECHR Article 3; UN Body of Principles, Principle 6; UN Code of Conduct, Article 5; *Chahal v UK*(1996); *A and Ors v Secretary of State for the Home Department*, [2005] UKHL 71).

No justification or excuses, including state of war, threat of war, internal political instability or any other public emergency (such as combating organised terrorism and crime: *Selcuk and Askar v Turkey* (1998)), may be invoked to justify the prohibition on torture, inhuman and degrading treatment (CAT Article 2(2); UN Body of Principles, Principle 6; UN HRC General Comment 20). The victim's conduct is irrelevant (*Chahal v UK* (1996)).

Where an individual enters custody uninjured and is later found to have injuries, it is incumbent on the detaining authorities to explain how the injuries occurred or risk the drawing of an adverse inference (*Ribitsch v Austria* (1995)).

Individuals should also be given access to a lawyer and right to have their arrest communicated to a relative or friend (PACE, Article 57, European Committee for the Prevention of Torture, three fundamental safeguards (2002)).

### Conditions of Detention and Ill-treatment

Detained persons should be given the right to a medical examination on admission (UN Body of Principles, Principle 24). The full protection of the health of persons in custody should be ensured and medical attention provided when required and the particular sanitary needs of women and girls should be considered [PSNI Code of Ethics, Article 5.3] (UN Code of Conduct, Article 6; UN Standard Minimum Rules for the Treatment of Prisoners, Rule 22; Bangkok rules (for women); Beijing Rules (for young people)).

Any unnecessary and deliberate force against those in detention is inhuman treatment (*Ribitsch v Austria* (1995)); deliberately striking a defendant and handcuffing him causing real injury is capable of amounting to inhuman treatment (*Egmez v Cyprus* (2002)).

Very special reasons are needed to justify solitary confinement, restrictions on wearing own clothes and eating own food for those awaiting trial (*Ramirez Sanchez v France* (2006)).

Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment (UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules, Rule 47)).

Allegations of ill-treatment, including all suspected cases of extra-legal, arbitrary and summary executions, must be properly, promptly and impartially investigated (CAT Articles 12 and 13; UN Body of Principles, Principle 7; UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; *Assenov v Bulgaria* (1998)).

Evidence obtained by ill-treatment must be excluded at trial (CAT Article 15; *Austria v Italy* (1963); *A and Ors v Secretary of State for the Home Department*, [2005] UKHL 71).

Other conditions in detention may also raise questions about compliance with ECHR Article 3 and the equivalent UN treaties. The detainee must not be detained in overcrowded conditions and must be provided with refreshments, opportunities for exercise, natural light and proper washing and toilet facilities etc. (CPT, 2nd General Report, 1992)

Those controlling places of detention, including police stations, must allow national and international independent inspectors and monitors (including the Policing Board's own Custody Visitors) to have unfettered access to all places of detention and to speak privately to those detained (Optional Protocol to the Convention Against Torture and the European Convention for the Prevention of Torture).

## CHILDREN

In all actions concerning children, the best interests of the child are the primary consideration Article 53, Justice (NI) Act (CRC Article 3(1)).

Actions by police officers dealing with children should be explained in a language that child understands (UNCRC art 13) – in both written and verbal formats.

A child must be afforded such protection and care as is necessary for his or her well-being (CRC, Article 3(2); Beijing Rules, Rule 5). Children are particularly vulnerable to sexual exploitation and abuse and need extra protection. The Safeguarding Board for NI<sup>154</sup> has 27 members, from the statutory and voluntary sector, of which PSNI are a member, whose common purpose is to help safeguard and promote the welfare of children and young people in NI.

Protecting a child's privacy is of paramount importance (ICCPR Article 14(1); CRC Article 40(2); Beijing Rules, Rules 8 and 21). No information that may lead to the identification of a juvenile offender should be published but the courts can allow publication in exceptional circumstances (The Criminal Justice (Children) (Northern Ireland) Order 1998) (Beijing Rules, Rule 8.2). Records of juvenile offenders should be kept confidential and closed to third parties (Beijing Rules, Rule 21.1).

<sup>154</sup> The Safeguarding Board Act (Northern Ireland) 2011 was passed in February 2011. It provided the legislative framework for the creation of a new regional Safeguarding Board for Northern Ireland (SBNI) and the establishment of five Safeguarding Panels to support the SBNI's work at a Health and Social Care Trust level.

Arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time (CRC Article 37(b); Beijing Rules, Rule 13.1; UN Rules for the Protection of Juveniles Deprived of their Liberty, Rules 1 and 2).

No child should be interviewed without an appropriate adult present and in a manner that secures informed engagement from the children.

Detention pending trial should be limited to exceptional circumstances and whenever possible be avoided and replaced by alternative measures such as close supervision (Beijing Rules, Rule 13.2; UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 17).

While in custody, children should receive care, protection and all necessary individual assistance (social, educational, vocational, psychological, medical Rules, Rule 13.5; UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 28).

A child's parents or guardian should be immediately notified of the apprehension of their child and a judge or other competent official or body should without delay consider the issue of release (Beijing Rules, Rule 10).

Where there are no grounds for denial of bail, as outlined above, all efforts should be made engage with relevant statutory authorities and the child's legal guardian to ensure that safe accommodation in the community is found (The Criminal Justice (Children) (Northern Ireland) Order 1998).

Police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime should be specially instructed and trained (UNCRC Art 4 (GC 5)) (Beijing Rules, Rule 12.1). There should also be a presumption of diversion from the criminal justice system where-ever possible UNCRC (art 40 (3) (b))

Adaptations to the criminal justice system are needed where children are on trial (T and V v UK (1999)). Basic procedural safeguards should be guaranteed at all stages of any criminal proceedings (Beijing Rules, Rule 7.1).

The procedure should take account of the child's age and the need to promote their rehabilitation (ICCPR Article 14(4)).

A child capable of forming his/her own views should have the opportunity to be heard and express those views freely in any judicial, administrative or other matter affecting him/her, either directly or through a representative or other appropriate body. The child's views should be given due weight in accordance with the age and maturity of the child and should be supported by an appropriate adult (CRC, Article 12).

## REFERENCES

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References to court judgments are mainly to the judgments of the European Court of Human Rights: as in for instance, Assenov v Bulgaria (1998). These are easily accessible from the ECtHR web site at <https://hudoc.echr.coe.int/>

Other judgments are from the courts of Northern Ireland or Great Britain and are available from the website at <http://www.bailii.org> All the other documents should be available from a normal internet search.

## APPENDIX B: UPDATE ON RECOMMENDATIONS FROM BOARD'S THEMATIC REVIEW OF PSNI'S RESPONSE TO COVID

This section sets out the recommendations made in the COVID report including the responses from PSNI and others and, where useful, any key updates or information.

### Recommendations 1 to 5 for the Executive and Assembly

**Recommendation 1** - 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;

**Recommendation 2** - 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;

**Recommendation 3** - 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;

**Recommendation 4** - 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;

**Recommendation 5** - 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.

### Update on Recommendations 1 to 5

In relation to these recommendations the PSNI state that they are supportive and have been engaging with the Executive on the drafting of the most current Regulations. In relation to Recommendation 2 they stated that this is vital for both the public to understand their rights or restrictions and for police officers to be able to interpret and enforce them in a proportionate manner. PSNI also state that they support Recommendations 3 and 4 and in particular for Recommendation 4 they state that *"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."* In relation to Recommendation 5 the PSNI welcomed greater collaboration with partners such as the Department of Health in the development and implementation of joint strategies designed to protect the health of the community. They stated that, "We remain committed to working with the Department to effectively tackle the threat to public health posed by COVID-19."



We will also seek to strengthen existing collaboration with the Department in other areas impacting public health, such as drug misuse and drugs related deaths.” More recently, PSNI has informed and encouraged 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.

### **Recommendations 6 to 16 for PSNI**

**Recommendation 6** - The PSNI should always initiate quality control mechanisms 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 response** - The PSNI has accepted this recommendation stating that – We have continuously reviewed the application of the Coronavirus Regulations and more specifically the use of Fixed Penalty Notices [FPNs] and have implemented strict assurance mechanisms for the issuing of COVID-19 FPNs. The Strategic Coordination Centre (SCC) manages the police response to all COVID-19 related incidents; this includes authorising the issuing of FPNs for breaches of the Regulations. Frontline officers may only issue a FPN with the authority of an Inspector (or above). This approach is designed to bring consistency to the enforcement of the Regulations. Once issued, FPNs are checked and countersigned by the officer’s supervising Sergeant to certify that they are satisfied it has been completed fully and issued lawfully and in compliance with the guidance. The Community Safety Department will ensure that any future ‘fast time’ criminal justice implementation plans take the learning from the COVID-19 experience into account.

**Recommendation 7** - The PSNI and the PPS should review all of the Coronavirus Regulation cases, both FPNs 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 response** - PSNI originally stated that it was their view that the current Regulations make no provision for any FPNs to be rescinded by the police or by the PPS. The only mechanism by which an enforceable penalty registered under Regulation 12 can be set aside is by direction of the Magistrates Court. Those individuals who have been reported to the PPS for suspected breaches of the Regulations will have their cases subjected to independent assessment by the PPS in terms of available evidence and public interest. It is the advice of Senior Counsel that were PSNI to interfere with the prosecutorial decision this would raise questions about potential breaches of human rights. PSNI has taken legal advice from Senior Crown Counsel who has determined that there is no scope to take any action in respect of FPNs issued. As is the case with all other prosecutorial acts taken by them, it is the PPS and the Courts who independently adjudicate on these matters. They state that they are therefore of the view that they cannot review these matters or, indeed, withdraw any action taken. That said, PSNI note that they will accept any decision of the PPS or courts and reconsider matters thereafter.

However, the PSNI has now decided, following further consultation and consideration that all the FPNs will be quashed and any payments repaid.

### **Human Rights Advisor Comment**

This is very welcome and shows considerable flexibility by officers and the Chief and is to be applauded. It should also pave the way to a much better relationship with the key groups effected by police action in June 2020 and this should provide a much more positive platform for the future.

### **PPS update on Recommendation 7**

The PPS is satisfied that the Test for Prosecution allows the prosecutor to identify and balance the competing considerations for and against prosecutions in any individual case, some of which are helpfully highlighted in the report. They have sought to ensure that cases involving a breach of Coronavirus Regulations are the subject of a careful and consistent approach by directing that all cases be dealt with by a very small team of prosecutors embedded in their Central Casework Section, which deals with the most novel and sensitive casework.

On 2 June 2021 the PPS announced that it had decided that there would be no prosecutions in relation to the Black Lives Matter protests. A total of 14 suspects were reported to the PPS by PSNI but none will be prosecuted.

### **Human Rights Advisor Comment**

The responses to recommendation 7 are very welcome and confirms the importance of this issue although perhaps this recommendation should have been set out more precisely, making it clear what the PSNI was being asked to do separately from what the PPS was being asked to do.

The Human Rights Act prohibit public authorities from taking action that violates human rights. Both the evidence test and the public interest test are fundamental but the PPS also has a third duty - to assess whether a conviction would violate those fundamental rights. It is clear, however, that if any FPN was unlawful (in violation of the Human Rights Act) the PPS would, in practice, advise and assist the PSNI and ensure that this did not occur.

The Board's Report proceeded on the basis that if a public authority finds that it has issued FPNs unlawfully it cannot leave it to others to challenge this – especially as it is likely to result in fines being paid following an unlawful action. Any public authority in such circumstances needs to be proactive

**Recommendation 8** - 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 (including figures based on the community background of the people involved).

**PSNI response** - We have reviewed our available records and will collate and publish available data pursuant to Section 75, as it relates to the use of the additional powers provided for under the Regulations. It should be noted however that data gathered from recipients of COVID-19 FPNs is limited to gender and age.

Data pursuant to Section 75 has and is being monitored in respect of the use of additional equipment issued to officers, namely Spit and Bite Guards. This data will be examined as part of the ongoing full Equality Impact Assessment commissioned by the Chief Constable.

### **Police Ombudsman Update**

The Police Ombudsman reported at paragraph 9.23 of her **Report** that:

*'I am not empowered to make a determination in respect of the conduct of any police officer when considering the application of a PSNI policy or practice under Section 60A of the 1998 Act. It will be a matter for the courts and/or appropriate tribunal if required to reach a conclusion as to whether the treatment of individuals at the 'Black Lives Matters' Protests on 6th June 2020 amounted to discrimination in fact.*

*The differential treatment by PSNI of protesters on 6th June when compared with those attending 'Protect Our Monuments' on 13th gave rise to claims of unfairness and discrimination against those persons who organised and attended the 'Black Lives Matters' 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.'*

## Human Rights Advisor

Allegations were made in the press and picked up by the Board's recommendation 14 (see below) that ethnic minority individuals attending the Black Lives Matter protest on 6 June were treated differently than white individuals attending the same event. It may be that individuals can and will complain about something specifically said or done by officers at this protest that might be evidence of direct discrimination and those cases will need to be investigated separately by the Police Ombudsman or Equality Commission.

There are three types of discrimination that are particularly relevant to these circumstances: direct discrimination, indirect discrimination and discrimination by association. Direct discrimination occurs when a person or organisation treats another person unfavourably as a result of their ethnic minority status (that is, on racial grounds). However, unlawful direct discrimination does not have to be intentional and can be unconscious (this may be an issue in relation to the use of stop and search in England). Indirect discrimination occurs when a seemingly neutral policy or practice has a disproportionate result on one group rather than another and that policy is not justified by any other substantial reasons. For instance, the imposition of stop and search powers in one geographical area may lead to a greater number of people from one community or ethnic minority being subject to the powers (because a greater number of those people live in that area) will need to be justified otherwise it will be unlawful. Indirect discrimination maybe justified (and therefore lawful) but the responsibility is on the organisation to do so convincingly.

Discrimination can be unlawful if the reason for the unfavourable impact is as a result of the characteristic of those that a person is associated with. For instance, an employee is treated unfavourably as a result of the fact that she has a child with a disability (rather than having a disability herself).

Interference with freedom of assembly and expression in relation to a protest about race discrimination itself could be direct discrimination, indirect discrimination (because it is likely that a disproportionate number of people from ethnic minorities would be likely to attend the protest) or discrimination by association.

Separately, these three kinds of discrimination can also occur at an individual level. However, for the purposes of indirect or unconscious direct discrimination it does not appear that any information has been collected about the ethnic minority status of those attending (or trying to attend) the protest who were subject to unfavourable treatment by PSNI (cautioned, persuaded not to attend, told to leave or given Fixed Penalty Notices etc.) compared to their white counterparts.<sup>155</sup> It may be that this evidence does not exist and cannot now be collected.

<sup>155</sup> Evidence of any disproportionality would have to be based on the numbers of ethnic minority members subject to some kind of negative interaction with police officers compared with white attendees also subject to a negative interaction. This would then need to be compared with the 'available populations' - the overall numbers of ethnic minority members compared with white people attending the event.

**Recommendation 9** - 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 judgment 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 response** – PSNI report that they understand the Board’s Human Rights Advisor and the Police Ombudsman are of the opinion that despite our best efforts policing has not always achieved the right balance between Human Rights and the enforcing of the Coronavirus Regulations.

The report rightly highlights that the speed at which the Coronavirus Regulations were enacted to address the risk to our communities and 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. The report also rightly recognises that the Police Service had to interpret this ‘balancing act’ for ourselves at a fast pace. They note that they are satisfied that officers acted in good faith and with integrity and consistently in the broader interests of our community trying to stop the spread of the virus with the priority being to help save lives by enforcing the Regulations.

PSNI state that they recognise, following our experience the Black Lives Matter Protests on the 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 many people in our Black and Minority Ethnic community. As the Chief Constable acknowledged in his report to the Northern Ireland Policing Board of 3 December 2020 there are undoubtedly lessons to be learned from our handling of protests this summer.

Renewed emphasis will be given to ensuring that legal advice and expert human rights advice informs policy, strategy and operational decision making. This process will be reflected 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 will continue to provide the Board with all relevant information to facilitate it in exercising its oversight function. In addition, we will undertake to highlight to the Board any relevant operational challenges as they arise.

**Recommendation 10** - 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 response** – We are now in receipt of the report and recommendations of the Police Ombudsman and are carefully considering their contents. We will share or forthcoming response with the Board. We recognised, following our own experience of policing the BLM Protests on the 6 June 2020, that our approach in balancing the enforcement of the Health Protection Regulations with human rights adversely impacted upon confidence in policing within many people in our Black and Minority Ethnic community. We have accepted this learning and have placed a renewed emphasis on ensuring that human rights legal advice informs policy, strategy and operational decision making. We are also determined to carry out more thorough Human Rights balancing exercises in our delivery of policing operations going forward. This process will be reflected in Command Training programmes and subsequent Gold strategies, Silver and Bronze operational plans and applicable Criminal Justice Strategies.

**Recommendation 11** - 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 response** – Whilst there is no obligation to inform police when organising an open air public meeting PSNI will continue, pursuant to Section 32(5) of the Police (Northern Ireland) Act 2000 to seek to engage protest organisers, at the earliest opportunity, adopting a ‘no surprises’ approach that has been central to policing of parades and protests for many years.

PSNI accept that they need to do more to effectively engage with and understand Black and Minority Ethnic community needs and expectations. The Community Relations Taskforce, led by Assistant Chief Constable Community Safety Department will take this and similar work forward.

**Recommendation 12** - It may also be useful for the PSNI to create an Independent Advisory Group [IAG] on protests and to co-op representatives of those organisers (this IAG should not deal the traditional challenges and debates surrounding parades and protests in Northern Ireland which are the focus of many other forums and processes).

**PSNI response** – PSNI recognise the benefits of meaningful and genuine engagement with communities and therefore have established a corporate Independent Advisory Group (IAG). IAG members have a broad expertise and experience with direct links to diverse communities, enabling them to articulate and reflect a wide range of viewpoints. They will provide a sounding board for the Service to understand the potential impact of police policies, practices and strategies on communities, and provide advice and perspective on challenging critical incidents.

**Recommendation 13** - 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 response** - PSNI has accepted this recommendation and stated that a seminar will be organised by Assistant Chief Constable Operations Support Department once Public Health Regulations allow, possibly in autumn 2021.

**Recommendation 14** - 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 response** - See update for recommendation 8 above.

**Recommendation 15** - 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 31 December 2020.

The PSNI should:

- Provide the Board with further scientific and professional evidence, including from police forces in other jurisdictions, to measure the extent to which spit and bite guards provide protection for police officers from COVID-19 transmission compared with that provided by the PPE supplied to officers;
- Complete a PSNI public consultation exercise on the deployment of spit and bite guards in line with Section 75 of the Northern Ireland Act 1998, and should include consideration of the criteria and guidance for their use; and
- Once these actions have been completed submit the evidence to the Board so that the Board can give its view to the Chief Constable on their use.

The Board should:

- Taking into account the findings of the Office of the Ombudsman's analysis, initiate an independent human rights-based assessment review to analyse each use of spit and bite guards since March 2020, taking into account Article 3 of the ECHR and the other human rights treaties ratified by the UK.

**PSNI response** - PSNI has been unable to accept this recommendation and stated that they have informed the Board of their decision to further roll out this equipment during this pandemic. To date the full roll out is yet to be commenced pending the approval of the policy and training materials by the Chief Constable.

### **Human Rights Advisor comments**

The PSNI have consulted on the use of SBGs during the pandemic as part of a section 75 equality impact assessment and this was not completed at the time of writing. The PSNI are also planning to report to the Policing Board in 2021 on whether SBGs should continue to be used in the long term and it is expected that these recommendations will be picked up in that report. Therefore, a review of their use and continued deployment will be included in the next Human Rights Annual Report. More information on SBGs and the human rights involved is set out the Human Rights Annual Report for 19/20 and the Board's COVID-19 thematic report published in November 2020.

However, the PSNI decided to refer every use of a SBG to the Police Ombudsman and she reported on their use on 1 December 2020.<sup>156</sup> The objective was:

'to ensure that each incident could be independently reviewed to identify if there had been any criminality or misconduct on behalf of officers, or if the particular use of the device was disproportionate, improper or in breach of the PSNI Code of Ethics.'

There were 70 such notifications and a sample of 10 of these were considered. In all instances the subject was violent and had consumed alcohol and/or suspected drug taking was present. One of those 10 was under 18 years of age.

In view of this report and the Ombudsman's review the Policing Board has not taken forward its own assessment of the individual uses of SBGs.

**Recommendation 16** - 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 response** - PSNI state that they continue to review our COVID-19 response to addressing vulnerability and ensure that learning will result in sustainable outcomes. The innovative approaches developed in respect of Domestic Violence and children and young persons at risk, have been adopted as business as usual by PSNI and partners.

<sup>156</sup> A Report on the Use of Spit Hood & Bite Guards incidents notified to the Police Ombudsman's Office.



The Multi Agency Community Safety Board was established in the midst of the COVID-19 pandemic. It provides a platform to engage and deconflict on shared issues in relation to contributors to community safety. This includes early intervention, prevention, diversion and the 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 Community Safety Board member's website to help aid a common understanding of the collaborative approach being taken regarding community safety.

### **Northern Ireland Policing Board**

**Recommendation 17** - OPONI and Policing Board should plan and co-operate more often on significant or serious challenges confronting PSNI.

Arrangements for the Police Ombudsman to speak directly to the Board have had to be cancelled twice due to the ongoing pandemic. This meeting will be re-arranged when the situation allows for the meeting to be organised. Regular meetings are held with the Ombudsman and the Chair of the Board and in addition the Board's Human Rights Advisor also meets on a regular basis with the Ombudsman.

### **Policing Board**

Both the Chair of the Policing Board and the Human Rights Advisor have met the Ombudsman several times recently and meetings between the whole Board and the Ombudsman are being planned.

**Recommendation 18** - 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.

See response to recommendation 17.

The Detail obtained statistics from PSNI on all COVID-19 FPN and reported that they showed that 'black people received a disproportionate number' of these notices.<sup>157</sup> PSNI provided the Board with the most up to date figures relating to the period 30 March 2020 and 31 December 2020 will indicate that, overall, 3.2% of Covid-related enforcements (fines) have been issues to people from BAME backgrounds. Further detail is provided in the below table provided by PSNI:

157 The Detail, 10 March 2021

Ethnicity	Number	Percent
White	2,702	72.2%
Irish Traveller	9	0.2%
Indian	5	0.1%
Pakistani	2	0.1%
Other Asian	3	0.1%
Black African	22	0.6%
Black Other	30	0.8%
Chinese	4	0.1%
Other Ethnic Group	22	0.6%
Mixed	7	0.2%
Roma	15	0.4%
Not Recorded	922	24.6%
<b>Total</b>	<b>3,743</b>	<b>100.0%</b>

It was noted that PSNI rely on recipients of Covid Penalty Notices providing ethnicity voluntarily. Statistics provided also indicated that during the 12 month period, January 2020 to December 2020, 4.1% of all persons stopped and searched/questioned were from BAME communities. The PSNI noted that dedicated engagement with Members from the Black, Asian and other minority Ethnic groups has been ongoing from June 2020, led by Community Safety Department. This has been informed by learning and perspectives derived from the Northern Ireland's Policing Board's thematic Review of the Policing Response to COVID 19 and the Police Ombudsman's report on the Policy and Practice of Policing Protests.

### **Power to enter property**

Following an incident where police officers entered a home suspecting breaches of the Regulations there is a pending judicial review of the PSNI which has raised questions about whether a police officer has the power to enter property without consent and without a warrant (this question has also been raised in various press reports and by some politicians).

At the time the Health Protection (Coronavirus, Restrictions)(No 2) Regulations (Northern Ireland) 2020 were in force. Regulation 7(1) stated:

'A relevant person may take such action as is necessary to establish whether a breach of these Regulations has occurred or to enforce any requirement imposed by Regulation 4 to 6C.'

A relevant person includes a police officer. Guidance on this provision was issued by the Executive on 29 January 2021<sup>158</sup> which stated:

18. Regulation 7(1) gives a relevant person the power to enter a private dwelling in order to establish a breach of the Regulations or enforce any of the requirements imposed by Regulations 4 to 6C. In most cases entry to a private dwelling will only be necessary to establish a breach of, or enforce, Regulation 6.
19. Relevant persons should recognise that in almost every case the entry of a private dwelling will constitute an interference with the Article 8 ECHR rights of an individual or individuals. Such an interference may be justified for the protection of health but only where the interference is necessary and proportionate to that aim.
20. Entry to a home is a particularly invasive use of the Regulation 7(1) power and therefore should be considered as a tool of last resort. A relevant person should consider whether there are any viable less intrusive options available to them to either establish a breach of the Regulations or enforce Regulations 4 to 6C.
21. In considering the exercise of Regulation 7(1) powers for this purpose, a relevant person should follow the guidance set out above, but in particular should do the following:
  - a) Attempt to engage with the owner or occupier of the relevant dwelling and encourage voluntary compliance with the Regulations;
  - b) Take all reasonable steps to establish the circumstances within the dwelling without obtaining entry;
  - c) Enquire about the presence of children in the dwelling prior to entry and consider any potential steps that could reasonably be taken to protect the welfare of any children in line with paragraph 15 above;
  - d) Seek the consent of the owner or occupier to enter the dwelling.'

The courts have always given a particular importance to the protection of a person's home from searches by the state and by police officers and this protection has existed long before the Human Rights Act came into force. The English judge and jurist Sir Edward Coke declared in *Semayne's Case* that there were strict limits on how law enforcement officers may enter a person's house. More recently the House of Lords (court) declared:

'Fundamental rights cannot be overridden by general or ambiguous words.'<sup>159</sup>

Not surprisingly this principle is also a fundamental basis of the European Convention on Human Rights and any interference with rights must be subject to clear, transparent and precise laws. These principles are also part of the legislation that applies to police powers more generally – the Police and Criminal Evidence Order – requiring a police officer, except in limited circumstances, to seek a warrant from the court to enter a home without consent.

<sup>158</sup> <https://www.health-ni.gov.uk/publications/guidance-exercise-police-powers-under-regulation-71-health-protection-coronavirus-restrictions-no-2>

<sup>159</sup> *Ex Parte Simms* [2000] 2 AC 115, para 131.

The opinion stated publicly by the PSNI and the Justice Minister that police officers have such a power as result of the Regulations has been doubted in relation to similar Regulations in England and Wales by the previous Supreme Court Justice, Lord Sumption, and by other police services.<sup>160</sup>

## **Funerals**

The restrictions imposed by the Regulations on attending funerals has been difficult for the relations and friends of people who died during the year. The European Convention on Human Rights protects those wishing to attend by asserting the fundamental right of assembly (in article 11) and the right to ‘manifesting’ religious belief (article 9). Of course, both of these rights are ‘qualified rights’ and can be lawfully restricted if ‘prescribed by law and are necessary in a democratic society in the interests of ... public safety... for the protection of health...’ There is no doubt that, in the context of the pandemic, some restrictions would be justified. However, some politicians have suggested that the PSNI have not enforced the Regulations consistently and, in particular, breaches of the Regulations in republican and national funerals have been ignored. Obviously, the law must be enforced consistently and inconsistent and unjustified enforcement on the grounds of religion or political opinion would be in violation of the anti-discrimination provision of the ECHR (article 14).

The most high-profile issue concerned the funeral of Bobby Storey which was held on 30 June, the very end of the time period set for the Policing Board’s review of the PSNI’s response to the pandemic. Significant numbers of people attended that funeral, possibly in breach of the 30-person limit imposed by the Regulations at the time.<sup>161</sup> Evidence of the breaches, at least of those involved in the organisation, was passed to the PPS but a decision was made not to prosecute them. The Director of Public Prosecutions stated:

“It is relevant that by the time of this funeral, the original Regulations of March 2020 had been amended on nine separate occasions through a combination of deliberate relaxation and re-working at pace to meet policy change. As a result, on the 30 June, the Regulations had become extremely difficult to navigate and, in certain respects, inconsistent.

Furthermore, organisers of this particular funeral and police had engaged against the backdrop of evolving Regulations in an attempt to ensure that a balance was struck in the funeral arrangements between respecting the sensitivity of the occasion and minimising any risk to both public health and safety.

Prosecutions can only be brought where the available evidence provides a reasonable prospect of proving, beyond reasonable doubt, a breach of the criminal law.

<sup>160</sup> Including by the Commissioner of the Metropolitan Police, 12 January 2021.

<sup>161</sup> Though see the analysis by the PPS and HMICFRS, referred to below.

As a result of the factors considered we have concluded that the prosecution could not prove any breach of the Regulations to the required standard. Whether considered alone or in combination, the two reasons outlined - that is the lack of clarity and coherence within the Regulations and the prior engagement between organisers and police - would pose an insurmountable difficulty if any of the reported individuals were prosecuted. This is because they could all avail of a defence of reasonable excuse in terms of their actual or reasonably perceived compliance with a complex set of Regulations and/or their reliance on the prior engagement with PSNI.

The law as it applied to the Storey funeral was changed significantly on the evening before the funeral and further amended two days later. Even though prosecutions are not being brought on this occasion, they are being brought for breaches in relation to funerals at a point in time when the Regulations were clear and coherent.

As has been evident in other jurisdictions, the law relating to permissible conduct in the course of the pandemic is not always clear cut and this can be challenging when it comes to enforcement of what are essentially health Regulations in a criminal justice context...<sup>162</sup>

The decision of the PPS was reviewed but the decision not to prosecute was confirmed in June 2020.

The approach taken by the PSNI in the period before and during the event itself was also subject to a review. The review of the PSNI approach by HMICFRS made a number of recommendations and what follows are what the Human Rights Advisor believes are the key extracts from the Report:<sup>163</sup>

‘In our view, and the view of the PPS in its public statement, it would have been extremely challenging for the police to interpret and apply the relevant provisions of the Regulations in order to identify what conduct was and was not permitted as at 30 June 2020.’<sup>164</sup>

‘The Regulations in force in Northern Ireland at the time of the Mr Storey’s funeral must equally be interpreted and applied in a way that protects and gives effect to human rights. When considering whether to take enforcement action in respect of apparent breaches of restrictions in the Regulations, the police had to consider whether, in all the circumstances, enforcing the restrictions would be a disproportionate interference with the relevant individuals’ human rights, such that, if prosecuted for an offence under the Regulations, they would be able to establish a “reasonable excuse” defence.’<sup>165</sup>

<sup>162</sup> <https://www.ppsni.gov.uk/news-centre/pps-issues-decisions-covid-funeral-files>

<sup>163</sup> The Human Rights Advisor should, perhaps, declare an interest in that the Report states ‘...we quote extensively from Mr John Wadham’s report for the Northern Ireland Policing Board. We support his conclusions and recommendations wholeheartedly.’ Page 73.

<sup>164</sup> Page 15, *The Police Service of Northern Ireland: An inspection into the Police Service of Northern Ireland’s handling of the Bobby Storey funeral on 30 June 2020, 17th May 2021.*

<sup>165</sup> Page 18.

‘The PSNI prioritised security and public order over enforcing the Regulations. Whatever was written in the Gold Strategy, it seemed to us that the priorities of senior officers were, in order:

- that the funeral should pass off without violent incident or serious disorder;
- that the funeral should pass off without any of the more provocative symbology associated with paramilitary funerals;
- and that – a perhaps distant third – there should be no serious breach of the Regulations.’<sup>166</sup>

‘We are, in some respects and to a limited extent, critical of the PSNI actions in the following section. In particular, whereas it is easy to understand why compliance with the Regulations might not have been the PSNI’s highest priority, it doesn’t follow that there is not more it could have done.’<sup>167</sup>

‘The most significant criticism is of the pre-funeral engagement, which did not, in our view, match the best examples we have seen in other police services. Although the level and amount of engagement were commendable, the PSNI did not cover the 4Es as thoroughly as it might have done. There was a degree of informality in the PSNI dealings with organisers that, in the unique circumstances of Northern Ireland, is easily understood and, perhaps, forgivable: senior officers are bound to have regular contact with a relatively small cohort of politicians and community leaders from across the political spectrum. But this comes with potential disadvantages. During engagement with funeral organisers, the PSNI should have more formally adopted the 4Es approach.

It could have – and should have – done more to explain the Regulations (as best it could), to encourage compliance and to advise of the potential consequences if the Regulations were breached. This would have made clear what the police expected of the organisers and attendees. We have also criticised some procedures, especially record-keeping, that should be improved in future engagement.’<sup>168</sup>

The report by HMICFRS, was itself the subject of a number of criticisms by politicians and journalists.<sup>169</sup>

This Report and the events it covers is particularly relevant for human rights purposes and because the PSNI’s approach to this funeral appears to have been substantially different to that taken to the Black Lives Matter protest three weeks before, on 6 June 2020. Perhaps, therefore, it is surprising, that this comparison is not referred to in the HMICFRS report.

166 Page 71.

167 Page 71.

168 Page 72.

169 For instance, being the main subject for discussion over several days after publication on the ‘Nolan Show’ on BBC Radio Ulster.

On 26 May 2021 the Police Ombudsman announced that she has commenced an investigation into a complaint she has received from a member of the public who was involved in a ‘Black Lives Matter’ protest at Guildhall Square, Derry/Londonderry, on Saturday 6 June 2020.

The complaint involves allegations of inconsistencies in the policing approach to engagement and enforcement at the Black Lives Matter protest when compared with the funeral of Bobby Storey. The complainant alleges that the inconsistencies amount to race discrimination. The investigation will focus on matters related to the engagement of the PSNI with the organisers of the Black Lives Matter protest in Guildhall Square, Derry/Londonderry in advance of the event. The investigation will examine if this engagement was consistent with the PSNI’s approach to the organisers of Bobby Storey’s funeral. The investigation will also examine the PSNI strategy, policies and decision-making around the two events in light of this complaint.

## APPENDIX C: IMPLEMENTATION STATUS OF OUTSTANDING RECOMMENDATIONS

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
1	<p><b>Training</b> PSNI should -</p> <ul style="list-style-type: none"> <li>i) consider Dr Richard Martin’s research on the training of officers;</li> <li>ii) work with the PSNI Human Rights Training Advisor to develop plans for improving the training; and</li> <li>iii) report to the Policing Board on the implementation of those plans.</li> </ul>	<p><b>Accepted</b></p> <p>The Board’s Human Rights Advisor in January 2021 met with the PSNI Human Rights Training Advisor met with to discuss the broader application of the recommendation for the Police College. The Police Human Rights Training Advisor is to consider development of an annual plan for 2021/22 and will report on progress to the Board through the established quarterly reporting mechanisms between the Board and Police College.</p> <p>Since the publication of Dr Richard Martin’s report which specifically relates to Public Order Command Courses delivered by Combined Operational Training, the PSNI has reviewed and amended the Human Rights and Use of Force lessons in both the Bronze and Silver Command Courses and now delivers this lesson. Proportionality assessments/discussions take place throughout the Public Order and Public Safety training material and additional material on policing of peaceful protest is now included in the course. This will be kept under review as a part of an annual review of Combined Operational Training content and delivery.</p>	<p>The Human Rights Advisor observed public order training of officers and considers this recommendation <b>Closed.</b></p>



Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
2	<p><b>Policy</b></p> <p>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.</p>	<p><b>Accepted</b></p> <p>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.</p>	<p>The Human Rights Advisor, met with the PSNI lead on policy and has reviewed documents relating to this.</p> <p><b>Work in progress</b></p>
3	<p><b>Operations</b></p> <p>The Body Worn Video (BWV) guidance should be expanded to include more information about the human rights issues involved in the use of BWV (especially in relation to privacy).</p>	<p><b>Accepted</b></p> <p>The use of BWV during encounters with members of the public is grounded in increasing accountability in policing and providing openness and transparency.</p> <p>The PSNI continues to extend and embed the use of BWV in frontline service delivery. Current training highlights the potential impact on human rights and in particular, Article 8 issues. The policy framework and guidance will be reviewed in light of this recommendation to provide reassurance on content relating to human rights impact.</p> <p>The current policy has been updated and sent to Legal Services Branch in early March 2021 for consideration and sign off and to make sure we are Human Rights compliant and legally protected. The BWV policy has been updated to incorporate human rights and a new end date of September 2021 has been set for full implementation of this recommendation awaiting the outcome of the judicial reviews.</p>	<p><b>Work in progress</b></p>

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
4	<p><b>Operations</b></p> <p>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.</p>	<p><b>Unable to Accept (at this time)</b></p> <p>The Multi Agency Triage team (MATT) crisis service initially operated in the Lisburn, Castlereagh and North Down &amp; 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. This report was expected by the end of 2020 but was delayed due to COVID-19 pressures. It is not expected that the report will be completed by the end of March 2021. Early indication is that the PHA is in favour of regional expansion of the service and a number of options are currently being considered to progress this.</p>	<p>In July 2021, the Health Minister highlighted the success of the MATT project as part of the wider mental health Strategy. The Public Health Agency are working on a model for implementation and a business case from PHA has been sent to PSNI for comment.</p> <p><b>Work in progress</b></p>
5	<p><b>Operations</b></p> <p>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.</p>	<p><b>Unable to Accept</b></p> <p>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.</p>	<p><b>Work in progress</b></p>

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
6	<p><b>Operations</b></p> <p>The PSNI should report to the Policing Board on implementing the recommendations made in the CJINI review of the methods used to disclose information in respect of historic cases to the office of the Police Ombudsman for Northern Ireland.</p>	<p><b>Accepted</b></p> <p><b>Rec 1:</b> The PSNI should urgently put in place an effective system to provide corporate assurance that: all material provided by the Liaison Office (LO) was that required in the original request from the Office of the Police Ombudsman for Northern Ireland (OPONI); and the disclosure and discovery regimes were effective and consistent across all Departments.</p> <p><b>Update:</b> In July 2019, PSNI established a new IT platform with an enhanced search function, onto which all extant electronic legacy information transferred. The Ombudsman attended to watch a demonstration of the new system. OPONI investigators then conducted searches of the system in person, assisted by police representatives, in order to satisfy themselves that all material required was obtainable. From March 2019, a Research Guide has been developed to ensure consistency of approach to sensitive research across Departments. In May 2019 a new, lawyer-led Unit was established to oversee governance of sensitive disclosure and discovery across all Departments. An electronic case management system to support governance has been identified and is being adapted for purpose.</p> <p><b>Rec 2:</b> Within one year of the publication of this Review, the PSNI and the OPONI should revisit and revise the Memorandum of Understanding (MoU).</p> <p><b>Update:</b> A new Memorandum of Understanding (MoU) was signed on 11 August 2019. PSNI continues to work collaboratively with OPONI to finalise the processes underpinning the new MoU.</p> <p><b>Rec 3:</b> PSNI should immediately review its internal processes for appointing and training staff to perform the role of an OPONI Liaison Officer (LO).</p> <p>Update: Review completed and training procedure established from July 2019 for the new IT platform.</p> <p><b>Rec 4:</b> The PSNI should review its PONI liaison (OPONI LO) staffing levels against current and potential future demand within one year of the publication of this Review.</p> <p><b>Update:</b> Review completed and a requirement identified for a Detective Inspector. An officer is currently on temporary transfer to the role, with a business case submitted to make the position permanent.</p> <p><b>Rec 5:</b> The Op TURNEL work to complete the full inventory of all legacy systems and data sources, should include a full audit of the PSNI's historic records to establish what is available and where they are located. The audit should identify material at risk of deterioration.</p>	Closed

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
7	<p><b>Operations</b></p> <p>Within 6 months of the publication of this Human Rights Annual Report, the PSNI should publish the criteria used by chief officers to decide which stop and search tools officers should use, ensure that they are human rights compliant and that they will be effective.</p> <p>Thereafter, the PSNI should analyse the activity after the event to determine whether the increase/decrease in deployments had an impact on crime levels or other objectives. The PSNI should provide a written briefing to the Performance Committee on the findings and on the steps taken, or to be taken, within 12 months of the publication of this Human Rights Annual Report.</p>	<p><b>Accepted</b></p> <p>The Policing Powers Delivery Group (PPDG) chaired by the Assistant Chief Constable, Operational Support Department continues to meet quarterly. This group oversees the use of all police powers, including the impact of stop and search. PPDG commissioned some research pertaining to increased stop and search activity in two Policing Districts during 2020, however, the results did not provide any learning in terms of an increase or decrease in crime following police activity. Further research has, therefore, been commissioned where all District activity will be examined over a specific period of time in 2019 (pre-Covid). The results will be considered by PPDG in 2021 and, in due course, a full response will be shared with the Board's Human Rights Advisor.</p> <p>Note: the Human Rights Advisor notes that the term 'tools' referred to in this recommendation means 'powers.' We understand, therefore, this to mean how we determine where and when Stop and Search powers should be used.</p> <p>A report setting out our approach from a NIM perspective is being drafted and I hope to have this ready for ACC's consideration at some time during May 21. In addition, the new PPDG quarterly report has been updated to include operational feedback and learning and a new section is being prepared on Point giving supervisors further advice in relation to quality control.</p>	<p><b>Closed as superseded by new recommendations included in the Annual Report for 2020/21</b></p>

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
8	<p><b>Operations</b></p> <p>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.</p>	<p><b>Accepted</b></p> <p>A Service Instruction on Stop and Search is almost complete.</p> <p>A Data Protection Impact Assessment (DPIA) has commenced. There is an acknowledgement that, in taking forward community monitoring of stop and search, a balance had to be achieved in terms of five matters, namely:</p> <ol style="list-style-type: none"> <li>1) The <b>Human Rights</b> of those being stopped and searched;</li> <li>2) The <b>duty</b> of police to effectively monitor our operational activity (as per LCJ's direction);</li> <li>3) The requirement to have suitable <b>powers/authority</b> to record such data;</li> <li>4) The requirement to record <b>accurate</b> data; and</li> <li>5) The requirement for police <b>accountability</b> to oversight bodies, including the Policing Board.</li> </ol> <p>PSNI is currently progressing an updated DPIA and seeking formal counsel from the Crown Solicitor's Office with a view to establishing a lawful way forward.</p> <p>New Service Instruction is currently being Section 75 screened. I anticipate publication during May 2021</p>	<p>Following an equality screening exercise by PSNI, PSNI are engaging with the department of Justice to consider legislation to legalise and underpin PSNI's approach to community monitoring. This continues to be a <b>Work in progress.</b></p>
9	<p><b>Operations</b></p> <p>PSNI should set out what indicators they use to assess the effectiveness of their use of each of the stop and search powers compared with other kinds of police officer deployments.</p>	<p><b>Accepted</b></p> <p>All powers continue to be monitored at the Policing Powers Development Group (PPDG). From a stop and search perspective, quarterly reports identify trends in terms of use of the powers on both adults and children; geographic (community) increases or decreases; and use of related body worn video i.e. use when conducting stop and search.</p>	<p><b>Closed as superseded by new recommendations included in the Annual Report for 2020/21</b></p>

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
10	<p><b>Public Order</b></p> <p>The PSNI should share in April each year its overall strategy for dealing with the events over the upcoming summer with the Policing Board.</p>	<p><b>Accepted</b></p> <p>The PSNI will share its Gold Events Strategy for 2021 when complete.</p> <p>ACC District Policing &amp; DCC have agreed that sharing a strategy for operational policing in the public domain may be counterproductive.</p>	<p><b>Closed.</b> The Human Rights Advisor will continue to receive the Strategy and brief the Board accordingly.</p>
11	<p><b>Use of Force –</b></p> <p>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.</p>	<p><b>Accepted</b></p> <p>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.</p> <p>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.</p>	<p><b>Work in progress</b></p>

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
12	<p><b>Victims –</b> As a result of the proposed new legislation on domestic violence in respect of domestic abuse, harassment, stalking and coercive control, which is to be 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.</p>	<p><b>Accepted</b> The training programme for The Domestic Abuse and Civil Proceedings Act 2021 commenced on 22 March 2021. It aims to change how frontline police officers and staff understand and respond to domestic abuse, particularly the investigation of the new domestic abuse offence which will criminalise abusive behaviour. The programme seeks to achieve this by increasing knowledge and understanding, raising awareness of the varied forms of domestic abuse, physical and non-physical, and providing strategies and skills that police officers and staff can use to improve outcomes for victims. As of August 2021, the internal training modules are complete and the PSNI has shared the material with the Human Rights Advisor.</p>	Closed
13	<p><b>Treatment of Suspects –</b> Jonathan Hall QC in his latest report raises some questions about the PSNI's use of the TACT powers at ports (Schedule 7) and a need to look at the safeguards and training that is in place (Para 9.86). He also says the ethnic minority data should be published by PSNI as a matter of course (Para 9.87) and community background information should be requested and published (Para 9.92). The Policing Board recommends that the PSNI reviews these issues and reports to the Policing Board.</p>	<p><b>Accepted</b> PSNI consider that Jonathan Hall's report is endorsing the importance of training to ensure the powers are not used in a discriminatory way, rather than highlighting an issue. PSNI see this as so important that their Ports officers (Examining officers) are trained to a National Accredited level for use of Schedule 7 (which is subject to annual re-accreditation) and they are continuing to invest in CPD.</p>	Closed

Rec	Detail	Update from PSNI	Human Rights Advisor Assessment
14	<p><b>Children and Young People</b></p> <p>In the previous Human Rights Annual Report the following recommendation was made: <i>PSNI should analyse its use in 2016/17 of police detention for children. That analysis should consider a random sample of cases (not less than 20%) in which children were detained. The analysis should include in particular whether alternative options were considered. If alternatives were considered but unavailable the PSNI should identify the reason(s). PSNI should report to the Performance Committee within 6 months of the publication of this Human Rights Annual Report.</i></p> <p>This recommendation was not completed because the PSNI did not have the capability to carry this out. However, the PSNI is part of a wider working group which has been considering alternatives to detention. The PSNI should report to the Board on the outcomes from this work and its actions following any recommendations.</p>	<p><b>Accepted</b></p> <p>PSNI currently carries out a monthly audit which is then converted into an annual figure for comparison. The sample size exceeds the aforementioned 20%. It should be acknowledged that the PSNI does not currently have alternative accommodation, other than the Juvenile Justice Centre, so the sampling is based on identifying whether children and young people are not taken to Juvenile Justice Centre and associated rationale. Dip sampling is intended to highlight any recurring issues of Juvenile Justice Centre availability or compliance issues.</p> <p>An internal audit of relevant custody records is conducted on a monthly basis, to identify trends on reasons for non-transfer to Juvenile Justice Centre. The reason, in the majority of cases, is direct transfer to court, disposal, lack of available space in Juvenile Justice Centre or the impracticality of transfer due to travel distance. Education continues and is embedded around the unsuitability of custody for the detention of children in custody suites.</p> <p>PSNI continue to work with key strategic partners in relation to the provision of suitable overnight accommodation for detained young people. This includes a range of issues, including proximity of suitable accommodation to court and custody areas.</p> <p>Going forward, PSNI suggest that they will forward a quarterly report to the Board to highlight figures and provide regular update on progress.</p>	<p><b>Closed.</b> (Agreed that the quarterly reports be provided to the Board).</p>



## APPENDIX D: GLOSSARY OF TERMS

<b>Bangkok Rules</b>	The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders
<b>Beijing Rules</b>	The United Nations Standard Minimum Rules for the Administration of Juvenile Justice
<b>Body of Principles</b>	The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
<b>CAT</b>	The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CEDAW</b>	The United Nations Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	The United Nations International Convention on the Elimination of All Forms of Racial Discrimination
<b>CPT</b>	The Council of Europe European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment
<b>CRC</b>	The United Nations Convention on the Rights of the Child
<b>CRPD</b>	The United Nations Convention on the Rights of Persons with Disabilities
<b>ECHR</b>	The European Convention of Human Rights
<b>ECtHR</b>	The European Court of Human Rights
<b>ICCPR</b>	The United Nations International Covenant on Civil and Political Rights
<b>Mandela Rules</b>	The United Nations Standard Minimum Rules for the Treatment of Prisoners
<b>PACE</b>	The Police and Criminal Evidence (Northern Ireland) Order 1989
<b>Tokyo Rules</b>	The United Nations Standard Minimum Rules for Non-custodial Measures
<b>UN</b>	United Nations
<b>UN Body of Principles</b>	UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
<b>UN HRC</b>	United Nations Human Rights Committee (set up by the ICCPR)
<b>UN Principles on the Use of Force:</b>	United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
<b>UN Code of Conduct</b>	United Nations Code of Conduct for Law Enforcement Officials
<b>UDHR</b>	The United Nations Universal Declaration of Human Rights



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