

ENSURING  
**HUMAN RIGHTS**  
STANDARDS  
IN POLICING

**HUMAN  
RIGHTS**

**Monitoring Framework**

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# 1

# INTRODUCTION

## 1.1 OUR MANDATE

Under the Police (NI) Act 2000, the Northern Ireland Policing Board has a duty to secure the maintenance of the police in Northern Ireland and to secure that the police are efficient and effective, and also to monitor the performance of the police in complying with the Human Rights Act 1998 (Police (Northern Ireland) Act, s.3(3)(b)(ii)). The 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.

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.

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 Advisor considers 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 to have independent investigations following a death.

## 1.2 OUR APPROACH

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 covert processes, that 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, which is set out in greater detail in each of the later sections

of this document, 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. The four indicators are:

1. Practical Policing;
2. Policy;
3. Training and Human Rights Culture; and
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; and
- Emerging governmental, legal or policy developments within the UK or elsewhere.

# 2

# MONITORING FRAMEWORK

## 2.1 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. The Policing Board's Human Rights Advisor 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 include the analysis of the PSNI's response to one of the Apprentice Boys marching bands in the parades on 10th August 2019 (see the Human Rights Annual Report for 2019/2020, page 64) or the analysis of the PSNI's response to the Black Lives Matter protest on 6th June 2020 (Thematic Review of the Policing Response to COVID-19, 2020, page 42).

### 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 Report<sup>1</sup>, 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.

A Recommendation in the Patten Report 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 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.

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).

<sup>1</sup> <https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf>

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 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 Police Ombudsman and the PSNI provide periodic statistics with some explanatory information to the Board. The Police Ombudsman 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.

## 2.2 OUTCOME

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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.

# 3

## LEGAL FRAMEWORK

### 3.1 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>2</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.

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.

<sup>2</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 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)).

### 3.2 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.

### 3.3 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)).

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.).

# 4

## HUMAN RIGHTS STANDARDS IN POLICING

### 4.1 USE OF FORCE

#### 4.1.2 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 Attenuated Energy Projectiles (AEPs) and firearms.

The use of AEPs 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).

#### 4.1.3 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 (MCA)** 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 Independent Police Complaints Commission (IPCC) 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>3</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>4</sup>

#### 4.1.4 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).

<sup>3</sup> [www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/BMRB\\_use\\_of\\_force\\_report.pdf](http://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/BMRB_use_of_force_report.pdf)

<sup>4</sup> College of Policing, Mental Health Introduction and Strategic considerations, 2016

Whenever the use of firearms is unavoidable, police officers should:

- (i) exercise restraint in such use, acting in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (ii) minimise damage and injury and respect and preserve human life;
- (iii) render assistance and medical aid to any injured or affected persons at the earliest opportunity;
- (iv) 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).

#### 4.1.5 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 ECHR 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)).

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, 19th 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.

## 4.2 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)).

#### 4.2.1 Freedom of Expression

The right to freedom of expression, has been described by the ECHR 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>5</sup>

#### 4.2.2 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

<sup>5</sup> 9(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if – (a) he intends to stir up hatred or arouse fear; or (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby. Note, however, 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 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)).

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)).

However 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)).



## 4.3 CRIMINAL INVESTIGATIONS

### 4.3.1 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).

### 4.3.2 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 to 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).

#### 4.3.3 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)).

#### 4.3.4 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 in any way 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)).

#### 4.3.5 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.

#### 4.3.6 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 2021.

## 4.4 ARREST AND PRE-TRIAL ISSUES

### 4.4.1 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).

### 4.4.2 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)).

#### 4.4.3 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).

#### 4.4.4 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)).

#### 4.4.5 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).

#### 4.4.6 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>6</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.

#### 4.4.7 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)).

<sup>6</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).

[www.mindwisenv.org/what-we-do/mindwise-services/criminal-justice/niaas/](http://www.mindwisenv.org/what-we-do/mindwise-services/criminal-justice/niaas/)

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 ECHR 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)).

#### 4.4.8 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).



## 4.5 DETENTION

### 4.5.1 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)).

### 4.5.2 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 Independent 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).

## 4.6 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>7</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

<sup>7</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.

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).

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 wherever 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

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 [www.bailii.org](http://www.bailii.org) All the other documents should be available from a normal internet search.

# GLOSSARY

**Bangkok Rules**

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders

**Beijing Rules**

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice

**Body of Principles**

The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

**CAT**

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

**CEDAW**

The United Nations Convention on the Elimination of All Forms of Discrimination against Women

**CERD**

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination

**CPT**

The Council of Europe European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment

**CRC**

The United Nations Convention on the Rights of the Child

**CRPD**

The United Nations Convention on the Rights of Persons with Disabilities

**ECHR**

The European Convention of Human Rights

**ECtHR**

The European Court of Human Rights

**ICCPR**

The United Nations International Covenant on Civil and Political Rights

**Mandela Rules**

The United Nations Standard Minimum Rules for the Treatment of Prisoners

**PACE**

The Police and Criminal Evidence (Northern Ireland) Order 1989

**Tokyo Rules**

The United Nations Standard Minimum Rules for Non-custodial Measures

**UN**

United Nations

**UN Body of Principles**

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

**UN HRC**

United Nations Human Rights Committee (set up by the ICCPR)

**UN Principles on the Use of Force:**

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

**UN Code of Conduct**

United Nations Code of Conduct for Law Enforcement Officials

**UDHR**

The United Nations Universal Declaration of Human Rights

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